

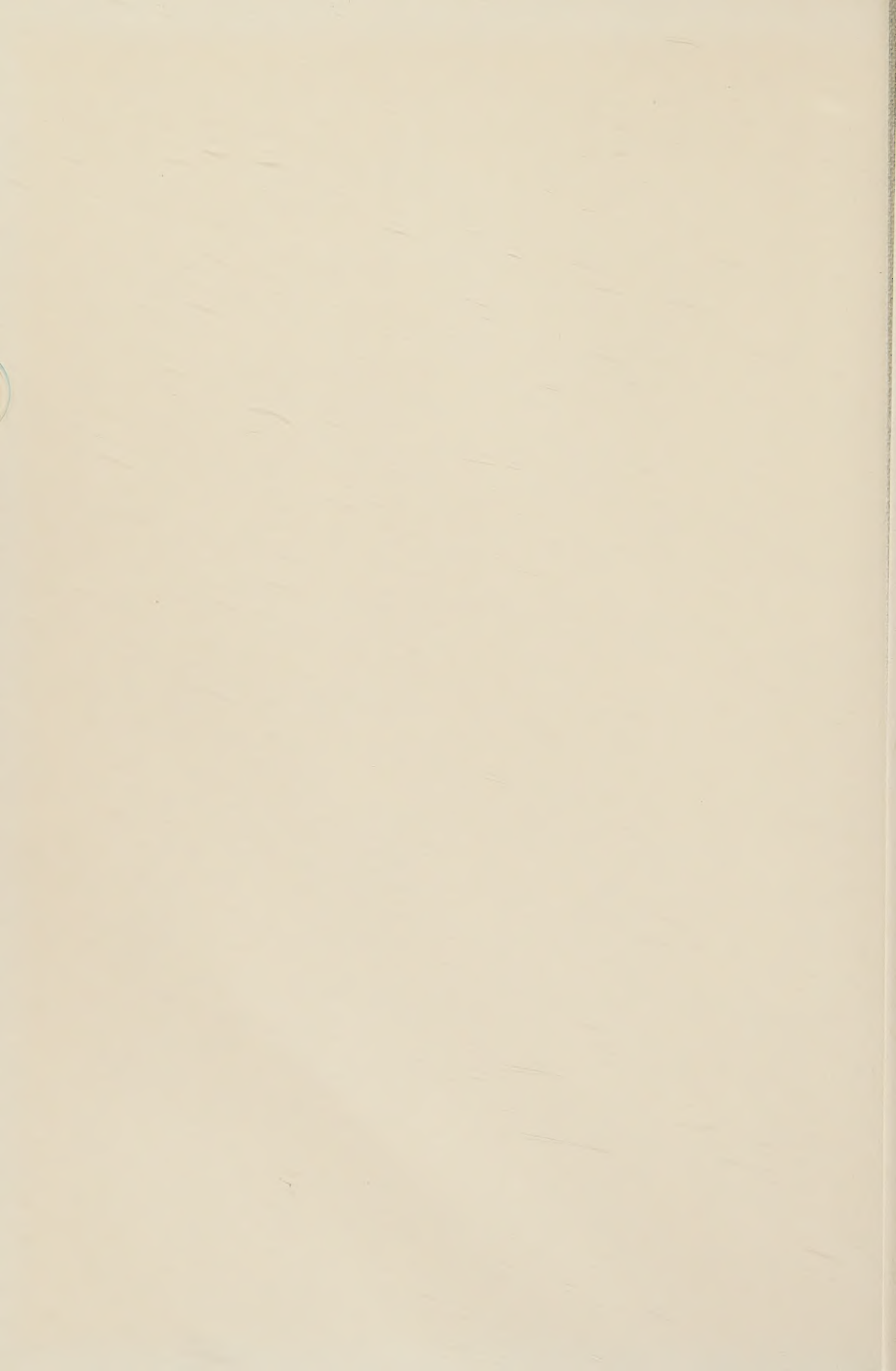


Digitized by the Internet Archive
in 2025

100 CALIFORNIA APPELLATE REPORTS, 2d SERIES—Cont'd

Cal.App. Page	P.2d Vol. Page	Cal.App. Page	P.2d Vol. Page	Cal.App. Page	P.2d Vol. Page	Cal.App. Page	P.2d Vol. Page
348 -	- 223 636	488 -	- 224 46	610 -	- 224 106	743 -	- 224 479
352 -	- 223 511	490 -	- 223 857	621 -	- 224 126	745 -	- 224 405
356 -	- 223 663	497 -	- 224 436	631 -	- 224 409	748 -	- 224 368
361 -	- 223 651	502 -	- 224 42	635 -	- 224 95	752 -	- 224 406
366 -	- 223 666	508 -	- 224 19	642 -	- 224 28	754 -	- 224 833
371 -	- 223 681	512 -	- 224 100	646 -	- 224 131	761 -	- 224 845
378 -	- 223 868	521 -	- 224 121	650 -	- 224 53	763 -	- 224 812
386 -	- 223 862	527 -	- 224 90	652 -	- 224 119	766 -	- 224 828
397 -	- 223 877	535 -	- 224 398	655 -	- 224 41	775 -	- 224 814
398 -	- 223 874	541 -	- 224 37	658 -	- 224 389	790 -	- 224 891
403 -	- 223 881	546 -	- 224 47	673 -	- 224 402	795 -	- 224 408
407 -	- 224 54	549 -	- 224 49	678 -	- 224 71	797 -	- 224 837
411 -	- 224 113	554 -	- 224 21	686 -	- 224 374	806 -	- 224 846
416 -	- 223 878	559 -	- 224 76	698 -	- 224 455	808 -	- 224 843
421 -	- 223 631	565 -	- 224 386	706 -	- 224 52	812 -	- 224 877
429 -	- 224 421	571 -	- 224 440	708 -	- 224 774	815 -	- 224 798
452 -	- 223 898	578 -	- 224 448	714 -	- 224 365	828 -	- 224 894
460 -	- 223 889	584 -	- 224 452	719 -	- 224 771	836 -	- 224 863
468 -	- 224 16	589 -	- 224 65	724 -	- 224 472	841 -	- 224 873
472 -	- 224 471	590 -	- 224 85	730 -	- 224 371	845 -	- 223 520
474 -	- 223 884	597 -	- 224 117	735 -	- 224 806	852 -	- 224 490
482 -	- 224 34	601 -	- 224 66	738 -	- 224 881	859 -	- 226 771





CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER SECOND SERIES



229 P.2d — 230 P.2d

CITE BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

Thus:
229 P.2d 1

ST. PAUL, MINN.
WEST PUBLISHING CO.

1951

COPYRIGHT, 1951, BY WEST PUBLISHING CO.
Pacific Reporter, Second Series, Vol. 229, Nos. 1-3;
Vol. 230, Nos. 1-4.

COPYRIGHT, 1951, BY WEST PUBLISHING CO.

JUDGES AND OFFICERS

SUPREME COURT

CHIEF JUSTICE

PHIL S. GIBSON San Francisco

DEPARTMENT ONE

PRESIDING JUDGE

JOHN W. SHENK San Francisco

ASSOCIATE JUSTICES

JESSE W. CARTER San Francisco

B. REY SCHAUER Los Angeles

DEPARTMENT TWO

PRESIDING JUDGE

DOUGLAS L. EDMONDS San Francisco

ASSOCIATE JUSTICES

ROGER J. TRAYNOR Berkeley

HOMER R. SPENCE San Francisco

CLERKS

WILLIAM I. SULLIVAN Clerk San Francisco

HARRY M. GARDISER Chief Deputy Clerk San Francisco

LOREN F. WHITE Deputy Clerk San Francisco

A. ROBERT FAIRWELL Deputy Clerk San Francisco

RAYMOND J. BELL Deputy Clerk San Francisco

A. F. BRADOVICH Deputy Clerk Sacramento

HENRY P. CRABTREE Deputy Clerk Los Angeles

DAVID BLOMGREN Deputy Clerk Los Angeles

JUDGES AND OFFICERS

DISTRICT COURTS OF APPEALS

FIRST DISTRICT—SAN FRANCISCO

Division 1

PRESIDING JUSTICE

RAYMOND E. PETERS San Francisco

ASSOCIATE JUSTICES

A. F. BRAY San Francisco

FRED B. WOOD San Francisco

Division 2

PRESIDING JUSTICE

JOHN T. NOURSE San Francisco

ASSOCIATE JUSTICES

C. J. GOODELL San Francisco

MAURICE T. DOOLING, Jr. Hollister

CLERKS

WALTER S. CHISHOLM Clerk San Francisco

L. R. ELKINGTON Deputy Clerk San Francisco

PAUL DINOIA Deputy Clerk San Francisco

SECOND DISTRICT—LOS ANGELES

Division 1

PRESIDING JUSTICE

THOMAS P. WHITE Los Angeles

ASSOCIATE JUSTICES

WILLIAM C. DORAN Los Angeles

LOUIS C. DRAPEAU Los Angeles

Division 2

PRESIDING JUSTICE

MINOR MOORE Los Angeles

ASSOCIATE JUSTICES

MARSHALL F. McCOMB Los Angeles

EMMET H. WILSON Los Angeles

JUDGES AND OFFICERS

DISTRICT COURTS OF APPEALS—Cont'd.

Division 3

PRESIDING JUSTICE

CLEMENT L. SHINN Los Angeles

ASSOCIATE JUSTICES

PARKER WOOD Los Angeles

PAUL VALLÉE Los Angeles

CLERKS

JAMES E. BROWN Clerk Los Angeles

WM. E. DORAN Deputy Clerk Los Angeles

EUGENE B. STANLEY Deputy Clerk Los Angeles

THIRD DISTRICT—SACRAMENTO

PRESIDING JUSTICE

ANNETTE ABBOTT ADAMS Sacramento

ASSOCIATE JUSTICES

PAUL PEEK Long Beach

B. F. VAN DYKE Sacramento

CLERKS

L. A. ENDRES Clerk Sacramento

THOMAS J. DILLON Deputy Clerk Sacramento

FOURTH DISTRICT

Fresno—San Bernardino—San Diego

PRESIDING JUSTICE

CHARLES R. BARNARD Fresno

ASSOCIATE JUSTICES

LLOYD E. GRIFFIN San Diego

STANLEY MUSSELL San Bernardino

CLERKS

EARL J. VERDECKBERG Clerk San Diego

LLOYD E. HIDDEN Deputy Clerk San Bernardino

ROY M. BOSTWICK Deputy Clerk Fresno

GEORGE J. KOBELIN Deputy Clerk San Diego

JUDGES AND OFFICERS

APPELLATE DEPARTMENT, SUPERIOR COURT

LOS ANGELES COUNTY

PRESIDING JUDGE

HARTLEY SHAW Los Angeles

JUDGES

EDWARD T. BISHOP Los Angeles

JESS E. STEPHENS Los Angeles

CLERK

J. J. MACGREGOR Los Angeles

SAN FRANCISCO COUNTY

PRESIDING JUDGE

FRANKLIN A. GRIFFIN San Francisco

JUDGES

HERBERT C. KAUFMAN San Francisco

PRESTON DEVINE San Francisco

CLERK

WHITMAN, JOSEPH F. San Francisco

SAN DIEGO COUNTY

PRESIDING JUDGE

L. N. TURRENTINE San Diego

JUDGES

ROBERT B. BURCH San Diego

WILLIAM A. GLEN San Diego

CLERK

BRUCE ROBINSON San Diego

SACRAMENTO COUNTY

PRESIDING JUDGE

RAYMOND T. COUGHLIN Sacramento

JUDGES

MALCOLM C. GLENN Sacramento

GROVER W. BEDEAU Sacramento

ALAMEDA COUNTY

PRESIDING JUDGE

S. VICTOR WAGLER Oakland

JUDGES

RALPH HOYT Oakland

THOMAS J. LEDWICH Oakland

ATTORNEY GENERAL

EDMUND G. BROWN San Francisco

CASES REPORTED

	Vol.	Page
Aday v. Ronayne, App.	230	P.2d 423
Alexander v. Angel, App.	230	P.2d 646
Alexander v. Hammarberg, App.	230	P.2d 399
Allington; People v., Super.	229	P.2d 495
Andrew Jergens Co. v. City of Los Angeles, App.	229	P.2d 475
Angel; Alexander v., App.	230	P.2d 646
Argonaut Min. Co. v. Industrial Acc. Commission, App.	230	P.2d 637
Associated Boat Industries of Northern Cal. v. Marshall, App.	230	P.2d 379
Atlas Assur. Co. v. State, App.	229	P.2d 13
Aubry v. Both, App.	229	P.2d 419
Babb; People v., App.	229	P.2d 843
Bank of America Nat. Trust & Sav. Ass'n v. Mundo, Sup.	229	P.2d 345
Barba v. Barba, App.	229	P.2d 465
Barnett; Bilich v., Super.	229	P.2d 492
Bartlett v. Rogers, App.	229	P.2d 434
Becerra; People v., App.	230	P.2d 872
Beitel; Hickson v., App.	229	P.2d 821
Benjamin; Murray v., App.	229	P.2d 430
Benjamin v. Stanislaus Title Co., App.	229	P.2d 430
Bennett & Armour; Heffernan v., App.	230	P.2d 658
Bernheimer v. Bernheimer, App.	230	P.2d 17
Biggs v. Biggs, App.	230	P.2d 32
Bilich v. Barnett, Super.	229	P.2d 492
Bitter; Los Angeles County v., App.	229	P.2d 466
Bjorses v. Crocker First Nat. Bank of San Francisco, App.	229	P.2d 468
Bjors' Estate, In re, App.	229	P.2d 468
Black; People v., App.	229	P.2d 61
Blair v. Mahon, App.	230	P.2d 832
Blankinship v. Blankinship, App.	230	P.2d 869
Bloomfield; Richfield Oil Corp. v., App.	229	P.2d 838
Bobst v. Cummins, App.	229	P.2d 136
Bogart; Lo Cicero v., App.	230	P.2d 684
Bogart's Guardianship, In re, App.	230	P.2d 684
Bo Kay Chan v. Gerdon Land Co., App.	230	P.2d 1
Boswell Co. v. W. D. Felder & Co., App.	230	P.2d 386
Both; Aubry v., App.	229	P.2d 419
Bozzani Motors; Jacobs v., App.	230	P.2d 51
Breuner Co. v. Bryant, Sup.	229	P.2d 356
Brkich; Galich v., App.	229	P.2d 89
Brockman v. Lane, App.	230	P.2d 369
Brodersen's Estate, In re, App.	229	P.2d 38
Brooks; Sexton v., App.	229	P.2d 24
Brown v. Brown, App.	230	P.2d 651
Browne; Valley View Mut. Water Co. v., App.	230	P.2d 875
Bruner v. Van's Markets, App.	229	P.2d 56
Bruner; Woodward v., App.	230	P.2d 861
Bryant; Breuner Co. v., Sup.	229	P.2d 356
Bryant; C. L. Tilden & Co. v., Sup.	229	P.2d 357
Bryant; Fosters Lunch System v., Sup.	229	P.2d 362
Bryant; Gene Compton's Corp. v., Sup.	229	P.2d 362

CASES REPORTED

	Vol.	Page
Bryant; Hagstrom's Food Stores v., Sup.	229 P.2d	359
Bryant; Haslett Warehouse Co. v., Sup.	229 P.2d	359
Bryant; Highway Transport v., Sup.	229 P.2d	361
Bryant; J. A. Clark Draying Co. v., Sup.	229 P.2d	360
Bryant; Manning's Inc. v., Sup.	229 P.2d	360
Bryant; Merchants Exp. Corp. v., Sup.	229 P.2d	358
Bryant; Owl Drug Co. v., Sup.	229 P.2d	357
Bryant; Peninsula Ice Co. v., Sup.	229 P.2d	364
Bryant; Robertson Drayage Co. v., Sup.	229 P.2d	361
Bryant; Union Ice Co. v., Sup.	229 P.2d	363
Bryant; Union Ice & Storage Co. v., Sup.	229 P.2d	363
Bryant; Walkup Drayage & Warehouse Co. v., Sup.	229 P.2d	358
Buckmaster v. Silva, App.	229 P.2d	799
Burkhalter; Peterson v., App.	229 P.2d	403
Burlingame, City of, v. San Mateo County, App.	230 P.2d	375
Cameron v. City of Gilroy, App.	230 P.2d	838
Campbell v. Campbell, App.	230 P.2d	433
Cary v. Wentzel, App.	230 P.2d	656
Central Aviation Corp.; Johnson v., App.	229 P.2d	114
Cervantes; People v., App.	229 P.2d	1
Cesena v. Cesena, App.	229 P.2d	453
Chambers v. Silver, App.	230 P.2d	146
Chan v. Gerdon Land Co., App.	230 P.2d	1
Chapman v. Gipson, App.	229 P.2d	834
Chuchian v. Metropolitan Life Ins. Co., App.	230 P.2d	381
Chung Gee v. Quan Wing, App.	229 P.2d	50
Cilibrasi v. Reiter, App.	229 P.2d	394
Cirlincione v. Cirlincione, App.	230 P.2d	642
City of Burlingame v. San Mateo County, App.	230 P.2d	375
City of Fresno v. Hedstrom, App.	229 P.2d	809
City of Gilroy; Cameron v., App.	230 P.2d	838
City of Glendale; Logan v., App.	229 P.2d	128
City of Long Beach; Nishkian v., App.	230 P.2d	156
City of Los Angeles; Andrew Jergens Co. v., App.	229 P.2d	475
City of Los Angeles; Hoagland v., App.	229 P.2d	823
City of Los Angeles; Youngstown Steel Products Co. of Cal. v., App.	229 P.2d	814
City of Pasadena v. Los Angeles County, Sup.	230 P.2d	801
City of Whittier; Osborn v., App.	230 P.2d	132
City & County of San Francisco; Van Dorn v., App.	230 P.2d	393
Clark Draying Co. v. Bryant, Sup.	229 P.2d	360
C. L. Tilden & Co. v. Bryant, Sup.	229 P.2d	357
Coca Cola Bottling Co.; Moss v., App.	229 P.2d	802
Cohen v. Cohen, App.	229 P.2d	464
Compton's Corp. v. Bryant, Sup.	229 P.2d	362
Connolly; People v., App.	229 P.2d	112
Consolidated Pipe Co. v. Gries, App.	230 P.2d	385
Construction Products Corp. v. Superior Court in and for Los Angeles County, App.	229 P.2d	399
Cooper v. State Bd. of Public Health, two cases, App.	229 P.2d	27
Copeland v. Rabing, App.	230 P.2d	649
Costa v. Regents of University of Cal., App.	229 P.2d	867
Coughlin v. Harland L. Weaver, Inc., App.	230 P.2d	141
County Sanitation Dist. No. 1 of Orange County v. Humeston, App.	229 P.2d	438
Crocker First Nat. Bank of San Francisco; Bjorses v., App.	229 P.2d	468
Crow-Harr Lumber Co.; Gilkey v., App.	229 P.2d	3
Cummins; Bobst v., App.	229 P.2d	136
Cummins' Estate, In re, App.	229 P.2d	136
Curtis; People v., App.	230 P.2d	877

CASES REPORTED

	Vol.	Page
Dalzell v. Kelly, App.	230 P.2d	830
Dean v. Kuchel, Sup.	230 P.2d	811
Dean v. Superior Court, App.	230 P.2d	362
Deluca v. Fish & Game Commission, App.	229 P.2d	398
Deutchman; Oppenheimer v., App.	230 P.2d	873
Dolly Varden Lumber Co.; Hale v., App.	230 P.2d	841
Dorcich v. Time Oil Co., App.	230 P.2d	10
Douglas v. Foster, App.	230 P.2d	371
D'Oyley v. Riddel, App.	230 P.2d	863
Equitable Sav. & Loan Ass'n v. Superior Court in and for Los Angeles County, App.	230 P.2d	119
Erassaret; Reina v., App.	229 P.2d	92
Erlanger v. Erlanger, App.	230 P.2d	33
Erlanger's Estate, In re, App.	230 P.2d	33
Eyherabide; Hougham v., App.	230 P.2d	139
Faust v. Faust, App.	230 P.2d	408
Field's Estate, In re, App.	229 P.2d	419
Fisch; Kaynor v., App.	230 P.2d	418
Fish & Game Commission; Deluca v., App.	229 P.2d	398
Flotho; Toshio Hamasaki v., App.	229 P.2d	801
Flynn v. Flynn, App.	229 P.2d	5
Foote v. State Bar of Cal., Sup.	230 P.2d	617
Foster; Douglas v., App.	230 P.2d	371
Fosters Lunch System v. Bryant, Sup.	229 P.2d	362
Fowler v. Key System Transit Lines, Sup.	230 P.2d	339
Fowler; Perry v., App.	229 P.2d	46
Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish, Sup.	230 P.2d	629
Fresno, City of, v. Hedstrom, App.	229 P.2d	809
Fresno County Humane Soc.; Rakoczy v., App.	230 P.2d	48
Fumiko Mitsuuchi v. Security-First Nat. Bank of Los Angeles, App.	229 P.2d	376
Gabriel; Martinelli v., App.	230 P.2d	444
Galich v. Brkich, App.	229 P.2d	89
Gall v. Harvey, App.	229 P.2d	68
Gee v. Quan Wing, App.	229 P.2d	50
Gene Compton's Corp. v. Bryant, Sup.	229 P.2d	362
Gerdon Land Co.; Bo Kay Chan v., App.	230 P.2d	1
Gering v. Superior Court in and for Los Angeles County, Sup.	230 P.2d	356
Gilkey v. Crow-Harr Lumber Co., App.	229 P.2d	3
Gipson; Chapman v., App.	229 P.2d	834
Glogau v. Hagan, App.	230 P.2d	392
Goad v. Rogers, App.	229 P.2d	791
Gompertz; People v., App.	229 P.2d	105
Gossner; Julien v., App.	229 P.2d	786
Gottfried; Kuhn v., App.	229 P.2d	137
Gould; People v., App.	229 P.2d	78
Graff; People v., App.	230 P.2d	654
Greene; Raphael v., App.	230 P.2d	436
Gries; Consolidated Pipe Co. v., App.	230 P.2d	385
Guthrie; People v., App.	229 P.2d	841
Hagan; Glogau v., App.	230 P.2d	392
Hagstrom's Food Stores v. Bryant, Sup.	229 P.2d	359
Hale v. Dolly Varden Lumber Co., App.	230 P.2d	841
Hamasaki v. Flotho, App.	229 P.2d	801
Hammarberg; Alexander v., App.	230 P.2d	399
Hardin v. San Jose City Lines, App.	230 P.2d	31
Harland L. Weaver, Inc.; Coughlin v., App.	230 P.2d	141
Harper v. Heizer, App.	229 P.2d	828
Harpke v. Lankershim Estates, App.	229 P.2d	103

CASES REPORTED

	Vol.	Page
Hart v. Landis, App.	229 P.2d	380
Hartter; Presidio Lodge No. 354, Free and Accepted Masons v., App.	229 P.2d	38
Harvey; Gall v., App.	229 P.2d	68
Harvey's Estate, In re, App.	229 P.2d	68
Haslett Warehouse Co. v. Bryant, Sup.	229 P.2d	359
Hayes v. Richfield Oil Corp., App.	229 P.2d	32
Hedstrom; City of Fresno v., App.	229 P.2d	809
Heffernan v. Bennett & Armour, App.	230 P.2d	658
Heizer; Harper v., App.	229 P.2d	828
Helvey v. Sax, App.	229 P.2d	796
Hensley; Lee v., App.	230 P.2d	159
Hickson v. Beitel, App.	229 P.2d	821
Higgins; Ingram v., App.	229 P.2d	385
Hill; Kelly v., App.	230 P.2d	864
Highway Transport v. Bryant, Sup.	229 P.2d	361
Hoagland v. City of Los Angeles, two cases, App.	229 P.2d	823
Hobart; Philp v., App.	229 P.2d	783
Hoffman; People v., App.	229 P.2d	486
Hogan v. Ingold, App.	229 P.2d	432
Hoskins; Macal Imp. Co. v., App.	229 P.2d	461
Hougham v. Eyherabide, App.	230 P.2d	139
Humeston; County Sanitation Dist. No. 1 of Orange County v., App.	229 P.2d	438
Hunt v. Plavsa, App.	229 P.2d	482
Hunter; Mills v., App.	229 P.2d	456
Indemnity Ins. Co. of North America; Record v., App.	229 P.2d	851
Industrial Acc. Commission; Argonaut Min. Co. v., App.	230 P.2d	637
Industrial Acc. Commission; Industrial Indem. Co. v., App.	229 P.2d	2
Industrial Indem. Co. v. Industrial Acc. Commission, App.	229 P.2d	2
Ingold; Hogan v., App.	229 P.2d	432
Ingram v. Higgins, App.	229 P.2d	385
International Longshoremen's & Warehousemen's Union; Juneau Spruce Corp. v., App.	229 P.2d	424
Ira v. Ira, App.	230 P.2d	867
J. A. Clark Draying Co. v. Bryant, Sup.	229 P.2d	360
Jacobs v. Bozzani Motors, App.	230 P.2d	51
Jensen v. Union Paving Co., App.	229 P.2d	121
Jergens Co. v. City of Los Angeles, App.	229 P.2d	475
J. G. Boswell Co. v. W. D. Felder & Co., App.	230 P.2d	386
John v. Marshall, App.	229 P.2d	367
John Breuner Co. v. Bryant, Sup.	229 P.2d	356
Johnson v. Central Aviation Corp., App.	229 P.2d	114
Johnson Corp. v. Superior Court of State, in and for Los Angeles County, App.	229 P.2d	849
Johnston v. Rapp, App.	229 P.2d	414
Johnston; Stott v., Sup.	229 P.2d	348
Johnstone v. Richardson, App.	229 P.2d	9
Julien v. Gossner, App.	229 P.2d	786
Juneau Spruce Corp. v. International Longshoremen's & Warehousemen's Union, App.	229 P.2d	424
Justice's Court of Tp. No. 2, Lake County; Krouse v., App.	229 P.2d	806
Kalmus v. Kalmus, App.	230 P.2d	57
Karlein v. Karlein, App.	229 P.2d	831
Kay Chan v. Gerdon Land Co., App.	230 P.2d	1
Kaynor v. Fisch, App.	230 P.2d	418
Kelly; Dalzell v., App.	230 P.2d	830
Kelly v. Hill, App.	230 P.2d	864
Kerr; People v., Sup.	229 P.2d	777
Key System Transit Lines; Fowler v., Sup.	230 P.2d	339

CASES REPORTED

	Vol.	Page
King; People v., App.	229 P.2d	20
Kolis v. Kolis, App.	230 P.2d	641
Kramer; People v., App.	229 P.2d	53
Krouse v. Justice's Court of Tp. No. 2, Lake County, App.	229 P.2d	806
Kuchel; Dean v., Sup.	230 P.2d	811
Kuchel; Lowell v., App.	230 P.2d	882
Kuhn v. Gottfried, App.	229 P.2d	137
Labrucherie; Lunny v., App.	230 P.2d	427
Landis; Hart v., App.	229 P.2d	380
Landrum v. Severin, Sup.	230 P.2d	337
Lane; Brockman v., App.	230 P.2d	369
Lankershim Estates; Harpke v., App.	229 P.2d	103
Larson; Tyler v., App.	229 P.2d	364
Lee v. Hensley, App.	230 P.2d	159
Legarra; Leven v., App.	229 P.2d	383
Legg v. United Ben. Life Ins. Co., App.	229 P.2d	454
Leven v. Legarra, App.	229 P.2d	383
Leymel's Estate, In re, App.	230 P.2d	48
Lo Cicero v. Bogart, App.	230 P.2d	684
Loewenstein's Estate, In re, App.	230 P.2d	882
Logan v. City of Glendale, App.	229 P.2d	128
London v. Marco, App.	229 P.2d	401
Lopez; People v., App.	229 P.2d	404
Los Angeles County v. Bitter, App.	229 P.2d	466
Los Angeles County; City of Pasadena v., Sup.	230 P.2d	801
Los Angeles County Civil Service Commission; Wilson v., App.	229 P.2d	406
Lowell v. Kuchel, App.	230 P.2d	882
Luchsinger v. Wieling, Sup.	230 P.2d	808
Lunny v. Labrucherie, App.	230 P.2d	427
Macal Imp. Co. v. Hoskins, App.	229 P.2d	461
McCaffrey v. Wiley, App.	230 P.2d	152
McDowell; Siffert v., App.	229 P.2d	388
McGee, In re, Sup.	229 P.2d	780
McGee; Markwort v., Sup.	229 P.2d	780
McGrath; People v., App.	230 P.2d	667
McInturff, Ex parte, App.	230 P.2d	443
McNamara; People v., App.	230 P.2d	411
McNeese; People v., App.	230 P.2d	640
Mahon; Blair v., App.	230 P.2d	832
Manning's, Inc. v. Bryant, Sup.	229 P.2d	360
Mansour; People v., App.	230 P.2d	52
Marco; London v., App.	229 P.2d	401
Markwort v. McGee, Sup.	229 P.2d	780
Marshall; Associated Boat Industries of Northern Cal. v., App.	230 P.2d	379
Marshall; John v., App.	229 P.2d	367
Martin; Richardson v., App.	230 P.2d	679
Martin v. Smith, App.	230 P.2d	679
Martinelli v. Gabriel, App.	230 P.2d	444
Maynard, Ex parte, App.	230 P.2d	880
Mendoza; People v., App.	229 P.2d	83
Mercer; People v., App.	229 P.2d	411
Mercer; People v., App.	230 P.2d	4
Merchants Exp. Corp. v. Bryant, Sup.	229 P.2d	358
Metropolitan Life Ins. Co.; Shavarsh Chuchian v., App.	230 P.2d	381
Miller v. Peters, Sup.	230 P.2d	803
Miller's Estate, In re, App.	230 P.2d	667
Mills v. Hunter, App.	229 P.2d	456
Milstein; Turner v., App.	230 P.2d	25

CASES REPORTED

	Vol.	Page
Mitsuuchi v. Security-First Nat. Bank of Los Angeles, App.	229 P.2d	376
Mollinet; Wharton v., App.	229 P.2d	861
Morgan v. Morgan, App.	230 P.2d	130
Morgan; People v., App.	229 P.2d	75
Moss v. Coca Cola Bottling Co., App.	229 P.2d	802
Mucci v. Winter, App.	230 P.2d	22
Mulligan v. Wilson, App.	229 P.2d	858
Mundo; Bank of America Nat. Trust & Sav. Ass'n v., Sup.	229 P.2d	345
Municipal Court of City & County of San Francisco; Wyman v., App.	229 P.2d	491
Murray v. Benjamin, App.	229 P.2d	430
Newson; People v., Sup.	230 P.2d	618
Nieri v. Nieri, App.	229 P.2d	126
Nishkian v. City of Long Beach, App.	230 P.2d	156
Nobile; Tomblinson v., App.	229 P.2d	97
Norris Oil Co. v. Von Glahn, App.	230 P.2d	885
Odle; People v., Sup.	230 P.2d	345
Oil Workers Intern. Union, CIO v. Superior Court, Contra Costa County, App.	230 P.2d	71
Olsen; Selinsky v., App.	229 P.2d	392
Oppenheimer v. Deutchman, App.	230 P.2d	873
Osborn v. City of Whittier, App.	230 P.2d	132
O. T. Johnson Corp. v. Superior Court of State, in and for Los Angeles County, App.	229 P.2d	849
Owl Drug Co. v. Bryant, Sup.	229 P.2d	357
Pacific Elec. Ry. Co.; Parga v., App.	230 P.2d	364
Palazuelos v. Palazuelos, App.	230 P.2d	431
Parga v. Pacific Elec. Ry. Co., App.	230 P.2d	364
Parker v. Womack, Sup.	230 P.2d	823
Parrish; Pitcher v., App.	230 P.2d	449
Pasadena, City of, v. Los Angeles County, Sup.	230 P.2d	801
Peoples; People v., App.	230 P.2d	441
Peninsula Ice Co. v. Bryant, Sup.	229 P.2d	364
People v. Allington, Super.	229 P.2d	495
People v. Babb, App.	229 P.2d	843
People v. Becerra, App.	230 P.2d	872
People v. Black, App.	229 P.2d	61
People v. Cervantes, App.	229 P.2d	1
People v. Connolly, App.	229 P.2d	112
People v. Curtis, App.	230 P.2d	877
People v. Gompertz, App.	229 P.2d	105
People v. Gould, App.	229 P.2d	78
People v. Graff, App.	230 P.2d	654
People v. Guthrie, App.	229 P.2d	841
People v. Hoffman, App.	229 P.2d	486
People v. Kerr, Sup.	229 P.2d	777
People v. King, App.	229 P.2d	20
People v. Kramer, App.	229 P.2d	53
People v. Lopez, App.	229 P.2d	404
People v. McGrath, App.	230 P.2d	667
People v. McNamara, App.	230 P.2d	411
People v. McNeese, App.	230 P.2d	640
People v. Mansour, App.	230 P.2d	52
People v. Mendoza, App.	229 P.2d	83
People v. Mercer, App.	229 P.2d	411
People v. Mercer, App.	230 P.2d	4
People v. Morgan, App.	229 P.2d	75
People v. Newson, Sup.	230 P.2d	618
People v. Odle, Sup.	230 P.2d	345

CASES REPORTED

	Vol.	Page
People v. Peeples, App.	230	P.2d 441
People v. Perkins, Sup.	230	P.2d 353
People v. Peterman, App.	229	P.2d 444
People v. Ponce, App.	229	P.2d 77
People v. Ruiz, App.	229	P.2d 73
People v. Ryan, App.	230	P.2d 359
People v. Sanders, App.	229	P.2d 76
People v. Sellers, App.	230	P.2d 398
People v. Syde, App.	229	P.2d 81
People v. Thomas, App.	229	P.2d 836
People v. Thomas, Sup.	230	P.2d 351
People v. Weinrich, App.	230	P.2d 440
People v. Wixson, App.	230	P.2d 432
Perkins; People v., Sup.	230	P.2d 353
Perry v. Fowler, App.	229	P.2d 46
Peterman; People v., App.	229	P.2d 444
Peters; Miller v., Sup.	230	P.2d 803
Peterson v. Burkhalter, App.	229	P.2d 403
Philp v. Hobart, App.	229	P.2d 783
Pitcher v. Parrish, App.	230	P.2d 449
Pitcher's Adoption, In re, App.	230	P.2d 449
Plavsa; Hunt v., App.	229	P.2d 482
Ponce; People v., App.	229	P.2d 77
Prefab Mfg. Co.; Walpole v., App.	230	P.2d 36
Presidio Lodge No. 354, Free and Accepted Masons v. Hartter, App.	229	P.2d 38
Quan Wing; Chung Gee v., App.	229	P.2d 50
Rabing; Copeland v., App.	230	P.2d 649
Rakoczy v. Fresno County Humane Soc., App.	230	P.2d 48
Raphael v. Greene, App.	230	P.2d 436
Raphael's Estate, In re, App.	230	P.2d 433
Rapp; Johnston v., App.	229	P.2d 414
Rauch, In re, App.	230	P.2d 115
Read v. Read, App.	230	P.2d 46
Record v. Indemnity Ins. Co. of North America, App.	229	P.2d 851
Rector, Wardens & Vestrymen of St. Mathias Parish; Freedman v., Sup.	230	P.2d 629
Regents of University of Cal.; Costa v., App.	229	P.2d 867
Reina v. Erassarret, App.	229	P.2d 92
Reitano v. Yankwich, App.	229	P.2d 387
Reiter; Cilibrasi v., App.	229	P.2d 394
Richardson; Johnstone v., App.	229	P.2d 9
Richardson v. Martin, App.	230	P.2d 679
Richfield Oil Corp. v. Bloomfield, App.	229	P.2d 838
Richfield Oil Corp.; Hayes v., App.	229	P.2d 32
Riddel; D'Oyley v., App.	230	P.2d 863
Riddel's Estate, In re, App.	230	P.2d 863
Riviera Realty Co.; Sanders v., App.	230	P.2d 856
Robertson Drayage Co. v. Bryant, Sup.	229	P.2d 361
Robson v. Robson, App.	229	P.2d 135
Rogers; Bartlett v., App.	229	P.2d 434
Rogers; Goad v., App.	229	P.2d 791
Ronayne; Aday v., App.	230	P.2d 423
Ronayne's Estate, In re, App.	230	P.2d 423
Ruby v. Superior Court in and for City and County of San Francisco, App.	230	P.2d 860
Ruiz; People v., App.	229	P.2d 73
Ryan; People v., App.	230	P.2d 359
Sanders; People v., App.	229	P.2d 76

CASES REPORTED

	Vol.	Page
Sanders v. Riviera Realty Co., App.	230	P.2d 856
Sanders v. Seaboard Finance Co., App.	230	P.2d 849
Sanders; U. S. Credit Bureau v., App.	230	P.2d 849
San Jose City Lines; Hardin v., App.	230	P.2d 31
San Mateo County; City of Burlingame v., App.	230	P.2d 375
Sax; Helvey v., App.	229	P.2d 796
Schmidt v. Townsend, App.	229	P.2d 488
Schnider v. State, App.	229	P.2d 847
Scroggin, Application of, App.	229	P.2d 489
Seaboard Finance Co.; Sanders v., App.	230	P.2d 849
Security-First Nat. Bank of Los Angeles; Fumiko Mitsuuchi v., App.	229	P.2d 376
Selinsky v. Olsen, App.	229	P.2d 392
Sellers; People v., App.	230	P.2d 398
Severin; Landrum v., Sup.	230	P.2d 337
Sexton v. Brooks, App.	229	P.2d 24
Shanander v. Western Loan & Bldg. Co., App.	229	P.2d 864
Shavarsh Chuchian v. Metropolitan Life Ins. Co., App.	230	P.2d 381
Shirk v. Southern Pac. Co., App.	229	P.2d 100
Siffert v. McDowell, App.	229	P.2d 388
Silva; Buckmaster v., App.	229	P.2d 799
Silver; Chambers v., App.	230	P.2d 146
Simpson; Stein v., Sup.	230	P.2d 816
Smith; Martin v., App.	230	P.2d 679
Southern Pac. Co.; Shirk v., App.	229	P.2d 100
Sprague, In re, Sup.	230	P.2d 633
Stanislaus Title Co.; Benjamin v., App.	229	P.2d 430
State; Atlas Assur. Co. v., App.	229	P.2d 13
State; Schnider v., App.	229	P.2d 847
State Bar of Cal.; Foote v., Sup.	230	P.2d 617
State Bd. of Public Health; Cooper v., App.	229	P.2d 27
Stein v. Simpson, Sup.	230	P.2d 816
Stott v. Johnston, Sup.	229	P.2d 348
Superior Court; Dean v., App.	230	P.2d 362
Superior Court, Contra Costa County; Oil Workers Intern. Union, CIO v., App.	230	P.2d 71
Superior Court in and for City and County of San Francisco; Ruby v., App.	230	P.2d 860
Superior Court in and for Los Angeles County; Construction Products Corp. v., App.	229	P.2d 399
Superior Court in and for Los Angeles County; Equitable Sav. & Loan Ass'n v., App.	230	P.2d 119
Superior Court in and for Los Angeles County; Gering v., Sup.	230	P.2d 356
Superior Court of State, in and for Los Angeles County; O. T. Johnson Corp. v., App.	229	P.2d 849
Syde; People v., App.	229	P.2d 81
Thomas; People v., App.	229	P.2d 836
Thomas; People v., Sup.	230	P.2d 351
Tilden & Co. v. Bryant, Sup.	229	P.2d 357
Time Oil Co.; Doreich v., App.	230	P.2d 10
Tolman v. Underhill, App.	229	P.2d 447
Tomblinson v. Nobile, App.	229	P.2d 97
Toshio Hamasaki v. Flotho, App.	229	P.2d 801
Townsend; Schmidt v., App.	229	P.2d 488
Turner v. Milstein, App.	230	P.2d 25
Tyler v. Larson, App.	229	P.2d 364
Underhill; Tolman v., App.	229	P.2d 447
Union Ice Co. v. Bryant, Sup.	229	P.2d 363
Union Ice & Storage Co. v. Bryant, Sup.	229	P.2d 363

CASES REPORTED

	Vol.		Page
Union Paving Co.; Jensen v., App.	229	P.2d	121
United Ben. Life Ins. Co.; Legg v., App.	229	P.2d	454
U. S. Credit Bureau v. Sanders, App.	230	P.2d	849
Valley View Mut. Water Co. v. Browne, App.	230	P.2d	875
Van Dorn v. City & County of San Francisco, App.	230	P.2d	393
Van's Markets; Bruner v., App.	229	P.2d	56
Von Glahn; Norris Oil Co. v., App.	230	P.2d	885
Walkup Drayage & Warehouse Co. v. Bryant, Sup.	229	P.2d	358
Walpole v. Prefab Mfg. Co., App.	230	P.2d	36
W. D. Felder & Co.; J. G. Boswell Co. v., App.	230	P.2d	386
Weinrich; People v., App.	230	P.2d	440
Wentzel; Cary v., App.	230	P.2d	656
Western Loan & Bldg. Co.; Shanander v., App.	229	P.2d	834
Wharton v. Mollinet, App.	229	P.2d	861
Wieling; Luchsinger v., Sup.	230	P.2d	808
Wieling's Estate, In re, Sup.	230	P.2d	808
Wiley; McCaffrey v., App.	230	P.2d	152
Williams v. Williams, App.	229	P.2d	830
Wilson v. Los Angeles County Civil Service Commission, App.	229	P.2d	406
Wilson; Mulligan v., App.	229	P.2d	858
Winter; Mucci v., App.	230	P.2d	22
Wixson; People v., App.	230	P.2d	432
Womack; Parker v., Sup.	230	P.2d	823
Woodward v. Bruner, App.	230	P.2d	861
Wyman v. Municipal Court of City & County of San Francisco, App.	229	P.2d	491
Yankwich; Reitano v., App.	229	P.2d	387
Youngstown Steel Products Co. of Cal. v. City of Los Angeles, App.	229	P.2d	814

†

CALIFORNIA REPORTER

229 PACIFIC REPORTER

SECOND SERIES

103 Cal.App.2d 255

PEOPLE v. CERVANTES.

Cr. 4581.

District Court of Appeal, Second District,
Division 1, California.

April 3, 1951.

Louis L. Cervantes was convicted for burglary with a prior conviction for burglary, and he filed motion for writ of error coram nobis and writ of habeas corpus. The Superior Court of Los Angeles County, Walter S. Gates, J., entered an order denying the motion, and Louis L. Cervantes appealed. The District Court of Appeal, Doran, J., held that, since the accused pleaded guilty in the trial court and there was nothing out of the ordinary in connection with the proceedings, the order would be affirmed.

Order affirmed and accused's applications and petitions in the District Court of Appeal for writ of error, etc., denied.

Criminal law ⇨1182

Habeas corpus ⇨113(12)

An order denying accused's motion for writ of error coram nobis and writ of habeas corpus on ground that the process was invalid upon its face and that no criminal charge or crime was proved in the trial court and that accused was denied constitutional right of equal protection from domestic violence and invasion was affirmed, where accused pleaded guilty and there was nothing out of the ordinary in connection with the proceedings.

Louis L. Cervantes, in pro. per.

Fred N. Howser, Atty. Gen., Donald D. Stoker, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was charged by information with two counts of burglary with a prior

conviction of burglary. Two other counts of bribery and a violation of Section 11500 of the Health and Safety Code were also alleged. Defendant pleaded guilty to the two burglary counts and admitted the prior conviction. The other two counts were dismissed. Defendant was sentenced June 29, 1948, the sentences to run concurrently.

On August 7, 1950 defendant petitioned the superior court for what was referred to as "an application for a writ of Coram Nobis", "an application for an alternative writ of Habeas Corpus" and a "petition to annul, vacate, and set aside judgment". Following a hearing, the applications and petition were denied, from which order defendant appealed.

Defendant was represented by counsel at the time the plea was entered and judgment pronounced. The later petition and applications above-mentioned were made in propria persona.

The appeal is from the order denying the motions.

Appellant's briefs on appeal are in propria persona. Most of appellant's opening brief is devoted to a review of elementary criminal law. Finally the following appears: "Your defendant-appellant contention is that the judicial record is not consistent with the facts as stated; order is, void for want of jurisdiction; or the process invalid upon its face; no criminal charge or crime was proved in the trial court". It is then contended that "The people of the State of California, has denied your applicant defendant the following rights guaranteed to each individual by the Constitution of the United States". Then follows seventeen specifications of so-called rights denied, the seventeenth of which is as follows: "Denied the equal protection from domestic violence and in-

vation". It would serve no useful purpose to describe or recite the others.

Appellant's closing brief contains a "motion for a writ of Error", "an application for a writ of review", a "writ of superseas", a "writ of probable cause", a "writ of mandate" and a "subpoena duces tecum".

Appellant's brief and petition contain no support for the contentions therein referred to. Nor is there any support in the record for appellant's contention in general. Assuming that appellant's petition in the court was a writ of Error Coram Nobis, it was properly denied. Such a writ does not lie in the circumstances revealed by the record.

Appellant pleaded guilty in the court below and there is nothing out of the ordinary in connection with the proceedings. The order therefore is affirmed and appellant's applications and petitions herein are denied.

WHITE, P. J., and DRAPEAU, J. concur.



103 Cal.App.2d 249

INDUSTRIAL INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.
Civ. 14784.

District Court of Appeal, First District,
Division 2, California.
April 3, 1951.

Proceeding by the Industrial Indemnity Company opposed by the Industrial Accident Commission of the State of California and Richard Keller to review an award of the Commission. The District Court of Appeal, Dooling, J., held that an award of compensation for medical treatment can be made only when necessity for the treatment results from injury incurred in the employment.

Award annulled, and matter remanded for further proceedings.

I. Workmen's compensation $\S$ 962

Under constitutional provision authorizing workmen's compensation, and statute

enacted thereunder, award of compensation for medical treatment can be made only where necessity for treatment results from injury incurred in the employment. Labor Code, §§ 3208, 3600, 4600; Const. art. 20, § 21.

2. Administrative law and procedure $\S$ 816, 817

Workmen's compensation $\S$ 1949

Where Industrial Accident Commission made erroneous findings as result of inadvertence and asked that District Court of Appeal remand case for further proceedings, court would annul award and remand matter for further proceedings. Labor Code, §§ 3208, 3600, 4600; Const. art. 20, § 21.

Leonard, Hanna & Brophy, San Francisco, for petitioner.

Edmund J. Thomas, Jr., San Francisco, for respondent, Industrial Accident Commission.

DOOLING, Justice.

On this proceeding to review an award of the Industrial Accident Commission it appears that the commission, after finding that "the evidence fails to establish that applicant sustained any injury arising out of and occurring in the course of his employment", further found the applicant entitled to certain medical expenses and made an award therefor.

The constitutional basis for our system of workmen's compensation is section 21, Article XX of the California Constitution which empowers the Legislature "to create and enforce a liability * * * for injury or disability * * * incurred or sustained by * * * said workmen *in the course of their employment* * * * (including) full provision for * * * medical, surgical, hospital and other remedial treatment * * * to cure and relieve from the effects of *such injury* * * *." (Emphasis ours.)

Following this constitutional authorization the legislature provided in section 3600 of the Labor Code for liability of employers to employees for "injury * *

arising out of and in the course of the employment". Section 3208 declares that "(i)njury includes any injury * * * arising out of * * * employment * * *" and section 4600 authorizes "(m)edical, surgical and hospital treatment * * * reasonably required to cure or relieve from the * * * injury * *."

[1,2] It is clear from these provisions that the award of compensation for medical treatment can only be made where the necessity for such treatment results from an injury incurred in the employment.

The respondent commission in its answer asserts that the findings were the result of inadvertence and asks us to remand the case for further proceedings.

The award is annulled and the matter remanded for further proceedings not inconsistent with this opinion. California Casualty Indemnity Exch. v. Industrial Accident Comm., 190 Cal. 433, 438, 213 P. 257.

NOURSE, P. J., and GOODELL, J., concur.



103 Cal.App.2d 150

**GILKEY v. CROW-HARR LUMBER
CO., Inc. et al.**
Civ. 4085.

District Court of Appeal, Fourth District,
California.

March 28, 1951.

Action by Helen Gilkey against Crow-Harr Lumber Company, Inc., and others for injuries sustained in intersectional collision between automobile driven by plaintiff and truck driven by named defendant's employee. The Superior Court of Fresno County, Edward L. Kellas, J., rendered judgment for plaintiff for \$614.54 and defendant appealed. The District Court of Appeal, Griffin, J., held that evidence sustained finding that

plaintiff had lawfully obtained right of way at intersection and defendant driver failed to yield it and that allowance of \$250 to plaintiff for injuries was not excessive.

Judgment affirmed.

1. Automobiles ⇨171(8)

Motorist crossing intersection, is under continuing duty to use care, and amount of care to be used depends on facts of particular case.

2. Appeal and error ⇨1008(1)

In action for injuries sustained when truck driven by defendant's employee collided with automobile driven by plaintiff as she was crossing intersection, whether plaintiff had lawfully obtained right of way at intersection and whether defendant driver failed to yield it was question for trial judge. Vehicle Code § 550(a).

3. Appeal and error ⇨1008(1)

Automobiles ⇨171(9), 245(14)

Motorist crossing intersection is not under continuing obligation to look in both directions at same time, and when driver looks in first one direction and then other and sees no oncoming traffic that might affect his operations, it should be ordinarily left to jury or trial court to determine under facts of each particular case, what amount of vigilance is required in order to constitute due care. Vehicle Code, § 550(a).

4. Damages ⇨131(1)

Allowance of \$250 for injuries sustained by woman in automobile collision, where woman received bruises about her left knee, left foot, and left shoulder, and complained soreness for about two or three weeks, was not excessive.

Chester O. Hansen and John Said, Fresno, for appellants.

Lester N. Gonser, Fresno, for respondent.

GRIFFIN, Justice.

As a result of an automobile accident the court, sitting without a jury, gave judgment against defendants and appellants Crow-Harr Lumber Company, Inc. and its truck driver employee, Radivoy Sub-

otich, for \$684.54 (subsequently reduced to \$614.54 on a motion for new trial).

Defendant driver, according to his testimony as presented in an agreed narrative statement, was operating a truck in a northerly direction on First Street in Fresno at about 20-25 miles per hour around 10:25 a. m. When about 30-40 feet south of the intersection with Huntington Street (which runs east and west and is about 87 feet in width), he saw plaintiff's car approaching from the west at a point near the west curb line of First Street extended, "crawling" along. He assumed plaintiff was going to stop and go south, but instead she accelerated her speed and continued straight ahead through the intersection. He saw plaintiff's face and she was looking straight ahead to the east. When he saw she was not going to stop her car he cramped the wheels of his truck to his right. An impact occurred approximately 25 feet north of the south curb of Huntington Street and near the east curb of First Street. He stated his truck was going at that time between 5-10 miles per hour and that plaintiff's car was going about 15 miles per hour.

Plaintiff testified she approached the intersection at 15-20 miles per hour, came to a stop at the intersection near the west curb line of First Street; that she looked to her left and then to the right and allowed a south-bound car to pass; that at that time, although she looked to the south for two blocks, she saw no north-bound traffic approaching; that without looking to the south again she proceeded directly across First Street and her car was struck by defendant's truck near the east curb line of First Street extended. East of First Street Huntington Street has a center parking about 42 feet in width. The record does not indicate that there was a boulevard stop sign in either direction. It is defendants' position that the evidence conclusively shows that plaintiff was guilty of contributory negligence as a matter of law, citing *Prato v. Snyder*, 12 Cal.App.2d 88, 55 P.2d 255; and *Henderson v. Braden*, 35 Cal.App.2d 88, 94 P.2d 625.

[1,2] It is the rule that an automobilist, crossing an intersection, is under a continuing duty to use care. The amount of care to be used depends on the facts of the particular case. *Isaacs v. City and County of San Francisco*, 73 Cal.App.2d 621, 627, 167 P.2d 221. From the statement of facts it might be reasonably inferred that plaintiff was obligated to stop at the intersection to permit the passage of the south-bound automobile. She gave no signal indicating that her course thereafter would be to the left or to the right. Defendants' false assumption that she was going to turn was not predicated upon any act of plaintiff. Under the evidence related there might be a factual question as to which driver entered the intersection first. Section 550(a) Vehicle Code. Giving plaintiff the benefit of every favorable inference fairly deducible and every favorable presumption arising from the evidence produced in her behalf, the evidence here shows that plaintiff had lawfully obtained the right of way at this intersection and that the defendant driver failed to yield it.

[3] One crossing an intersection is not under a continuing obligation to look in both directions at the same time, and when the driver looks in first one direction and then the other and sees no oncoming traffic that might affect his operations, it should be, as here, ordinarily left to the jury or to the trial court, as the case may be, to determine, under the facts of each particular case, what amount of vigilance is required in order to constitute due care. *Hamlin v. Pacific Electric Railway Co.*, 150 Cal. 776, 780, 89 P. 1109; *Young v. Tassop*, 47 Cal.App.2d 557, 564, 118 P.2d 371; *Mahnkey v. Bolger*, 98 Cal.App.2d 628, 220 P.2d 824; *Anthony v. Hobbie*, 25 Cal.2d 814, 155 P.2d 826; *Prato v. Snyder*, 12 Cal.App.2d 88, 55 P.2d 255. The cases relied upon by defendants are factually dissimilar.

[4] The next complaint is that the damages are excessive in allowing \$250 for personal injuries. The agreed statement shows that plaintiff "apparently was stunned from the accident" and taken to

the emergency hospital. She received bruises about her left knee, left foot, and left shoulder. She complained of soreness for about two or three weeks but was able to return to her nursing work after being off for one day. The extent of her bruises is not indicated by the record. From the facts shown we see no justifiable complaint that the amount awarded is the result of passion or prejudice on the part of the trial court. It cannot be said that such an award, under the evidence, is shocking to the conscience of the members of this court. *Johnston v. Long*, 30 Cal.2d 54, 181 P.2d 645; *Burr v. Goss*, 91 Cal.App.2d 351, 357, 205 P.2d 61.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



103 Cal.App.2d 91

FLYNN v. FLYNN.

Civ. 17998.

District Court of Appeal, Second District,
Division 2, California.

March 27, 1951.

Hearing Denied May 24, 1951.

Action by Errol Leslie Flynn, also known as Errol Flynn, against Liliane Carre Flynn, for a declaration of rights under a property settlement agreement. The Superior Court of Los Angeles County, Otto J. Emme, J., entered judgment rejecting plaintiff's demand for declaration of rights, and the plaintiff appealed. The District Court of Appeal, Moore, P. J., held that facts stated in complaint showed existence of actual controversy over rights and duties of parties under written instrument sufficient for action of declaratory relief, and refusal to allow proof in presence of such complaint was error.

Reversed.

1. Declaratory judgment ⚡314

A complaint stating that an actual controversy existed between plaintiff and defendant under property settlement agree-

ment which had been incorporated in an interlocutory decree of divorce, and reciting the particulars on which parties disagreed, and asking for declaration as to their respective rights and duties, was a sufficient complaint for declaratory relief.

2. Declaratory judgment ⚡313

A complaint for declaratory relief is sufficient if it declares facts showing the existence of actual controversy over the rights and duties of the parties under written instrument, and demands their adjudication.

3. Appeal and error ⚡1056(1)

Trial ⚡60(1)

Where there was valid complaint for declaratory relief which recited existence of actual controversy over interpretation of writing, and plaintiff contended that the writing was ambiguous and required extrinsic proof of intent of parties, it was prejudicial error to reject offer of proof.

4. Contracts ⚡169

A trial court may consider the circumstances under which written instrument was made, its object, nature, and subject matter and the negotiations of its authors in arriving at intent expressed by such writing.

5. Contracts ⚡169

Where language employed in a written instrument is fairly susceptible of either one of two interpretations contended for, without doing violence to usual and ordinary import of such language or some established rule of construction, a latent ambiguity exists that must be resolved by resort to extrinsic evidence, in order to ascertain the intention of the parties. Code Civ.Proc. §§ 1856, 1860.

6. Declaratory judgment ⚡384

A decree in action for declaration of rights under a written agreement, determines only the purposes intended by such writing, and does not provide for its modification as to terms contained, since sole purpose of such action is to obtain an interpretation of writing.

7. Pleading ⚡360(4)

Where complaint is held to be insufficient and general objection to introduc-

tion of evidence thereunder is sustained, and pleading is not capable of such amendment as would state a valid cause of action, complaint will be dismissed.

8. Constitutional law 315

Declaratory judgment 369

Where general objection to introduction of evidence under complaint was sustained in action seeking declaration of rights under written agreement, parties are not entitled to findings, and filing of finding and judgment thereon was a denial of due process of law to party against whom judgment was rendered.

Jerry Giesler, Beverly Hills, and Robert E. Ford, Los Angeles, for appellant.

Loeb & Loeb, Los Angeles, by Adrian A. Kragen, Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment rejecting his demand for a declaration of his rights under a property settlement agreement which was subsequently approved and incorporated in the interlocutory decree of divorce entered at the suit of the wife, respondent herein. By his second amended complaint in the instant action appellant alleged that a controversy existed between himself and respondent relative to the meaning of their agreement which provided for monthly payments of \$1500 for maintenance and support aggregating \$18,000 annually¹ and, in anticipation of a possible change in the income tax laws, the writing provided by paragraph 16 thereof as follows: "In the event that any law, either federal or state or both, is enacted and becomes effective under which Mrs. Flynn may or will be required to pay federal or state income tax or both upon the amounts received by her from Flynn for her support and maintenance and under which Flynn is allowed to deduct or exclude from his taxable income all or part of such amounts, then beginning with the date upon which such law becomes effective and continuing thereafter as long

as Flynn is required to make payments to Mrs. Flynn for her support and maintenance, Flynn shall pay to Mrs. Flynn in addition to all other payments provided for herein the lesser of the following two amounts: (1) The amount by which the total of any federal and state income taxes Mrs. Flynn may be required to pay exceeds the amount of such taxes she would have been required to pay if the payments received by her from Flynn were not included in her taxable income; (2) the amount by which the total of any federal or state income taxes Flynn would have been required to pay if he were not entitled to deduct or exclude from his taxable income any of the payments required to be made hereunder to Mrs. Flynn exceeds the total amount of any such taxes he is required to pay."

The pleading then declares "an actual controversy exists between the plaintiff and defendant, relating to the legal rights and duties of the plaintiff and defendant, under the aforesaid judgment incorporating said Property Settlement Agreement, in particular, as follows: "A. Plaintiff contends that the true and correct meaning of the Property Settlement Agreement between the parties, and particularly, with reference to Paragraph 16 thereof, all as set forth in Exhibit 'A', is that plaintiff shall only be required to reimburse defendant for the Federal and State Income Tax which defendant may, or will be required to pay upon the amounts received by defendant from plaintiff for her support and maintenance under and pursuant to the terms and provisions of said Property Settlement Agreement. In particular, plaintiff contends that the amounts paid to defendant as and for defendant's taxes for the preceding taxable year, as provided in Paragraph 16 of said Property Settlement Agreement, shall not be computed as support and maintenance received by defendant from plaintiff in determining the amount of money to be reimbursed to defendant under the terms of Paragraph 16 of said Property Settlement Agreement. Defendant contends to the contrary, and

1. Numerous other covenants contained in the agreement do not affect the merits of the present controversy.

claims that under the provisions of Paragraph 16 of said Property Settlement Agreement plaintiff is obligated to reimburse defendant for her Federal and State taxes on all sums received by defendant from plaintiff including therein such sums of money as plaintiff shall have paid defendant for her support and maintenance, together with such sums of money as plaintiff may have paid defendant in reimbursement of defendant's taxes for the preceding year."

By her answer respondent admits appellant's allegation of his contention that the amounts paid to defendant as and for her taxes for the preceding taxable year shall not be computed as support and maintenance in determining the amount of money to be reimbursed to defendant. Also, she admits that she claims that under paragraph 16 plaintiff is obligated to reimburse defendant for her federal and state taxes on all sums received by defendant from plaintiff, including therein such sums of money as plaintiff shall have paid to defendant for her support and maintenance together with such sums of money as plaintiff shall have paid defendant in reimbursement of defendant's taxes for the preceding taxable year, "but that the amount to which defendant is entitled under paragraph 16 shall not be more than the amount by which the total of any Federal or State income taxes plaintiff would have been required to pay if he had not been entitled to deduct the payment to defendant from his taxable income exceeds the total amount of any such taxes plaintiff is actually required to pay. Except as hereinabove admitted, the allegations of paragraph IV of plaintiff's complaint are denied."

At the trial of the action the court held the complaint to be insufficient, determined summarily that the agreement attached to the pleading, as approved by the court, is not ambiguous, rejected plaintiff's offer of proof, made and filed findings in accordance with defendant's contention as to the meaning of the agreement and entered judgment in accordance therewith.

[1-3] By virtue of the presence of a valid complaint it was prejudicial error to

deny plaintiff's offer of proof. An actual controversy existed. This is established by the allegations of both parties. A complaint for declaratory relief is legally sufficient if it declares facts showing the existence of an actual controversy over the rights and duties of the parties under a written instrument and demands their adjudication. *Columbia Picture Corporation v. De Toth*, 26 Cal.2d 753, 760, 161 P.2d 217, 162 A.L.R. 747; *Maguire v. Hibernian Savings & Loan Society*, 23 Cal.2d 719, 728, 146 P.2d 673, 151 A.L.R. 1062.

Appellant might with reason have contended that at the date of the agreement the law requiring a divorcee to report as income the sums paid her for support had not been enacted; that the entire field of taxation was strange to him; that in anticipation of such legislation, however, he undertook to mollify its asperities for respondent by arranging to pay the tax upon the support money to be received under the contract; that he meant to relieve her of the burden of the tax on her support money but had no intention of doing more. Had he so testified and if others present at the conference had supported him, the court might justifiably have found that a fair interpretation of the agreement is that the reimbursement to be made to respondent by appellant is limited to the amount she has paid as tax on the sum she has received as support money. The basis for respondent's position consists wholly of a "construction" of the agreement. In that situation the court is confronted with a serious demand for an interpretation of the agreement and a declaration of the rights of the parties.

In the light of the cited authorities a controversy existed which appealed to equity. Having paid respondent \$18,000 for her support in 1943, in 1944 she reported as additional income for 1943 the sum of \$10,600 paid to her in reimbursement for the amount of the taxes she had paid on the \$18,000 support money received in 1943. According to respondent's contention when 1945 arrived she was entitled to be paid not only the \$18,000 for that year's support and the \$10,600 reimbursement for the tax she had paid on it in 1944, but, al-

so, having paid \$12,000 taxes on the \$28,600, she demanded reimbursement for the \$12,000 paid on her income of 1944. It is a contention that reasonably might have been made upon the testimony of both parties as to their understanding of their agreement that appellant became obligated to pay the tax on the tax, *ad infinitum*, as they gather greater volume and intensity through the years.

[4,5] Intent is the paramount feature of a contract. In order to ascertain it from a written document the trial court may consider not only the circumstances of its making but also the object, nature and subject matter of the instrument and the negotiations of its authors that preceded its execution. By such proof the court is made conscious of the situation of the parties at the time they attempted to record their understanding. Code Civ.Proc., §§ 1860, 1856; Universal Sales Corporation v. California, etc., Mfg. Co., 20 Cal.2d 751, 761, 128 P.2d 665. If the language employed in the writing is fairly susceptible of either one of two interpretations contended for, without doing violence to its usual and ordinary import or some established rule of construction, a latent ambiguity exists that must be resolved. To do so, resort must be made to extrinsic evidence as provided by section 1860, *supra*, in order to ascertain the intention of the parties. (See 4 Cal.Jur.Ten-Year Supp., p. 119.) Where a divorced wife sued for moneys she claimed as support money under a written contract with her husband and the latter contended that the agreement was clear and unambiguous and meant to assign half of his wages from present and future employment and that such assignment of future wages was void, the court heard the evidence and found that it was the intention of the parties to draw a separation agreement and to provide for the wife's support and that they had agreed that one half of the husband's wages was the amount of such support and that the writing was not intended as an assignment of future wages. The husband contended that the evidence had been improperly admitted to prove the intent of the parties.

But the court reaffirmed the rule that "parol evidence is not only admissible to explain an ambiguity appearing on the face of the document but is admissible to show what appears to be a perfectly clear agreement, in fact, meant something entirely different to the parties." Wells v. Wells, 74 Cal. App.2d 449, 456, 169 P.2d 23; citing Code Civ.Proc., sec. 1860; Universal Sales Corporation v. California, etc., Mfg. Co., *supra*.

[6] Inasmuch as the purpose of an action for declaratory relief is to obtain an interpretation of a contract, the decree provides only for a determination of the purposes intended and not for a modification of its terms. Putnam v. Putnam, 51 Cal.App.2d 696, 699, 125 P.2d 525. Where an actual controversy exists and the writing requires extrinsic proof of the intention, it is error to deny the evidence offered. Columbia Pictures Corporation v. De Toth, 26 Cal.2d 753, 161 P.2d 217, 162 A. L.R. 747.

[7,8] There was no occasion to make findings after the court had refused to hear evidence of the contentions of the parties. There was nothing to find. By sustaining the general objection to the introduction of evidence the court in effect sustained a general demurrer to the complaint. It has long been the practice when a complaint is held to be insufficient to dismiss the action when the pleading is not capable of such amendment as would state a valid cause of action. When the court sustained the general objection it left the plaintiff in exactly the same situation as if it had granted a nonsuit. In either event, the plaintiff is not entitled to findings. Bradley Co. v. Ridgeway, 14 Cal.App.2d 326, 330, 58 P.2d 194; Culver v. W. B. Scarborough Co., 73 Cal.App. 421, 432, 238 P. 1096. The court having rejected appellant's offer of evidence, the filing of findings and judgment was an effective denial of due process of law. (5 Cal.Jur., 875.)

Reversed.

McCOMB and WILSON, JJ., concur.

Hearing denied; EDMONDS, J., dissenting.

103 Cal.App.2d 41

JOHNSTONE v. RICHARDSON et al.

Civ. 14589.

District Court of Appeal, First District,
Division 1, California.

March 22, 1951.

Bruce Johnstone brought a petition for a writ of mandate to compel the State Board of Equalization of the State of California to cancel a seasonal liquor license issued to May Richardson, and when the Supreme Court denied a petition for a hearing after District Court of Appeal affirmed judgment of the trial court denying the application, the applicant filed a request to file a supplement and amendment to the original petition. The Superior Court in and for the County of Marin, Edward I. Butler, J., denied the request and the applicant appealed. The District Court of Appeal, Peters, P. J., held that the business of the licensee was a "seasonable business" within the Alcoholic Beverage Control Act.

Affirmed.

1. Judgment ⇨592

Cases should not be tried piecemeal by limiting, by means of a stipulation, the issue to be first tried, and, upon failure to secure the desired relief, by trying other issues that could and should have been tried in first proceeding.

2. Intoxicating liquors ⇨60

Where lodge was located in a vacation area, so that it was very busy during some periods of year and not busy during others and a different type of operation was necessary during those two periods of year, such business was a "seasonal business" within Alcoholic Beverage Control Act, and lodge operator was properly granted a seasonal on-sale distilled spirits license, even though lodge was kept open all year. Gen.Laws, Act 3796, § 5, subd. 22, § 38f; Const. art. 20, § 22.

See publication Words and Phrases, for other judicial constructions and definitions of "Seasonal Business".

3. Statutes ⇨184, 188

Words used in statute must be construed in context, keeping in mind the na-

ture and purpose of statute and where they appear.

4. Mandamus ⇨16(1)

Where specific seasonal on-sale distilled spirits license sought to be revoked in proceedings for writ of mandate to compel State Board of Equalization to cancel license terminated before the judgment was entered and during period of year licensee had no license, but licensee intended shortly thereafter to apply for another seasonal license, the proceeding was not moot.

Bruce Johnstone, in propria persona, R. J. Hecht, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., J. Albert Hutchinson, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Bruce Johnstone, as a resident of Inverness, Marin County, and as accuser or complainant, for several years has sought, by various proceedings, to compel the State Board of Equalization to revoke the on-sale distilled spirits license for seasonal business issued to May Richardson who operates the Inverness Lodge. The petitioner first pursued his remedies before the State Board, and, when it denied him relief, sought mandate to compel the board to cancel the license. Although the petition for mandate presented several issues involving the validity of the issued license, by stipulation of the parties it was agreed that, in the first instance, the issues were to be restricted in that proceeding to an interpretation of Article XX, section 22 of the Constitution, and of section 38f of the Alcoholic Beverage Control Act (Deering's Gen.Laws, Act 3796), and to a determination as to whether those provisions, as applied to the facts, prohibited the issuance of the questioned license, leaving the other issues to be tried later. It was further stipulated that May Richardson was fully qualified for a seasonal on-sale general license except as she might be affected by section 38f. The trial court denied the application for the writ. This court affirmed, holding that section 38f did not apply to

seasonal licenses. *Johnstone v. State Board of Equalization*, 95 Cal.App.2d 527, 213 P.2d 429.

[1] On the same day that the Supreme Court denied a petition for hearing in that case (March 6, 1950) Johnstone filed a request to file a supplement and amendment to his original petition for mandate. The trial court, without a trial, denied the request and denied the petition for the writ insofar as it involved issues not passed on in the first proceeding, and again Johnstone appeals. This piecemeal trying of cases by limiting, by means of a stipulation, the issue to be first tried, and, upon failure to secure the desired relief, trying other issues that could and should have been tried in the first proceeding, is not to be commended. All of the issues involved in this and the prior proceeding should have been tried in one action. However, in the interests of justice we will assume, for the purposes of this appeal, that the holding in the prior opinion is not *res judicata* of the issues now involved.

The original petition which appellant unsuccessfully sought to amend alleges that appellant is a resident of Inverness, Marin County; that during the school vacation period the population of that town and area is greatly increased by vacationists; that May Richardson operates the Inverness Lodge; that during the entire year food and lodging are furnished at the Lodge; that liquor is sold on the premises under license each year for the nine-month period commencing April 1st and terminating December 31st; that the business of the Lodge is not seasonal within the provisions of the Alcoholic Beverage Control Act; that an on-sale distilled spirits license for a seasonal business can be issued properly only to a business that is carried on at specific seasons or periods of the year, and which, from its very nature, cannot be continuous; that May Richardson cannot qualify in this classification. It is further alleged that since 1947 the board has issued a seasonal license to May Richardson upon her representation that she runs a seasonal business, which representation it is claimed is false and was known by the applicant and the board to be false. It is also averred that

on April 1, 1949, appellant filed a protest with the board, protesting the renewal of the license; that the board refused to consider the protest; that on April 20, 1949, appellant filed an accusation or complaint requesting the board to cancel the license on the ground that the business involved was not a seasonal one; that the board replied that there was no requirement in the law that a licensee must actually close his premises during any portion of the year; that the legal requirement of a seasonal business is that the premises be located in a seasonal area, and that for one quarter of the year the licensee shall not sell alcoholic beverages; that Inverness Lodge is in such a seasonal area and does not sell liquor in the first quarter of the year. The petition then alleges that in thus defining a seasonal business the board is attempting to usurp the functions of the legislature by creating a new type of license, that is, one that is issued to a licensee who does an annual business in a seasonal area; that such a license is not recognized by the law; that the board, in issuing such a license, violated the law. The petition further alleges that the appellant requested the board to serve the complaint on the licensee, but the board advised him that it had been advised by the attorney general that no further action need be taken by the board, and that no hearing would be had. The supplement to the petition avers that the license was issued to May Richardson in the summer of 1947 over the protests of certain residents of Inverness even though a hearing officer of the board had recommended a denial of the license on the ground that the applicant does not conduct a seasonal business; that since 1947 the board has issued a license to May Richardson every three months except for the first three months of the year, and will continue to do so unless restrained. The petition requests a writ of mandate requiring the board to revoke or suspend the license of May Richardson, and seeks to enjoin the board from issuing to her such a license until her premises qualify under the law. Attached to the petition are some ten exhibits that support, with documentary evidence, some of the factual allegations of the petition.

The board filed an answer denying some of the allegations of the petition, alleging the prior proceedings and averring, among other things, that the petition does not state a cause of action.

No trial was had. The cause was argued orally and in writing and the trial court then denied the petition. It held that the complaint filed with the board by petitioner on April 19, 1949, did not state a cause of action requiring a hearing to be held, and that the board in declining a hearing did not abuse its discretion. It also held that the license sought to be suspended had expired, and that the cause was therefore moot. Permission to file the amended and supplemental petition was denied, as was the application for the writ. Judgment was entered accordingly.

It should first be pointed out that the appellant does not complain of the fact that no formal hearing in the sense of a trial was had. In fact, appellant specifically requests that the case not be remanded for a trial, but requests that it be decided as a matter of law. His exact position is stated as follows in his reply brief (p. 8): "This controversy should be brought to an end. Each side presented its contentions to the trial Court; each side demurred to the other's pleas; petitioner stands on his petition, the Respondent Board, on its theory of 'fluctuating demand' as justification for the issuance of the license in question. * * * No purpose would be served by a remand. We can make no better case than the one made in our petition; there is no evidence which could alter the situation."

The sole question presented is whether a business that operates during the entire year, but which is subjected to fluctuating demands during the year, is or is not a business that may secure a seasonal liquor license. It is the theory of appellant that, as a matter of law, any business that operates throughout the year, regardless of the fluctuating demand, is not a seasonal business and is not entitled to a seasonal liquor license. This contention cannot be sustained.

There is no statutory definition of the phrase "seasonal business." The Constitution, in Article XX, section 22, which is the

section generally defining the powers of respondent board in liquor matters, authorizes the board to issue licenses for less than a year by fixing the amount of the license fee for annual licenses and a smaller fee for "seasonal businesses." The Alcoholic Beverage Control Act (Deering's Gen.Laws, Act 3796) while it does not define the terms "seasonal business," does refer to such businesses in several places. Thus, in section 5, subsection 22, in referring to types of licenses and the fees to be charged fixes the license fee for "On-sale general license for seasonal business" at \$18.75 per quarter. Section 38f of the act limits on-sale general licenses to one license for each 1,000 of population. It was held, on the former appeal, that this limitation did not apply to licenses for seasonal businesses. The section (38f) also confers upon the board the "power to make all rules and regulations consistent with the provisions of Section 22 of Article XX * * * or this act, necessary to carry into effect the provisions of this section, and to restrict the issuance of alcoholic beverage licenses, including seasonal licenses." Thus, the Constitution and the statute use the terms "seasonal business" and "seasonal license" to mean the same thing.

It is apparent that the term "seasonal" used to limit the word "business" or "license" could mean a business which operates only in certain periods of the year and is entirely dormant in other portions of the year. The then attorney general of the state, in a letter addressed to the board dated November 27, 1936, in discussing the power of the board to fix fees for various types of licenses, so construed the terms "seasonal business." In that letter it is stated: "As to what constitutes a seasonal business I refer you to the case of *Froehly v. T. M. Harton Co.*, [291 Pa. 157] 139 A. 727, which contains an excellent discussion upon this point. It was pointed out there that a business, to be seasonal, must be of the kind that is performed exclusively at specific seasons or periods of the year and which, from its nature, cannot be continuous or carried on throughout the year. It was, therefore, held that in that case

the occupation of dishwasher was not a seasonal business even though the amusement company for which the dishwasher worked was a seasonal business, being open only during the summer months."

This is the interpretation which appellant contends this court must give to the terms. In additional support of his position he cites *Local Union, etc. v. Howard Bus Lines*, 202 Ga. 430, 43 S.E.2d 523, which defined the terms "seasonal industries" to mean industries that were seasonal by nature, and not those which were seasonal only because of peaks and lulls in consumer demand.

The attorney general is no longer of the view expressed in his letter of 1936. Under date of June 14, 1949, in an official letter to the board in reference to the facts of the instant case, a deputy attorney general expressed himself as follows: "A reference to the Act and to the regulations of the Board does not indicate that such license may be issued only where the premises for which the license is to be issued was literally closed and locked during any part of the year. The legislative and administrative history demonstrates that such licenses have been sought and issued for premises in the recreational areas of the State where, during certain periods of the year, vacationists, travelers and other persons resort in considerable numbers, whereas, in 'off-season' periods the attendance may be very small, thus necessitating a completely different type of operation during the season of large attendance and the relatively small attendance at other times. Many establishments in the recreational areas of the State, however, maintain limited services and usually remain open in a limited sense throughout the year in order to prepare for the coming season, and the legislative intent and the Board policy, as indicated by the legislative and administrative history, indicates that such so-called 'seasonal licenses' were designed to accommodate the public under such circumstances, and in the absence of some such showing in the proposed accusation it appears that no good cause for taking disciplinary action is presented on this theory."

[2,3] We agree with this construction of the words involved as used in the Alcoholic Beverage Control Act. It must be remembered that words do not always have an immutable meaning. They are not construed in a vacuum. When used in a statute they must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear. An on-sale liquor license is somewhat different from other types of licenses. It is only granted where the applicant is operating some other business as well—as sale of food, hotel where food is served, etc. In the instant case the applicant runs an establishment where food and lodging are furnished. That business she operates the entire year. Admittedly, because the place of business is located in a vacation area, the business of the lodge varies in different seasons. The business is seasonal in the sense that during certain periods there is a great demand for the services rendered, while in other periods there is very little demand. The proprietor, nevertheless, has determined to operate the hotel business for the entire year. But, so far as her liquor business is concerned, she operates that but nine months a year. That portion of her business is discontinued for three months of each year. Of course, the two businesses cannot and should not be considered separately because the liquor business is integrally connected in this case with the hotel business. But, because the lodge here involved is located in a vacation area, it is very busy during certain periods and not busy in other periods. This requires a different type of operation during the two periods. On-sale licenses for seasonal businesses were obviously designed by the legislature and by the board to take care of the needs of the public in such areas. It would not serve the needs of the public if it were to be held that a summer resort could secure a seasonal license if it closed its doors for some period of the year, but could not secure such a license if it remained open all year to serve its permanent guests, to prepare for the coming busy season, to keep its help on a permanent basis, and for other reasons. Such an interpretation would be most artificial. See

Hotel Enterprises v. Porter, Em.App., 157 F.2d 690. We think that, as used by the legislature and by the board, the word "seasonal" must be interpreted to refer to a business located in a seasonal area where the consumer demand fluctuates during different periods of the year. This is in accord with the dictionary definition of the term. In Webster's New International Dictionary (2d ed.) the first definition given of the term "seasonal" is "of, pertaining to, or occurring at, a particular season or seasons; as *seasonal* rates, demand," etc. The secondary definition, which is the one contended for by appellant, is "not continuously active." We think that the word was used in the statute in the first sense above set forth.

[4] The trial court, in addition to interpreting the words involved as above indicated, held that the entire proceeding was moot. This conclusion was based upon the fact that the specific license sought to be revoked terminated on December 31, 1949, and the judgment of the lower court was entered on March 20, 1950, which was during the three-month period the applicant had no license. Therefore, there was not, on the date judgment was entered, any license upon which the board could act. However, it is admitted that the applicant intended to and did apply and secure a seasonal license starting April 1, 1950, in accordance with her past custom. It would be unsound to hold that in all cases an administrative proceeding involving the revocation of a license issued for fixed periods could not be reviewed because the statutory period fixed for the license had expired. Short term administrative orders could seldom be reviewed if that were the law, and the judicial power of review would be defeated in such cases. See *Burke v. Coleman*, 356 Mo. 594, 202 S.W.2d 809; *Wahl v. Waters*, 11 Cal.2d 81, 77 P.2d 1072. For these reasons we do not predicate our decision upon the ground that the proceeding was moot.

The petition for the writ of mandate admitted that the business of Inverness Lodge fluctuates in the different seasons of the year. The petition also disclosed that the

liquor license is issued for nine months of the year. It also disclosed that the sole ground upon which the accusation before the board was based was that Inverness Lodge remains open the entire year, and that such a business is not entitled to an on-sale distilled spirits license for a seasonal business. Appellant requests that the case be decided as a matter of law. The board and the trial court interpreted the statute to mean that seasonal licenses could be issued to businesses such as that of applicant even though it operated on an annual basis. That interpretation is sound. That is the end of the case.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



102 Cal.App.2d 789

ATLAS ASSURANCE CO., Limited, et al.
v. STATE.
Civ. 14599.

District Court of Appeal, First District,
Division 2, California.

March 13, 1951.

Hearing Denied May 10, 1951.

Action by the Atlas Assurance Company, Ltd., and others, against the state of California for damages due to the negligent operation of the Belt Line Railroad owned by the state which resulted in knocking down a pole of a power line of the Pacific Gas and Electric Company and a resulting fire damaging the property of the company. From a judgment for plaintiff in the Superior Court, in and for the city and county of San Francisco, George W. Schonfeld, J., the defendant appealed. The District Court of Appeal, Schottky, J. Pro Tem., held that the defense of contributory negligence was not established.

Judgment affirmed.

I. Electricity ☞ 14(1)

A very high duty is placed upon the power company in construction and mainte-

nance of its equipment so as to avoid injury to persons or property in the handling of electricity.

2. Negligence ☞28

Everyone must use his property so as not to injure others.

3. Negligence ☞28, 68

A landowner may make any lawful use of his land and it is not contributory negligence to neglect to take precautions to avoid future injury which can only occur as result of another's negligence.

4. Electricity ☞20

Where due to negligent operation of the State Belt Line Railroad a freight car was thrown from the tracks, falling against a power pole of power company, which pole was broken off, causing wires to sag and fall into the street and short circuit, and a fire resulted damaging the property of the power company, evidence did not establish any contributory negligence by the power company proximately contributing to the fire so as to preclude recovery for damages sustained.

Edmund G. Brown, Atty. Gen., Harold B. Haas, Miriam E. Wolff, Deputy Attys. Gen., for appellant.

H. A. Thornton, E. M. Taylor, Thornton & Taylor, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

The State of California appeals from a judgment against it in the sum of \$52,617.-56 in an action brought by respondents, subrogees of the Pacific Gas and Electric Company, for damages alleged to have been caused by negligence of appellant's employees in the operation of the State Belt Railroad.

Certain facts were undisputed and the parties entered into the following agreed statement of facts:

"It is agreed that shortly after the inception of World War II, the Government of the United States took over and occupied the property lying to the south of Beach Street, between Powell and Taylor,

for Government yards and warehouses, and for the handling and storage of supplies en route to the South Pacific area.

"That, to serve these yards, a track was installed on Beach Street, with numerous spurs leading into said yards, which track and spurs were used by the State Belt Line Railroad to switch and deliver cars to and into said yards. That said track on Beach Street was elevated from three to four feet above the level of the street.

"That on January 8, 1944, said State Belt Line Railroad had 'spotted' a box car on one of these spurs, known as No. 7, so close to the main line tracks as to prevent clearance by cars being switched on the main line on Beach Street.

"That on said January 8, 1944, said Belt Line Railroad, operated by the State of California, under the supervision and control of the State Board of Harbor Commissioners, was switching certain cars on said tracks in a westerly direction. That the end (or most westerly) car of said train struck said car spotted on spur No. 7.

"That, as a result of said collision, said end car, which was refrigerator car No. 92200 of the Pacific Fruit Express, was thrown from its tracks and down said embankment, falling against a power line pole of the Pacific Gas and Electric Company, situated approximately nine feet northerly of the nearest rail of said track and 140 feet easterly of Mason Street, on Beach Street.

"That the impact of said car broke said pole off at the ground level, splintering it for a distance of six feet or more above the ground and displacing said pole six feet to the north, into the street.

"That two other poles were broken by the strain thrown on them. The first was the one immediately to the west of the pole which was struck, this pole also being broken off at the ground line. The other pole so broken was at the southwest corner of Beach and Mason Streets.

"These poles carried an 11,000 volt feeder, known as Q-1102KV, in other words, the No. 2 line carrying that voltage into Station 'Q', located at 320 Beach

Street, at the northwest corner of Mason, in the City and County of San Francisco.

"That on the pole next westerly from that struck was a buck-arm, attached to and leading from which was an 11,000 volt line leading northerly across Beach Street.

"That the 11,000 volt line running east and west on Beach Street consisted of four wires, being, in order from north to south, the neutral, the red, white and blue phases. The line leading northerly across Beach Street consisted of three wires, being the red, white and blue phases, without a neutral wire.

"That the shattering and displacement of the pole, struck by said car, and of the pole to the west, caused a sag in said Q1102 wires, dropping them onto the wires leading northerly across Beach Street. That, as a result of such contract, all of said wires shorted, burned off and fell into the street.

"That at that time a fire occurred at generating station 'Q' of the said Pacific Gas and Electric Company. That one of the issues in this case is whether the fire was caused or contributed to by the said short circuit in said wires and whether, if said short circuit caused or contributed to said fire, said fire was not also caused or contributed to by negligence of the Pacific Gas and Electric Company, its agents, servants, or employees. That the amount of damage caused by said fire is also an issue in this case, but that it is agreed that the total damage to Pacific Gas and Electric Company resulting from both the collision or allision of the said refrigerator car with the power line pole together with the short circuit and the fire was in the sum of \$52,617.56.

"It is further admitted by defendant State of California that said defendant is liable for the damage to poles and lines located outside the power station 'Q' of the Pacific Gas and Electric Company, caused by the collision or allision of the said refrigerator car and pole and will consent to judgment against it in the amount of that damage when ascertained.

"That the following plaintiffs had, prior to said fire, issued to said Pacific Gas and

Electric Company policies of insurance. That by reason of said fire said Pacific Gas and Electric Company made claim against each of said companies. That by reason of said fire and said claims said plaintiff companies paid to said Pacific Gas and Electric Company the amount hereafter set opposite their respective names, and that, by reason of such payments and of the terms and conditions of the policies under which such payments were made thereunder, the following plaintiffs have been subrogated to such rights, if any, which the Pacific Gas and Electric Company have herein, to the extent of such payments: (There follows a list of the companies and the amounts paid.)

"That said Pacific Gas and Electric Company filed a claim with the State Board of Control in the form and amounts hereto attached and marked 'Exhibit A', on December 21, 1945. That on November 25, 1947, after due hearing, said State Board of Control refused to allow said claim or any part thereof.

"That the allegations contained in paragraphs I and II of the complaint for damages are true; the allegations being:

"That 'plaintiffs above named, save and except for Underwriters at Lloyd's, London, which is a voluntary association, created, organized and existing under the laws of Great Britain, are and each of them is a corporation, created, organized and existing under the laws of the following states or countries: (There follows a list of the companies and their place of incorporation.)

"'Defendant the State of California owns and operates within the City and County of San Francisco, State of California, a railroad known as the State Belt Railroad; that the defendant operates said railroad through a Board of State Harbor Commissioners having an office and place of business in said City and County of San Francisco, State of California.'"

There is attached to the stipulation the claim of the Pacific Gas & Electric Company, before the Board of Control of the State of California, which reads: "In the Matter of the Claim of Pacific Gas and

Electric Company, a corporation, against the State of California.

"The undersigned claimant hereby makes claim against the State of California in the sum of Eighty-two Thousand Nine Hundred Eighty-seven and 93/100 Dollars, pursuant to the provisions of Section 16021, Government Code, and in support of said claim represents as follows:

"On January 8, 1944, employees of the State Belt Railroad carelessly and negligently operated railroad cars and switching devices on Beach Street between Powell and Mason Streets at approximately 2:12 a. m., that as a proximate result thereof a refrigerator car, No. 92200 of the Pacific Fruit Express became derailed and struck a pole on the south side of Beach Street between Powell and Mason Streets on which was suspended various power wires belonging to the Pacific Gas and Electric Company and used for the purpose of transmitting electrical energy. The impact was of such force that it broke the pole, causing a short circuit and an unusually heavy stress on the power system because of its close proximity to Generating Station Q. This sequence of events resulted in an arc which ignited the insulating oil in the regulators and transformers located in said generating station, and the flames in spreading were communicated to all adjacent inflammable electrical and building equipment resulting in the damage hereinafter itemized, commencing at page 2 of this claim.

"Pacific Gas and Electric Company makes this claim on its own behalf and also on behalf of the following named insurance companies who, by reason of the respective payments noted opposite the name of such company and the policies of insurance under which said payments were made, have been subrogated to the rights of Pacific Gas and Electric Company to the extent of such payments."

It was the position of the appellant at the trial that while it admitted liability for its negligence in the hitting of the pole and consequent breaking of the wires, it denied liability for the damage done to Substation "Q" by the explosion and fire caused by an

arc which ignited the insulating oil in the regulators and transformers therein. Appellant contends that certain evidence was excluded that should have been admitted as bearing on the contributory negligence of the Pacific Gas and Electric Company in the equipment and maintenance of its substation, that this excluded evidence would also have tended to prove that appellant's negligence was not the proximate cause of the damage to the substation, the respondents' subrogor failed to mitigate damages, and that it was making an extraordinary use of its property.

Appellant introduced in evidence a series of questions and answers that had been previously submitted to the Pacific Gas and Electric Company and answered by it, which gave a full description of the physical condition of Substation "Q"; the amount of power which was flowing in and out of said substation; the location of the short circuits; and a description of the various protective devices installed by the electric company. These answers disclosed that Station "Q" was completed in 1908 and placed in operation that year by Great Western Power Company, was taken over August 1, 1930, by Pacific Gas and Electric, that since that time there had been no change made in capacity of boilers, turbines, generators, incoming and outgoing circuits.

Appellant called as a witness a Mr. Blanchard, an expert in the field of electrical engineering, who calculated the minimum and maximum current on the short circuit a minimum of 9,000 amperes, a minimum of 18,000 amperes. Mr. Creim, the Regional Power Manager for the United States Bureau of Reclamation at Sacramento, was then called to testify as an expert in the field of design, management and supervision of electrical power systems. He testified that the arc, created at the point where the wires in the street crossed when the pole was hit by the railroad car, could not of itself cause the fire in Substation "Q", a distance of 140 feet away from the collision, and that there could not have been a fire in said substation unless an arc was formed within the vault. Basing his testimony on the description of

the equipment given by the Pacific Gas and Electric he stated that the arc which caused the fire occurred inside the regulator in Substation "Q", and that to cause the arc there had to be a short circuit in that regulator. He calculated that the short circuit here involved amounted to 9,500 amperes.

Appellant then attempted to demonstrate the inadequacy of the equipment in Substation "Q" to handle a short circuit of the magnitude caused by the breaking of the wires by defendant, it being the State's theory that ordinary reasonable care in the maintenance and operation of such a substation would require anticipation of short circuits of such magnitude and the provision of equipment to absorb them without material damage to the substation. Defendant attempted to do this by asking the expert witness Creim a series of questions, by the answers to which defendant expected to prove that the power station was not operated, maintained nor designed in accordance with present day reasonable engineering standards and that the fire would not have occurred if said power station had been so designed, equipped, operated and maintained.

Respondents objected to the admission of this line of testimony upon the ground that evidence tending to establish contributory negligence was inadmissible. The trial court sustained the objections and excluded the testimony and the principal issue presented on this appeal is as to the propriety of the defense of contributory negligence.

The principal case relied on by respondent is *Kleinclaus v. Marin Realty Co.*, 94 Cal.App.2d 733, at page 738, 211 P.2d 582, at page 584, where this court said:

"The tenor of the vast majority of the decisions is that a landowner may make any lawful use of his land and that it is not contributory negligence to neglect to take precautions to avoid future injury which can only occur as the result of another's negligence. As so tersely expressed by the United States supreme court in the passage above quoted from the *LeRoy Fibre Company* case (*LeRoy Fibre Company v. Chicago, M. & St. P. Ry. Co.*, 232 U.S. 340, 34 S.Ct. 415, 417, 58 L.Ed. 631): 'The tang-

ibility of property is in its uses, and that the uses by one owner of his property may be limited by the wrongful use of another owner of his is a contradiction.' * * *

"We are satisfied to hold that plaintiffs were not obliged to anticipate the negligent flooding of their land by defendants and that their permitting the drainage ditch to become clogged before the flooding started cannot constitute contributory negligence. If they had chosen to fill up the drainage ditch deliberately before the danger from flooding by defendants' negligence occurred they would only have been exercising the rights of an owner to use his land in any lawful fashion."

The *Kleinclaus* case cites with approval *LeRoy Fibre Co. v. Chicago, M. & St. P. Ry. Co.*, 232 U.S. 340, at pages 349, 350, 34 S.Ct. 415, at page 417, 58 L.Ed. 631, a case dealing with the negligent setting of a fire on plaintiff's property by an adjoining railroad, where the court said:

"That one's uses of his property may be subject to the servitude of the wrongful use by another of his property seems an anomaly. It upsets the presumptions of law, and takes from him the assumption, and the freedom which comes from the assumption, that the other will obey the law, not violate it. It casts upon him the duty of not only using his own property so as not to injure another, but so to use his own property that it may not be injured by the wrongs of another. How far can this subjection be carried? Or, confining the question to railroads, what limits shall be put upon their immunity from the result of their wrongful operation? In the case at bar, the property destroyed is described as inflammable, but there are degrees of that quality; and how wrongful must be the operation? In this case, large quantities of sparks and 'live cinders' were emitted from the passing engine. Houses may be said to be inflammable, and may be, as they have been, set on fire by sparks and cinders from defective or carelessly handled locomotives. Are they to be subject as well as stacks of flax straw, to such lawless operation? And is the use of farms also, the cultivation of which the building of the

railroad has preceded? Or is that a use which the railroad must have anticipated, and to which it hence owes a duty, which it does not owe to other uses? And why? The question is especially pertinent and immediately shows that the rights of one man in the use of his property cannot be limited by the wrongs of another. The doctrine of contributory negligence is entirely out of place. Depart from the simple requirement of the law, that every one must use his property so as not to injure others, and you pass to refinements and confusing considerations. There is no embarrassment in the principle even to the operation of a railroad. Such operation is a legitimate use of property; other property in its vicinity may suffer inconveniences and be subject to risks by it, but a risk from wrongful operation is not one of them.

"The legal conception of property is of rights. When you attempt to limit them by wrongs, you venture a solecism. If you declare a right is subject to a wrong, you confound the meaning of both. It is difficult to deal with the opposing contention. There are some principles that have axiomatic character. The tangibility of property is in its uses, and that the uses by one owner of his property may be limited by the wrongful use of another owner of his is a contradiction."

See also *Yik Hon v. Spring Valley W. Co.*, 65 Cal. 619, 4 P. 666; *Steele v. Pacific Coast Ry. Co.*, 74 Cal. 323, 15 P. 851; *Flynn v. San Francisco & S. J. R. Co.*, 40 Cal. 14. And in 65 C.J.S., *Negligence*, § 118, page 713, it is stated: "It has generally been held that the rule which requires one to exercise ordinary care to protect himself from the results of the negligence of others is subject to the exception that, as a person is entitled to use his own premises for any lawful purpose, his failure to protect them from the negligence of another will not be contributory negligence."

Appellant contends that it was error to apply the rule of the *Kleinclaus* case to the situation in the instant case. Appellant argues: "The difference between the *Kleinclaus* case and the case at bar is readily apparent, and it is our contention that the

use of the *Kleinclaus* case to bar defendant as a matter of law from introducing the excluded evidence is a misapplication of the doctrine and an unwarranted extension of the principle enunciated in the *Kleinclaus* case. In the latter case the plaintiff did not create nor assist in creating the force that damaged it. In the case at bar plaintiffs' subrogor was sending out of its premises the force which caused its damage and it was the recoil of that force onto its premises which caused the damage complained of. In the *Kleinclaus* case the plaintiff was not carrying on a hazardous activity in so far as it added to the particular damage complained of. In the case at bar plaintiffs' subrogor was using its property for an ultra-hazardous activity."

[1] It may be conceded that respondents' subrogor was devoting its property to an extraordinary use, an ultra-hazardous activity, but we are unable to see how that fact makes inapplicable the rule of the *Kleinclaus* case, and appellant has cited no case which so holds. It is true that a very high duty is placed upon a power company in the construction and maintenance of its equipment, so as to avoid injury to persons or property in the handling of such a highly dangerous instrumentality. As said in *Shearman and Redfield on Negligence*, Vol. 4 (Rev.Ed.) p. 1752, in regard to a gas company (and the same may be said to apply to an electric power company): "It is the duty of the gas company to build all its works, lay its pipes, and carry on its business, in such manner as to avoid injury to the property of others by the escape of gas, or of the materials employed in making it, or of the washings and refuse. To this end, the company is bound to use a degree of care and skill proportioned to the danger reasonably to be anticipated, which it is its duty to avoid," and at p. 1759, the same author says: "The business of supplying the public with electricity, like that of supplying gas, for lighting or other purposes, involves the handling of a highly dangerous agent, and therefore requires a corresponding degree of care on the part of one who undertakes it, to prevent injury to persons lawfully in any place where his wires are

strung, whether over a highway or on a housetop." See *Holmes v. Southern California Edison Co.*, 78 Cal.App.2d 43, 55, 177 P.2d 32; *Anstead v. Pacific Gas & Electric Co.*, 203 Cal. 634, 638, 265 P. 487; *Fairbairn v. American River Electric Co.*, 179 Cal. 157, 175 P. 637; *Lozano v. Pacific Gas & Electric Co.*, 70 Cal.App.2d 415, 161 P.2d 74; *Irelan-Yuba Gold Quartz Mining Co. v. Pacific Gas & Electric Co.*, 18 Cal.2d 557, 116 P.2d 611; *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 40 P. 108, 28 L.R.A. 596; *Anderson v. Southern California Edison Co.*, 77 Cal.App. 328, 246 P. 559; *Bergen v. Tulare County Power Co.*, 173 Cal. 709, 161 P. 269. However, none of the above cases cited by appellant throw any light on the question here involved, for none of those cases were concerned with a situation where a power company was bringing an action for damage to its property by the negligent act of the other party. The cases do, of course, emphasize the idea that the furnishing of electricity is an ultra-hazardous activity and that great care must be exercised to avoid injury to the persons or property of others.

As we view the matter the principal question involved in the instant case is not a difficult one. Here it is admitted that due to the negligent operation of appellant's Belt Line Railroad a freight car was thrown from its tracks and down an embankment, falling against a power pole of the P. G. & E. Co. (respondents' subrogor) which was 9 feet northerly of the nearest rail of said track; that the impact of said car broke the pole off at the ground level, splintering it for a distance of 6 feet or more above the ground and that two other poles were broken by the strain thrown on them; that the shattering and displacement of the pole struck by said car, and of the pole to the west caused a sag in the Q1102 wires dropping them onto the wires leading northerly along Beach Street, and that as a result of such contact all of said wires shorted, burned off and fell into the street. The trial court found, upon sufficient evidence, "That at that time a fire occurred at generating station 'Q' of the said Pacific Gas & Electric Company; which fire was caused by the unusually heavy stress on the

power system of Pacific Gas & Electric Company, due to said short circuit at said pole in close proximity to said Station 'Q'; that as the result thereof an arc was generated inside the current regulator inside said station, on the Blue phase of said Q-1102KV Feeder, which arc ignited the insulating oil in said regulator, causing an explosion which threw out said burning oil, resulting in flames which spread and were communicated to inflammable and electric equipment, resulting in damage thereto and to said station 'Q' in the agreed sum of \$52,617.56."

[2] How under such circumstances there could be a defense that there was contributory negligence on the part of the power company which proximately contributed to the fire in the substation we are unable to understand. If the freight car had not been thrown from its track by the admitted negligence of appellant there would have been no fire in the substation. The power company was conducting a lawful enterprise on its own property, and on property over which it had a right of way, under regulation of the Public Utilities Commission, and we do not believe it could be expected to anticipate and guard against any such accident as occurred in the instant case. If appellant's theory were correct it would be interesting to try to calculate what degree of precaution would have to be taken by the power company to avoid the defense of contributory negligence. As stated by the U. S. Supreme Court in *Leroy Fibre Co. v. Chicago, M. & St. P. Ry. Co.*, supra, "Depart from the simple requirement of the law, that every one must use his property so as not to injure others, and you pass to refinements and confusing considerations." [232 U.S. 349, 34 S.Ct. 417.]

[3,4] We believe that the rule expressed in the *Kleinclaus* case that a "landowner may make any lawful use of his land and that it is not contributory negligence to neglect to take precautions to avoid future injury which can only occur as the result of another's negligence" is applicable to the facts of the instant case and the trial court correctly ruled against the admission of the evidence offered by appellant.

The additional argument of appellant that the evidence excluded by the court would have tended to show that respondents' subrogor failed to mitigate damages is but a repetition of its argument on contributory negligence for it could scarcely be contended upon the record here that there was any time after the breaking of the wires causing the short circuit resulting in the explosion in the regulator and the fire. There is no contention that respondents' subrogor did not do everything in its power to fight the fire caused by the explosion in the substation.

In view of the foregoing we believe that the judgment should be and the same is hereby affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; SCHAUER, J., dissenting.



103 Cal.App.2d 122

PEOPLE v. KING.

Cr. 902.

District Court of Appeal, Fourth District,
California.

March 27, 1951.

Donald Pawnee King was convicted in the Superior Court, Riverside County, O. K. Morton, J., of extortion, and from a judgment entered thereon and an order denying a new trial, he appealed. The District Court of Appeal, Griffin, J., held that there was nothing in the positive and direct testimony presented by the prosecution from which court could justly conclude that testimony identifying defendant with the crime was per se unbelievable.

Judgment and order affirmed.

1. Criminal law ⇨1159(2)

In prosecution for extortion, even though testimony offered in opposition to prosecution's evidence and in support of defendant's alibi afforded opportunity for persuasive argument to jury against probability of defendant's guilt being established

beyond a reasonable doubt, there was nothing in positive and direct testimony presented by prosecution from which reviewing court could justly conclude that such testimony was per se unbelievable.

2. Criminal law ⇨553

Jury is authorized to reject any testimony which is contradictory of that given by witnesses for prosecution, if they conscientiously feel warranted in doing so after full consideration.

3. Criminal law ⇨1160

By denying defendant's motion for new trial after conviction, judge concurred in jury's verdict which rejected, as it had right to do, testimony offered by defendant as to an alibi, and accepted as true evidence given by prosecution's witnesses, and Appellate Court could therefore not disturb that finding.

4. Criminal law ⇨787(2)

Instructions in reference to failure of defendant to testify and failure to deny or explain facts within his knowledge were not erroneous in view of fact that it might be inferred from evidence produced that defendant had an explanation to make as to his whereabouts at time of crime, and that, if evidence produced by prosecution were false, defendant would have denied it.

5. Criminal law ⇨1137(5)

Where defendant introduced record of his previous conviction of a felony in evidence, in support of a motion to strike allegation in information pertaining to previous conviction, and court admitted record, admission was not error, in absence of showing that record was shown to jury, that jury had access to it, or that it was considered for any other purpose except to have court, out of presence of jury, rule upon motion.

6. Criminal law ⇨778(4)

Jury was sufficiently instructed on its duty to accept conclusions tending to prove innocence instead of guilt when the two conclusions may be drawn from evidence.

7. Criminal law ⇨814(3)

Court properly refused defendant's proffered instruction to effect that mere

fact defendant had been previously convicted of a felony could not be considered by jury as tending to prove his guilt, when there was no evidence of a previous conviction.

8. Criminal law — 782(1)

Instructions sufficiently covered statutory provision regarding weight of evidence rule. Code Civ.Proc. § 2061, subd. 6.

Daniel W. Gage, Clyde P. Harrell, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant was tried on an information charging him with the crime of extortion (violation of section 518 of the Penal Code). When arraigned he admitted a prior conviction of a felony (attempted extortion).

The charge was that on June 5, 1950, defendant, by force and fear, obtained \$4,000 from one Warden E. Myers by wilfully and unlawfully threatening said Myers that unless he paid over to defendant said sum defendant would expose and impute to Myers a crime, to wit, violation of section 288a of the Penal Code. A jury verdict resulted in a conviction. Defendant appealed and now concedes that the evidence is sufficient to show that the crime of extortion has been sufficiently established, but claims that he had no part in it and that the evidence produced by him as to his claimed alibi should not only have raised a reasonable doubt in the minds of the jurors but his alibi was actually established by a preponderance of the evidence.

The complaining witness, a retired railroad employee, aged 73 years, who was on June 2, 1950, employed as night clerk in a hotel, was proceeding to the public library through the park in Riverside shortly before noon. There he had occasion to go to the rest room. He went inside of one of the three enclosures and soon thereafter a man who occupied the next enclosure stuck his fingers through a hole drilled in that

dividing partition and suggested some sexual familiarity. Soon thereafter, as the complaining witness left the rest room, this person came up to him, showed him a badge inscribed "Riverside Detective", and told him he was under arrest and to come with him. They proceeded across the street where an accomplice was standing who was introduced as the "sergeant". The "sergeant" took charge of the complaining witness. The other man stated that he was going to the police station and file charges against the complaining witness. The "sergeant" inquired of Myers his name, where he lived, and asked other personal questions. After walking a short distance, a third person approached them, whom the complaining witness identified as the defendant King. The "sergeant" told Myers: "There comes another officer". After some conversation, the "sergeant" said to defendant: "All right, put the cuffs on him and we will take him to jail". They took the complaining witness to his home. His wife was away at the time. After some conversation they threatened to take Myers to jail. However, after some admonition and promises made to the complaining witness that they would see what they could do to have the case dropped, they left. On June 5, about one or one-thirty p. m. the "sergeant" and defendant King contacted Myers at his home and told him that "somebody has reported this to my chief, and now I got to take you to jail". After considerable conversation about the complaining witness putting up bail Myers offered to draw a draft payable to the City of Riverside for \$4,000. This was refused. After disclosing the fact that the complaining witness had \$4500 in a bank in a joint savings account with his wife, the defendant King went to the bank with the complaining witness. Four thousand dollars in \$100 bills was drawn from the account. King left the bank with the complaining witness and crossed over to the courthouse. As they were about to enter, the "sergeant" came towards them, told them to go back because there were a couple of newspaper photographers who wanted to take the complaining witness' picture. Thereafter, the "sergeant" told the complaining wit-

ness to give the bond money to defendant King. This was done and the witness went home awaiting further instructions as to the time of trial. About the 19th of the month someone called the complaining witness and told him that his bond had been forfeited. He then went to the police station and found that there was no record of such a charge or of such a bail forfeiture. About June 30, Myers identified King at the police station as the same person to whom he had handed the money. The identification of King in this transaction by Myers and at the times mentioned, was most positive.

Mrs. Monroe, who lived next door to the complaining witness' home, testified that she saw defendant King and another man come to Myers' home on June 2d about one p. m.; that on June 5, the defendant King, whom she positively identified, and another man knocked at the door of complaining witness' home between 12 noon and 2 p. m.; that she accosted them and told them that he was sleeping because he worked at night; that they told her: "Yes, I know, but we have got to see him"; that after about one hour they came out accompanied by the complaining witness.

Defendant failed to take the stand to testify in his own behalf. He produced several witnesses in an effort to establish an alibi. His first witness was a bank teller who identified certain money orders which he testified he cashed for defendant King in Los Angeles on June 2nd, sometime between the hours of 10 a. m. and one p. m. Another witness was a brake specialist in Hollywood, who testified he saw defendant on June 2nd in his shop sometime between 10:30 and 11 a. m.; that defendant left his car there for brake service and that he picked it up around 3:30 in the afternoon. A sales slip from which the witness refreshed his memory was introduced in evidence.

Another witness, manager of a clothing store in Hollywood, testified that he sold a suit of clothes to defendant on June 2nd, at approximately 12:15 p. m., and that defendant remained in the store from 30 to 45 minutes. He also produced records indicating such a sale on that date.

An optometrist testified that defendant had his eyes examined in his office on June 5th at 12 noon; that the examination consumed about 45 minutes of time. However, on cross-examination it was revealed by the witness' appointment book received in evidence that there was a previous entry on May 26, in reference to the examination of defendant's eyes. The witness stated in reply to the query: "Is it a 'phony'?" that "It is nothing"; that due to the fact that his practice was small he might have some names of patients on his appointment book merely for the purpose of showing to other patients that he was relatively busy; that he had certain names on there and had a private check mark opposite the ones that were real appointments. It then developed that this witness lived next door to defendant. It was stipulated that the distance between the park in Riverside and the City Hall in Los Angeles was 54 miles.

[1,2] The testimony offered in opposition to the prosecution's evidence and in support of defendant's alibi afforded opportunity for a persuasive argument to the jury against the probability of defendant's guilt being established beyond a reasonable doubt, but we find nothing in the positive and direct testimony presented by the prosecution from which a reviewing court could justly conclude that such testimony is *per se* unbelievable. It is manifest that the jury in the instant case was authorized, if it conscientiously felt warranted in doing so, after a full and fair consideration thereof, to reject any testimony which was contradictory to that given by witnesses for the prosecution. *People v. Ohman*, 67 Cal. App.2d 467, 154 P.2d 463; *People v. Lewis*, 81 Cal.App.2d 119, 124, 183 P.2d 271.

[3] In this connection it should be remembered that a motion for new trial was made and was denied by the trial judge. He also had the witnesses before him and was fortified with the opportunity of observing their manner and demeanor on the stand, their apparent candor, and the reasonableness or unreasonableness of the statements they made. By his action in denying the motion for new trial the judge concurred in the verdict of the jury which rejected, as it had a right to do, the testi-

mony offered by defendant, and accepted as true evidence given by the prosecution's witnesses. We are not in a position to disturb that finding. *People v. Mayor*, 60 Cal. App.2d 722, 724, 141 P.2d 470; *People v. Ohman*, supra.

The next complaint is that the court erroneously instructed the jury by reading CALJIC Instructions 51, 51-A and 51-B in reference to the failure of defendant to testify and failure to deny or explain facts within his knowledge. These forms of instruction are supported by *People v. Adamson*, 27 Cal.2d 478, 165 P.2d 3; *People v. Wade*, 71 Cal.App.2d 646, 163 P.2d 59; and *People v. Liss*, 35 Cal.2d 570, 219 P.2d 789.

[4] Defendant argues that since other witnesses testified as to defendant's whereabouts on the days in question, his testimony would be but cumulative and accordingly the rule as there stated is not here applicable. We see no merit to this argument. It might be reasonably argued and inferred from the evidence produced that defendant had an explanation to make as to his whereabouts on the occasions mentioned, and that if the evidence produced by the prosecution were false, he would have denied it. *State v. Grebe*, 17 Kan. 458; *Mooney v. Davis*, 75 Mich. 188, 193, 42 N.W. 802; *People v. Adamson*, supra.

[5] The next point is that the court erred in receiving in evidence a copy of defendant's previous conviction of a felony. The facts surrounding the receipt of this document in evidence are that during the trial and out of the presence of the jury, counsel for defendant moved to strike from the information the allegation pertaining to the previous conviction. This motion was based on some claim that the offered record did not show that defendant had been previously convicted of a felony due to some claimed irregularity pertaining to the revocation of probation and the subsequent commitment. In support of the motion counsel for the defendant offered the record in evidence and the court ad-

mitted it "in connection with the defendant's motion", which motion was denied. No claim is made that the court erred in denying the motion. The objection is that the jury was "free to examine the same and know its contents", and accordingly must have erroneously gained information from the record that defendant had been previously convicted of attempted extortion. Since defendant offered the record in evidence and since there was no showing that this particular exhibit was shown to the jury, that the jury had access to it, or that it was considered for any other purpose except to have the court, out of the presence of the jury, rule upon the motion, defendant could not claim prejudicial error.

[6] Complaint is made that the court refused defendant's proffered instruction pertaining to the duty of the jury, where two conclusions may be drawn from the evidence, to accept conclusions tending to prove innocence instead of guilt. The jury was sufficiently instructed on this subject in the language of CALJIC Instruction No. 26, p. 28.

[7] Defendant offered an instruction to the effect that the mere fact defendant had been previously convicted of a felony could not be considered by the jury as tending to prove his guilt. The court properly refused it because, as indicated by the court, there "was no evidence of a previous conviction".

[8] Lastly, it is argued that the court erred in failing to give, on its own motion, a proper instruction embodying section 2061, subd. 6 of the Code of Civil Procedure regarding the weight of evidence rule there indicated. He cites *People v. Putnam*, 20 Cal.2d 885, 890, 129 P.2d 367. An examination of the instructions given shows that this subject was sufficiently covered.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

SEXTON v. BROOKS et al.

Civ. 18063.

District Court of Appeal, Second District,
Division 2, California.

March 21, 1951.

Rehearing Denied April 9, 1951.

Hearing Granted May 17, 1951.*

Mollie Sexton sued Evelyn Simon Brooks and another for personal injuries received when plaintiff fell on a cement sidewalk in front of named defendant's business building. From a judgment of the Superior Court, Los Angeles County, Mildred L. Lillie, J., for plaintiff, named defendant appealed. The District Court of Appeal, Moore, P. J., held that appellant was not responsible for defects in the sidewalk because of a concrete strip dropping about six inches to the level of the remainder of the walk at a line where the concrete formed a ridge on which plaintiff caught her heel, in the absence of evidence that appellant or any of her predecessors in interest built the ridge, strip or walk.

Judgment reversed.

1. Municipal corporations ⇨808(1)

A sidewalk is part of highway or street, which owner of abutting property owes no duty to maintain in good repair, in absence of statute or ordinance imposing such burden.

2. Highways ⇨199

Negligence ⇨37, 52

A possessor of land crossed by public highway or private right of way is not liable for injuries to travelers on highway or persons lawfully using private way because of his failure to use reasonable care to maintain highway or way in safe condition for their use or to warn them of dangerous conditions known to him and neither known to nor likely to be discovered by such travelers, though not created by owner.

3. Negligence ⇨32(2.8)

A pedestrian is not merchant's invitee while traversing public street with intent to enter on merchant's property.

4. Municipal corporations ⇨808(1)

The basis of landowner's liability for injuries to pedestrian because of defect in sidewalk adjacent to land is not mere benefit

or advantage to owner from presence of walk, but owner's creation or control of condition entirely independent of ordinary use for which sidewalks are designed.

5. Municipal corporations ⇨808(2)

A business building owner was not obligated to construct handrail to insure safety of pedestrians on public sidewalk abutting building because of dangerous condition created by concrete ridge at line where concrete strip next to building dropped to level of remainder of walk, as private citizens may not construct handrails on public sidewalks without municipal consent and such construction would constitute public nuisance abatable on city's demand.

6. Municipal corporations ⇨808(2)

A business building owner was not responsible for defects in abutting public sidewalk because of concrete ridge at line where concrete strip next to building dropped to level of remainder of walk beside shoe store vestibule, and hence not liable for injuries to woman tripping over ridge while proceeding along walk toward such store with intent to enter it, in absence of evidence that such owner or any of her predecessors in interest built ridge, strip or sidewalk.

Moss, Lyon & Dunn, Los Angeles, Henry F. Walker, Los Angeles, of counsel, for appellant.

Joseph A. Ball and Thomas F. McCarry, Long Beach, for respondent.

MOORE, Presiding Justice.

The judgment here on review resulted from an action to recover damages for personal injuries received when respondent fell on a cement walk allegedly maintained by and under control of the appellant.

The locus of the accident was a concrete area in front of and adjacent to business property owned by appellant in the city of Redondo Beach. The two story building was operated as a hotel on the second floor while the ground space was leased to others for shops or stores. The building and all its entrances face in a westerly direction with the hotel stairway at the extreme north end

* Subsequent opinion 245 P.2d 496.

and a shoe repair store just to the south of it. A barber shop and another storeroom (vacant at the time of the accident) comprise the remainder of the ground floor. The three rooms are reached by way of a vestibule three feet wide. The face of the building stands on appellant's west property line. The sidewalk area from the building to the street is 12 feet wide, is entirely paved and is included within the 70 feet dedicated in 1902 to public use as a street which extends from appellant's west property line to the property line on the west side of the street. As shown by the photograph reproduced herein, commencing at the north line of the building there is a concrete strip 18 inches in width lying adjacent to the building. Its slope does not con-



form with the topography but is kept so nearly level from the entrance southward that at the junction of the line drawn perpendicular to the property line at the north side of the vestibule of the shoe store, the concrete strip drops about six inches to its new level which continues down the street at the same grade as that of the remainder of the sidewalk. At the line where the strip drops, herein referred to as the "step-off," the concrete forms a ridge $\frac{7}{8}$ ths of an inch high and two inches wide which was constructed prior to 1918. Its evident purpose was to divert storm waters from the vestibule whose floor level is five and $\frac{3}{8}$ ths inches below the sidewalk. Commencing at the step-off the 18-inch strip continues southward as the eastern portion of the sidewalk but is given a slope into the vestibule, forming a ramp into the first-floor stores. There was no evidence as to the identity of the agency that had actually caused the construction of the concrete strip and ramp. Appellant purchased the building March 1, 1946. The accident occurred May 10, 1948.

Respondent was a guest of the hotel. As she was proceeding from its entrance to the shoe repair shop, she caught her heel on the ridge at the step-off and was thrown forward, her body falling in the vestibule. There was no handrail at the step-off and no sign of caution. There was testimony that the ramp did not conform with architectural standards in Los Angeles county.

Appellant seeks reversal of the judgment on three grounds: (1) the evidence does not support the judgment; (2) errors in instructions given and refused; (3) errors in rulings made concerning evidence of other accidents at the same place.

[1,2] The primary question thus presented for decision is whether there exists a liability upon the part of a landowner for injuries received by a potential business invitee as a result of a dangerous condition existing on the public sidewalk adjacent to the landowner's premises. From the facts recited, it is clearly established that the accident occurred on public property, an area over which appellant had

never exercised control. It is a persistent principle of the common law that a sidewalk is part of the highway and that no duty is cast upon the owner of the abutting property to maintain the street in good repair. In the absence of a statute or an ordinance imposing such a burden, none exists. *Martinovich v. Wooley*, 128 Cal. 141, 143, 60 P. 760; *Daly v. Mathews*, 49 Cal.App.2d 545, 548, 122 P.2d 81; *Schaefer v. Lenahan*, 63 Cal.App.2d 324, 326, 146 P.2d 929. The rule is succinctly stated in the Restatement of the Law of Torts, Section 349, as follows: "A possessor of land over which there is a public highway or private right of way is not subject to liability for bodily harm caused to travelers upon the highway or persons lawfully using the [private right of] way by his failure to use reasonable care (a) to maintain the highway or way in a safe condition for their use or (b) to warn them of dangerous conditions thereon which, although not created by him, are known to him, and which they neither knew nor are likely to discover * * *. The duty to maintain a highway in a condition safe for travel is * * * in some states by statute and in others by common law, placed upon the municipal subdivision which holds the highway open to the public for travel."

Respondent recognizes this general rule but contends that the above decisions are not applicable. She relies upon the principles enunciated in *Johnston v. De La Guerra Properties, Inc.*, 28 Cal.2d 394, 170 P.2d 5. The facts there disclose a situation utterly unlike that involved here. The place where Mrs. Johnston fell was a private walk which served as an approach to the defendant's restaurant.

[3] Though intending to visit the cobbler shop, respondent herein was merely using the public highway enroute to her destination. A pedestrian does not fall within the classification of an invitee of a merchant while traversing a public street with the intention of entering upon the merchant's property. *Villa v. United Electric Ry. Co.*, 51 R.I. 384, 155 A. 366, 75 A.L.R. 282; *Duchemin v. Boston Elevated Railway Company*, 186 Mass. 353, 71 N.E. 780, 66 L.R.A. 980; *Prosser on Torts*, sec.

79, p. 640. Unlike the Johnston decision, the dangerous condition involved herein existed wholly on a public street not constructed by appellant or any predecessor in interest.

[4] Respondent argues that the ramp was constructed entirely for the benefit of appellant's property and that consequently she owed a duty to the respondent to keep it in a proper and safe condition, citing *Granucci v. Claasen*, 204 Cal. 509, 269 P. 437, 59 A.L.R. 435; *Monsch v. Pellissier*, 187 Cal. 790, 204 P. 224. The *Granucci* case involved a situation where the landowner was permitted by the city to construct a special wooden driveway from the street to her property upon which structure he was injured. The *Monsch* decision was concerned with a lightwell "consisting of iron grating and inlaid glass for her [defendant's] sole and exclusive use and benefit." It is not the presence of mere benefit or advantage to the landowner that forms the basis of the liability; rather it is the fact that the owner has created or has within his control a condition entirely independent of and apart from the ordinary use for which sidewalks are designed. *Granucci v. Claasen*, 204 Cal. at page 512, 269 P. 437.

[5] Respondent contends that even though the scene of the accident was on a city street appellant was obligated to construct a handrail to insure the safety of such pedestrians as proceed along the sidewalk abutting appellant's building. Neither appellant nor any other private citizen may without municipal consent construct a handrail upon a public sidewalk. Such a construction by appellant or one of her predecessors would have constituted a public nuisance abatable on the city's demand. The proximity of the hotel to the street conferred no privilege upon the owner to encumber the sidewalk.

[6] As respondent moved from the hotel entrance toward the shoeshop she was only a pedestrian on the street. Appellant was no more responsible than respondent for the ridge in the sidewalk and cannot be punished for its existence. There was not a scintilla of evidence that appellant or any of her predecessors in interest at any time

built the ridge, the 18-inch strip or the sidewalk. How then could she be responsible for its defects?

In view of the foregoing it will not be necessary to discuss the other points raised by appellant.

Judgment reversed.

McCOMB and WILSON, JJ., concur.



102 Cal.App.2d 926

COOPER v. STATE BOARD OF PUBLIC HEALTH et al.

COOPER v. STATE BOARD OF PUBLIC HEALTH.

Civ. 17803.

District Court of Appeal, Second District,
Division 3, California.

March 20, 1951.

Proceeding for a writ of mandate by William LaGrande Cooper against the State Board of Public Health, and others, as members of such board, to compel the Board to annul its order revoking his license as a clinical laboratory technologist. The Superior Court, Arnold Praeger, J., rendered a judgment denying the writ and the petitioner appealed, and the Board appealed from an order taxing costs. The District Court of Appeals, Vallée, J., held that the Board had jurisdiction of all charges alleged in the accusation, and that all findings of the trial court were supported by the evidence.

Judgment and order affirmed.

1. Physicians and surgeons ☞10

An act or omission may constitute a violation of obligations of a licensed clinical laboratory technologist, and a violation of his obligations as a drugless practitioner, if he also holds that license also. Business and Professions Code, § 1200 et seq.

2. Physicians and surgeons ☞11(1)

One guilty of professional misconduct, holding both a license as a drugless practi-

tioner and a clinical laboratory technologist is amenable to disciplinary action by both the Board of Medical Examiners, and the State Board of Public Health. Business and Professions Code, § 1200 et seq.

3. Physicians and surgeons ☞10

Individual's license as a clinical laboratory technologist brings him within reach of State Board of Public Health. Business and Professions Code, § 1200 et seq.

4. Physicians and surgeons ☞11(1)

The State Board of Public Health had jurisdiction of charges against a licensed clinical laboratory technologist involving professional misconduct. Business and Professions Code, §§ 1202, 1203, 1205, 1240, 1265, 1284, 1287, 1288, 2138, 2141, 2378, 2392, 2394, 2396, 2409, 2411.

5. Administrative law and procedure ☞749 Physicians and surgeons ☞11(3)

There was a presumption that decision of State Board of Public Health revoking a clinical laboratory technologist's license was made after consideration of evidence and Board proceeded in manner required by law notwithstanding that it did not take additional evidence after findings and decision of hearing officer were submitted. Business and Professions Code, § 1200 et seq.; Government Code, § 11517.

6. Administrative law and procedure ☞764 Physicians and surgeons ☞11(3)

If order or decision of State Board of Public Health is not supported by findings or findings are not supported by weight of evidence, there is a prejudicial abuse of discretion. Code Civ.Proc. § 1094.5(b, c).

7. Administrative law and procedure ☞383 Physicians and surgeons ☞11(3)

Question on appeal from decision of State Board of Health revoking a clinical laboratory technologist's license was whether evidence, viewed in light most favorable to board sustained finding of trial court to effect that penalty of revocation was not so disproportionate to offenses found to have been committed as to amount to an abuse of discretion on part of Board. Business and Professions Code, § 1200 et seq.; Code Civ.Proc. § 1094.5(b, c).

8. Physicians and surgeons ☞11(3)

In proceeding by a clinical laboratory technologist to compel the Board of Public Health to annul an order revoking his license, evidence that licensee secured his license by premeditated misrepresentations and fraud and deliberately and consciously violated statutes regulating activities of such licensees, for personal, financial aggrandizement without excuse, mitigation or palliation, was sufficient to justify Board's revocation of license. Business and Professions Code, §§ 1200 et seq., 2138, 2141, 2378, 2392, 2394, 2396, 2409, 2411; Code Civ.Proc. § 1094.5(b, c).

9. Administrative law and procedure ☞461 Physicians and surgeons ☞11(3)

A transcript of testimony taken in a proceeding before the Board of Medical Examiners to revoke license of drugless practitioner who was also a licensed chemical laboratory technologist, constituted hearsay evidence in a subsequent proceeding before the State Board of Health to revoke his license as a clinical laboratory technologist. Government Code, § 11513 (c).

10. Administrative law and procedure ☞764 Physicians and surgeons ☞11(3)

Where Board of Public Health, in a proceeding to revoke a clinical laboratory technologist's license, admitted into evidence, a transcript of testimony taken in a prior proceeding against the licensee before the Board of Medical Examiners, to revoke licensee's drugless practitioner's license when transcript was used solely for purpose of supplementing and explaining direct evidence, its admission was not prejudicial error. Business and Professions Code, § 1200 et seq.; Government Code, § 11513(c).

11. Mandamus ☞190

Statute providing that where writ of mandate is issued for purpose of inquiring into validity of any final administrative order or decision, all or part of record of proceedings before inferior tribunal or board may be filed, and that if expense of preparing all or any part of record has been borne by prevailing party, such expense shall be taxable as costs, refers to record

of proceeding filed in Superior Court and not to a copy of record obtained and used by Board's counsel in Superior Court. Code Civ.Proc. § 1094.5(a).

12. Costs ⇐3

He who would claim costs must put his finger on a statute which awards the same.

13. Mandamus ⇐190

The State Board of Public Health was not entitled to costs expended to procure a copy of its record in a proceeding revoking the license of clinical laboratory technologist, for use of its counsel in Superior Court in absence of statutory authorization for award of such item. Code Civ.Proc. § 1094.5(a).

Walter N. Anderson, Los Angeles, and F. Walter French, Santa Monica, for petitioner and appellant.

Fred N. Howser, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondents and appellants.

VALLÉE, Justice.

The license of William LeGrande Cooper (referred to as petitioner) as a clinical laboratory technologist was revoked by order of the State Board of Public Health (referred to as the board) for violations of the Business and Professions Code. Cooper petitioned the superior court for a writ of mandate to compel the board to annul its order. He appeals from the judgment denying the writ. The board appeals from an order taxing costs.

Appeal of Petitioner.

Petitioner was accused in ten counts of violations of the Business and Professions Code. An answer was filed and a hearing had before a hearing officer named by the board. The hearing officer, in his proposed findings and decision, submitted to the board, found for petitioner on five counts and found him guilty on five counts. Thereafter the board notified petitioner that it had determined not to adopt the proposed decision of the hearing officer; that it would determine the matter on the record without taking additional evidence; and

that petitioner could present written argument to the board. Written argument was presented, and thereafter the board found petitioner guilty on nine counts of the accusation and ordered that his license as a clinical laboratory technologist be revoked.

The record in the superior court consisted of the petition for the writ of mandate, the return of the board, and a transcript of the evidence introduced before the hearing officer. No additional evidence was offered or received.

The court made findings of fact and concluded that: 1) the board did not proceed without or in excess of its jurisdiction; 2) there was a fair trial, and 3) the decision of the board is supported by the weight of the evidence.

Petitioner, at all pertinent times, also held a license as a drugless practitioner issued by the Board of Medical Examiners. About the time the accusation was filed with the State Board of Public Health an accusation for revocation of petitioner's license as a drugless practitioner was filed with the Board of Medical Examiners. See *Cooper v. State Bd. of Medical Examiners*, 35 Cal.2d 242, 217 P.2d 630. The facts alleged in two of the counts in the accusation before the State Board of Public Health, found by the board to be true, were also alleged in the accusation before the Board of Medical Examiners.

There is no contention here that the decision of the board is not supported by the weight of the evidence. Petitioner claims that the board was without jurisdiction because, so he says, it had no jurisdiction to revoke petitioner's license for violations of the Business and Professions Code dealing with healing arts over which it has no power of enforcement, and because some of the acts charged were the basis of the revocation of his license as a drugless practitioner.

[1-4] A "Clinical laboratory technologist" is any person who engages in the work and direction of a clinical laboratory. Bus. & Prof. Code, sec. 1203. A "clinical laboratory" is any place operated "for the practical application of one or more of the fundamental sciences by the use of spe-

cialized apparatus, equipment and methods for the purpose of obtaining scientific data which may be used as an aid to ascertain the presence, progress and source of disease." (Bus.& Prof.Code, sec. 1205.) A clinical laboratory technologist may not "practice medicine and surgery or * * * furnish the services of physicians for the practice of medicine and surgery." Bus. & Prof.Code, sec. 1240. Any person who violates the chapter treating of "Clinical Laboratory Technology" Bus.& Prof.Code, Div. 2, ch. 3, is guilty of a misdemeanor. Bus.& Prof.Code, sec. 1287. It is unlawful for a clinical laboratory technologist to accept assignments for tests from any person not licensed under a provision of law relating to the healing arts. Bus.& Prof. Code, sec. 1288. The State Board of Public Health is authorized to revoke the license of a clinical laboratory technologist "for good cause after hearing on notice." Bus. & Prof.Code, secs. 1202, 1203, 1265. As a drugless practitioner, petitioner was not authorized to use drugs or medical preparations in or upon human beings or to sever or penetrate any of the tissues of human beings except the severing of the umbilical cord. Bus.& Prof.Code, sec. 2138; Cooper v. State Bd. of Medical Examiners, 35 Cal. 2d 242, 249, 250, 217 P.2d 630. The fact that the acts charged in the present proceeding also constitute violations of petitioner's obligations as a drugless practitioner does not absolve him from wrongdoing under his license as a clinical laboratory technologist. An act or omission may constitute a violation of the obligations of a clinical laboratory technologist who holds such a license, and a violation of his obligations as a drugless practitioner if he also holds that license. One guilty of professional misconduct, holding both licenses, is amenable to disciplinary action by both boards. A clinical laboratory technologist must conform to the law and the rules of professional conduct in whatever capacity he may act in a particular matter. His license as a clinical laboratory technologist brings him within the reach of the State Board of Public Health. Bennett v. State Bar, 27 Cal.2d 31, 37, 162 P.2d 5; Christopher v. State Bar, 26 Cal.2d 663, 666,

161 P.2d 1; Libarian v. State Bar, 25 Cal. 2d 314, 317, 153 P.2d 739; Jacobs v. State Bar, 219 Cal. 59, 63, 64, 25 P.2d 401; Stuck v. Board of Medical Examiners, 94 Cal.App.2d 751, 757, 211 P.2d 389; Moore v. State Board of Equalization, 76 Cal.App.2d 758, 763-765, 174 P.2d 323. The board had jurisdiction of all charges alleged in the accusation.

[5] Petitioner claims that the board failed to proceed in the manner required by law because it did not take additional evidence and because the record does not show that the members of the board read, or were familiar with, the evidence presented to the hearing officer. The board was not required to take additional evidence. Government Code, sec. 11517. There is no showing that any member of the board did not read, or was not familiar with, the evidence. The law presumes that the decision of the board was made after consideration of the evidence. Pacific Indemnity Co. v. Industrial Accident Comm., 28 Cal.2d 329, 339, 170 P.2d 18.

[6-8] Petitioner urges that the penalty of license revocation was so disproportionate to the violations involved as to amount to an abuse of discretion on the part of the board. See Code Civ.Proc., sec. 1094.5, subds. (b) and (c). The evidence established that: petitioner obtained his license as a clinical laboratory technologist by fraud and misrepresentation, and that the license would not have been issued in the absence of the fraud; he gave blood tests of the premarital syphilis determination type to divers persons, violations of secs. 2141, 2378 and 2394 of the Bus. & Prof.Code; he accepted urine specimens from divers persons for urine analysis and pregnancy test and issued reports directly to said persons (violations of the same sections); he held himself out as a physician and surgeon by signs, business cards, and various other means, violation of sections 1240, 2141, 2378, 2396, and 2409 of the Bus.& Prof.Code; People v. Christie, 95 Cal. App.2d Supp. 919, 212 P.2d 629; he obtained a specimen from a lay person for marital serology and falsely reported the test performed thereon, violation of Civ.

Code, secs. 79.01-79.09 and sec. 2411 of the Bus.& Prof.Code; he aided and abetted an unlicensed person in the performance of a premarital and prenatal examination for syphilis, violations of Civ.Code, secs. 79.01-79.09 and secs. 2378 and 2392 of the Bus. & Prof.Code; he made a false report of a laboratory test for syphilis; he made diagnoses of syphilis; he employed unlicensed technicians and apprentices, violation of sec. 1284 of the Bus.& Prof.Code; he failed to comply with the board's rule requiring weekly forwarding of the reports of premarital tests; and on at least two occasions he penetrated the tissue of a human being in the giving of blood transfusions, violations of secs. 1240, 2138, 2141, and 2378 of the Bus.& Prof.Code; *Cooper v. State Bd. of Medical Examiners*, 35 Cal.2d 242, 217 P.2d 630. The inquiry in the trial court, in this behalf, was whether there was any prejudicial abuse of discretion, which is established if the order or decision of the board is not supported by the findings or the findings are not supported by the weight of the evidence. Code Civ.Proc., sec. 1094.5, subs. (b) and (c). The ultimate power of decision rests with the trial court. The question on appeal is whether the evidence, viewed in the light most favorable to the board, sustains the finding of the trial court to the effect that the penalty of revocation is not so disproportionate to the offenses found to have been committed by the petitioner as to amount to an abuse of discretion on the part of the board. *Moran v. Board of Medical Examiners*, 32 Cal.2d 301, 308, 196 P.2d 20; *Cooper v. State Bd. of Medical Examiners*, 35 Cal.2d 242, 246, 217 P.2d 630; *Southern Cal. Jockey Club v. California Horse Racing Bd.*, 36 Cal.2d 167, 223 P.2d 1. The record shows, largely on petitioner's own testimony, that he secured his license by premeditated misrepresentations and fraud and that as to the remaining matters he deliberately and consciously violated the statutes we have referred to, for personal, financial aggrandizement—without excuse, mitigation or palliation. Manifestly, the findings of the trial court are supported by the evidence.

[9, 10] Petitioner claims that the board committed prejudicial error in admitting in evidence a transcript of testimony taken in the proceeding before the Board of Medical Examiners. He correctly says that it was hearsay. Government Code section 11513(c), in part, provides: "Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." An examination of the record reveals that the evidence taken before the Board of Medical Examiners was used solely for the purpose of supplementing and explaining the direct evidence.

Appeal of the Board.

[11-13] The board appealed from the order taxing costs to the extent that the order eliminated as a collectible item the amount expended by the board to procure a copy of its record for the use of its counsel in the superior court. The cost bill included this item: "To preparation of one copy of Board Record In the Matter of the Accusation of William LeGrande Cooper, D-2 \$370.85." The item was stricken by the court on petitioner's motion. Code of Civil Procedure section 1094.5(a) provides that where a writ of mandate is issued for the purpose of inquiring into the validity of any final administrative order or decision "All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs." We think it patent that the statute refers to the record of the proceeding filed in the superior court and not to a copy of the record obtained for the use of counsel. The record of the proceedings before the board filed in the superior court in the present case was provided and paid for by petitioner. It has been said that he who would claim costs must put his finger on a

statute which awards the same. *Sime v. Hunter*, 55 Cal.App. 157, 159, 202 P. 967; cf. *Barkly v. Copeland*, 86 Cal. 493, 25 P. 3; *Sunny Slope Water Co. v. City of Pasadena*, 1 Cal.2d 87, 100, 33 P.2d 672; *Corona Foothill Lemon Co. v. Lillibridge*, 12 Cal.App.2d 549, 554, 55 P.2d 1210. There is no statutory authorization for the award of the item claimed as costs. Further, it appeared at the oral argument that the board had a number of copies of the record available but refused to allow its counsel to use one of said copies, thus requiring the purchase of an unnecessary copy.

Judgment and order affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



HAYES et al. v. RICHFIELD OIL CORPORATION et al.

Civ. 17805.

District Court of Appeal, Second District,
Division 2, California.

March 21, 1951.

Rehearing Denied April 9, 1951.

Hearing Granted May 17, 1951.*

Edmund Hayes and Ruth Hayes sued Richfield Oil Corporation and others to recover for personal injuries sustained by Ruth Hayes when she fell into an open grease pit on premises leased by the named defendant for the operation of a gasoline service station. The Superior Court, Los Angeles County, Samuel R. Blake, J., rendered judgment on a jury verdict in favor of plaintiff, and the named defendant appealed. The District Court of Appeal, Moore, P. J., held that the jury was warranted by the evidence in finding that the appellant had been a joint operator of the service station and therefore liable to plaintiff.

Affirmed.

1. Landlord and tenant ⇨164(1), 167(2, 8)

As general rule, lessor is not liable for injuries caused to his lessee or to third person upon leased premises even though such

* Subsequent opinion 240 P.2d 580.

injury is caused by condition existing thereon, but where property is leased for public or semipublic purpose liability may be imposed upon landlord for dangerous condition existing thereon at time of transfer.

2. Landlord and tenant ⇨167(8)

Premises leased for operation of gasoline service station were leased for a "public purpose" within purview of rule imposing liability upon landlord for injuries sustained as result of dangerous condition existing on premises at time of transfer when premises are leased for "public purpose".

See publication Words and Phrases, for other judicial constructions and definitions of "Public Purpose".

3. Landlord and tenant ⇨169(8)

In action against landlord for personal injuries sustained by third party who fell into unguarded grease pit on premises leased for operation of service station, evidence sustained jury's implied finding that dangerous condition responsible for accident had existed at time property was transferred, and that landlord was therefore liable.

4. Joint adventures ⇨115

In personal injury action brought against oil corporation and person operating oil station under lease from oil corporation, evidence sustained jury's finding that oil corporation was joint operator of station and therefore liable to third party injured by fall into unguarded grease pit on leased premises.

5. Appeal and error ⇨1170(9)

Pleading ⇨406(6)

In action against lessor of gasoline service station to recover for personal injuries sustained by third party when she fell into unguarded grease pit on leased premises, where liability was sought to be imposed upon lessor by reason of the fact that premises had been let for a public use but no such allegation of purpose was made in pleadings, that deficiency in pleading was cured by evidence introduced and by fact that issue was fully and clearly presented to jury by court's instruction and there was no such miscarriage of justice or misdirection of jury as would permit appellate

court to set aside judgment for plaintiff. Const. art. 6, § 4½.

6. Negligence ⇨136(9)

Contributory negligence can be deemed to exist as matter of law only when evidence points unerringly to such construction and when only reasonable hypothesis is that such negligence is present.

7. Negligence ⇨66(2)

Forgetfulness of known danger does not always show want of ordinary care.

8. Husband and wife ⇨216

Landlord and tenant ⇨169(11)

In action against landlord and tenant of gasoline service station to recover for personal injuries sustained by woman when she fell into grease pit on leased premises, questions as to contributory negligence of woman or her husband were for jury's determination.

9. Negligence ⇨105

Assumption of risk doctrine is not applicable where one wrongfully crosses premises of gasoline service station unaware of peril and where it cannot be said that risk of danger and injury was present as matter of common knowledge.

Moss, Lyon & Dunn, Los Angeles, for appellant. Henry F. Walker, Los Angeles, of counsel.

Shacknove & Goldman, Los Angeles, for respondents. Ben F. Goldman, Jr., Los Angeles, of counsel.

MOORE, Presiding Justice.

The Richfield Oil Corporation appeals from a judgment awarded plaintiffs on account of injuries received by Mrs. Hayes when she fell into an open grease pit on premises leased by Richfield to defendant Scavone. By the terms of such lease the premises were to be operated as a gasoline service station under the name of "Scavone's Richfield Service."

The station is located at the northwest corner of the intersection of Alameda street and Olympic boulevard in Los Angeles. The accident occurred at approximately 3 a.m. when the station was not open for service.

Mr. Hayes, a truck driver whose place of business was across the street from the service station, being a regular patron was given permission to park his automobile there while out on his daily trips. On the day of the accident pursuant to their plan to drive to San Diego respondents parked their car at the rear of the station about 2:30 a.m. and proceeded across its premises on the side next to Alameda which was illuminated by a street light. They had no difficulty in seeing objects clearly. They crossed Olympic to their truck. On discovering that it required a new part they recrossed Olympic and the Richfield premises on the west side which did not have the benefit of a street light. Mr. Hayes preceded his wife and had arrived at their automobile when he heard her scream. He rushed back to find that she had fallen into the grease pit at the north end of the station building. The pit was unlighted and unguarded except for a steel plate approximately four inches high extending along the side and a concrete abutment of the same height at each end. The pit was 28 feet long. It extended across the lot and out beyond the extended line of the building on each side for about five feet. Although the property was floodlighted adequately during business hours, at the time of the injury only two small lamps were burning inside the building. They did not illuminate the pit area. The grease pit was provided with sockets for chain guards but such apparatus had never been in use by Scavone. He never saw any equipment on the premises for guarding the grease pit. Mr. Hayes testified that he was familiar with the station's layout in general and knew of the pit's location. Mrs. Hayes testified that she had no knowledge of its existence.

The written lease from appellant to Scavone provided that the premises were to be used primarily for the operation of a gasoline service station; the lessee must maintain the entire premises in good order and repair and in a clean and safe condition; make no material alterations or changes without the consent of Richfield; must sell only Richfield oil and gasoline while other merchandise might be purchased elsewhere.

Either party could terminate the lease on 24 hours' notice. A "Richfield representative" called at the station every 30 to 45 days. Another Richfield representative known as a merchandiser visited the premises once a week in order to make an inspection and to indicate conditions that should be changed. The station was painted in the distinctive Richfield colors and bore large "Richfield" signs. When the equipment required repairs Scavone notified appellant's maintenance department and the necessary improvements were made.

Pleadings

The complaint sets forth three causes in three separate counts. In count I after alleging that plaintiffs were patrons of the service station the pleading proceeds: "On or about the 24th day of June, 1948, defendants and each of them were operating and had possession, management and control of the aforesaid gasoline and service station and garage * * * and were using the aforesaid premises as a service station and garage catering to the motoring needs of the public * * * and did on said date negligently and carelessly and without due regard for the safety and welfare of the Plaintiffs and other patrons and customers of the Defendants leave the aforesaid pit open and unprotected and without cover or guard rails, and did maintain the aforesaid pit during the night time without illumination or lighting of any kind and in a negligent and careless manner"; that plaintiff Ruth Hayes, while a patron and customer of the aforesaid business of the defendants and while lawfully and necessarily upon the aforesaid premises, fell into the unguarded pit and was grievously injured, and necessarily expended for her treatments large sums of money.

Count II adopted all of count I and declared: "Defendants and each of them knew, or should have known, that members of the public customarily were in the habit of and did cross the aforesaid premises of defendants, and of using the aforesaid premises of the defendants as a passageway from one public street to another. Despite such knowledge on the part of Defendants, and each of them, Defend-

ants maintained such premises in a negligent and careless manner and did maintain such open pit unprotected and without cover or guard rails and did maintain said pit during the night time without illumination or lighting of any kind, knowing full well that the Plaintiff Ruth Hayes, as a member of the public, might fall into the aforesaid unprotected open pit and become injured thereby."

During the course of the trial respondents amended their complaint to conform to the proof, in doing which, after adopting their first count, "for a third cause of action" in substance alleged that prior to the date of the injury Richfield inspected the premises of the aforesaid service station operated by the defendants to determine whether or not such premises were safe, clean and suitable for use by the public and the patrons and business guests of the aforesaid service station and did so negligently and carelessly perform said inspection that the premises became and remained unsafe and unsuitable for the use by the public and the patrons of said service station and were so unsafe and unsuitable on or about the 24th day of June, 1949.

Upon the issues raised by such complaint and the answer thereto the action was tried to a jury which returned a verdict in favor of respondents. The grounds urged for reversal are (1) the insufficiency of the pleadings and the evidence to support the judgment; (2) contributory negligence as a matter of law; (3) error in giving and refusing instructions.

The General Rule of a Lessor's Liability and Exceptions

[1] It is the general rule that a lessor is not liable for injuries caused to his lessee or to a third person upon the leased premises even though such injury is caused by a condition existing thereon. *Johnston v. De La Guerra Properties, Inc.*, 28 Cal.2d 394, 398-399, 170 P.2d 5; *Carty v. Blauth*, 169 Cal. 713, 716, 147 P. 949; *Neuber v. Royal Realty Company*, 86 Cal.App.2d 596, 610, 195 P.2d 501. However, there are numerous exceptions to this rule, one of which is that urged by respondents as controlling in this

action, to wit, when property is leased for a public or a semipublic purpose liability may be imposed upon the landlord for a dangerous condition existing thereon at the time of the transfer. In support thereof they cite *Burroughs v. Ben's Auto Park, Inc.*, 27 Cal.2d 449, 453, 164 P.2d 897; *King v. New Masonic Temple Ass'n*, 51 Cal.App. 2d 512, 515, 125 P.2d 559; *Boothby v. Town of Yreka City*, 117 Cal.App. 643, 649, 4 P.2d 589; *Prosser on Torts*, section 81, page 653; 123 A.L.R. 870. Although many reasons have been advanced for the landlord's liability under this theory the best explanation is that the lessor's responsibility to the public is so great that he will not be permitted to shift it to the tenant, and he may not allow his land to be used in a manner which involves a public, rather than a private, danger. See *Prosser on Torts*, p. 655; *Dennis v. City of Orange*, 110 Cal. App. 16, 22, 293 P. 865, 868. As was observed in the *Dennis* case, "To relieve a landlord from liability under such circumstances would be * * * contrary to public policy and substantial justice, for it would not infrequently operate to deprive the injured party of all remedy except against an irresponsible tenant through whom a negligent landlord would reap the profits, without bearing the responsibilities of his proprietorship."

Leased for Public Use

[2] Appellant herein leased the premises to Scavone for the express purpose of conducting a service station—a public purpose. The lease itself specifically required that the property be used "primarily for such purpose." The building and equipment were in place. The grease pit had been constructed parallel with the north or back end of the station building. The parking area was at the rear of the property. That appellant was obviously aware of the danger of maintaining the pit at that location is demonstrated by the fact that the inventory of equipment delivered to the lessee included "chain guards." Yet the premises were delivered to Scavone without such safety apparatus and without any precautions having been taken to see that the dangerous condition of the pit was corrected. Not only did

appellant transfer the premises in this condition but its agents made numerous inspections of the property without taking any action to remove the peril. Moreover, appellant had the reserved right under the lease to enter premises and make necessary repairs whenever the lessee failed to do so. Appellant could also force the lessee to make such repairs under penalty of forfeiture of the lease, as also provided in their agreement. Under these circumstances appellant was liable under either of two theories. (1) It was joint operator of the station with Scavone, or (2) with full knowledge of the existence of the peril it transferred the station to be used for a public service.

[3] The general rule as to a lessor's liability for injuries to an invitee on the premises of a lessee is predicated upon the theory that the landlord on transferring the property gives up all control thereof. It is not so much ownership as control of property that creates legal liability for its negligent use. *Lippman v. Subway Terminal Corporation*, 115 Cal.App. 363, 368, 1 P.2d 1056; *Johnston v. De La Guerra Properties Inc.*, supra. Accordingly, when the lessor still retains and actually exercises control over leased property the reason for the general rule fails and he is liable. Appellant recognized and acted upon such doctrine at the trial. At its request the jury were instructed that "if you find from all the evidence that Richfield * * * retained control over the business of Scavone's Richfield Service, then, in that event, you must find that said defendant had a legal duty of using reasonable and ordinary care to keep the premises * * * in a safe and suitable condition." Although appellant argues that the property was not in a dangerous condition when transferred, but became so thereafter through the lessee's negligence, this question was one peculiarly for the trier of fact. The jury was instructed on this point and its implied finding, supported by the evidence, will not be disturbed on appeal.

Although respondents had not pleaded the lease and the exception to the general rule as to liability in event of accident on prop-

erty leased for public purpose, while Scavone was on the stand he testified that he had leased the premises from appellant to be used as a service station. Notwithstanding timely objection to such testimony, after its recital there were two issues before the court, namely: (1) whether Richfield was liable as a joint operator with Scavone, as pleaded by respondents; (2) whether Richfield was liable as a lessor under the exception to the general rule that a lessor is not liable after transfer to his lessee.

Failure to Plead Public Use

[4] Having demonstrated that the jury were warranted by the evidence in finding that appellant was a joint operator with Scavone and therefore liable to respondents, we come now to a consideration of appellant's thesis, to wit, that it cannot be held under the theory that it leased the station to Scavone for a public use for the reason that such fact was not pleaded as an exception to the general rule of a lessor's non-liability for accidents after transfer. At the conclusion of the taking of evidence respondents requested the following instruction:

"When property is leased to be used for a public or semi-public purpose, *or involving admission of the public*, if at the time possession of the premises is delivered to the lessee to be held under the lease thus executed, a condition exists on the leased premises such as to make its intended use dangerous to other persons or their property, and if that condition then is known to the lessor, or if it then would be known to him in the exercise of ordinary care, the lessor becomes liable to an invitee of the lessee for any injury suffered by such invitee and proximately caused by the unsafe condition (provided, of course, that the injured person is not guilty of contributory negligence).

"Whenever, by virtue of the terms of such a lease, the lessor has the right of re-entry, the lessor's duty is to exercise that right of re-entry for the purpose of inspecting the premises to the end of removing or preventing any such dangerous condition that reasonable inspection would disclose to him."

Appellant did not choose to rest the matter with its objection to respondents' instruction but requested and the court gave the following instruction:

"A lessor who leases property for a purpose involving the admission of the public is under a duty to see that the leased premises are safe for the use so intended, and that their condition will not expose to unreasonable risk or harm any of the public who may enter. In the performance of that duty a lessor is required to exercise only reasonable care to inspect and repair the premises before possession is transferred to the lessee to be held under the lease thus executed. Should the lessor violate his duty, as thus defined, and should an invitee of the lessee suffer injury as a proximate result of such violation, lessor is liable for the injury unless the injured person is guilty of contributory negligence.

"You will note that a lessor is liable only to an 'invitee' of the lessee and would not be liable to a person who was merely a licensee or trespasser. You will note also, that a lessor is liable to an invitee only if the leased premises are being used for purposes stated in the lease; and if the premises are being used for purposes contrary to or in violation of the terms of the lease, then the lessor may not be held liable to a person coming upon the premises in pursuance of some business or purpose which the lessee operates or permits in violation of his lease agreement."

Appellant's instruction is substantially the same as that given on behalf of respondents. It recognized the identity of the doctrines incorporated in the two instructions as shown by its counsel's statement at the time of submitting its requested instruction to the court. He said: "I would like the record to show also that the instructions that I have offered pertaining to duties of a landlord with respect to the lease of property intended for some public purpose are offered on the reservation that counsel offers them only because the court has indicated that that phase of the law is involved and it is the feeling of counsel for defendant Richfield * * * that such instructions are not called for under the plead-

ings." Not content with his declaration appellant's counsel went further and caused the court to define a "dangerous condition" and to say that a lessor may not be held liable for minor defects, that he is not obliged to keep his service station in a perfect condition.¹

[5] Thus both theories of recovery were fully presented to the jury. While there was no allegation of the purpose of appellant that the premises were to be put to a public use, that deficiency in the pleading was cured either by instructions given at appellant's request or by the fact that the issue of leasing the station for a public use was fully and clearly presented to the jury. Under such circumstances to reverse the judgment would violate the very purpose of section 4½ of Article VI of the constitution. There was no "misdirection" of the jury because the instructions stated the law. Also, "an examination of the entire cause, including the evidence" discloses that the errors complained of have not "resulted in a miscarriage of justice."²

[6-8] Appellant urges also that recovery by respondents should be denied for the reason that the evidence shows them to have been contributorily negligent as a matter of law. It is argued that the husband was negligent in that (1) he preceded his wife leaving her alone to find her way across the dangerous premises and (2) he failed to warn her of the presence of the pit although he knew of its existence. Also, it is

contended that Mrs. Hayes was negligent in proceeding in the darkness over unfamiliar terrain when a lighted pathway was available on the other side of the building. However, those cases in which contributory negligence is said to have existed as a matter of law are extremely rare. Only when the evidence points unerringly to such a construction and when the only reasonable hypothesis is that such negligence is present, can it be deemed to exist as a matter of law. *Anthony v. Hobbie*, 25 Cal.2d 814, 818, 155 P.2d 826. Such is the situation herein. Mrs. Hayes was acting reasonably in assuming that she could proceed safely across the premises of a public service station with nothing of a dangerous character present to do her harm. With respect to Mr. Hayes, it may be said that forgetfulness of a known danger does not always show a want of ordinary care. *Neel v. Mannings, Inc.*, 19 Cal.2d 647, 655, 122 P.2d 576; *Meindersee v. Meyers*, 188 Cal. 498, 504, 205 P. 1078. Whether it was contributory negligence on the part of either of the plaintiffs was a question solely for the jury's determination.

[9] Neither was there error in refusing to instruct the jury on the matter of assumption of risk by Mrs. Hayes. That defense implies a recklessness on the part of the unfortunate lady, a mental state of willingness in making a deliberate choice of a course of conduct without reference to the fact that one may act with due care. *Hedding v. Pearson*, 76 Cal.App.2d 481, 485,

1. "A dangerous or defective condition, as denoted by the use of that term in these instructions, means a condition in, on or of the premises, equipment, property, or building in question that would have caused them to be not reasonably safe for persons who, with ordinary care for their own safety, used said public gasoline service station or might have used it for the purpose intended, or as expressly or impliedly invited, or as permitted by the controlling authority.

"An owner, lessor, or the tenant lessee is not an insurer of the safety of persons using its gasoline service station premises, equipment or property. It may not be held liable for minor defects or imperfections not involving the danger just described. It is not required to keep its gasoline service station in an

absolutely safe or perfect condition or free from every defect that possibly might lead to injury, unless any condition short of perfection is a dangerous condition, as I have defined the term."

2. Section 4½, Article VI, Constitution of California:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

173 P.2d 382. The doctrine is not applicable where one lawfully crosses the premises of a public gasoline service station unaware of peril and where it cannot be said that the risk of danger and injury was present as a matter of common knowledge. (Ibidem.)

Judgment affirmed.

McCOMB and WILSON, JJ., concur.



102 Cal.App.2d 896

In re BRODERSEN'S ESTATE.

**PRESIDIO LODGE NO. 354, FREE AND
ACCEPTED MASONS et al. v.
HARTTER.
Civ. 7828.**

District Court of Appeal, Third District,
California.

March 19, 1951.

Hearing Denied May 17, 1951.

Proceeding in the matter of the estate of William E. Brodersen, deceased, wherein Mildred F. Hartter filed a petition for the construction of the will, and for determination of her interest in the estate. The Superior Court, San Francisco County, T. I. Fitzpatrick, J., entered a decree construing the wills in question, and the Presidio Lodge No. 354, and others appealed. The District Court of Appeal, Deirup, J., pro tem., held that where second will was a complete will and purported to dispose of all of the estate of the testator, and the will, in fact, disposed of most of estate, except for a few articles of personal property, as to those articles of personal property not disposed of, a prior will mentioning the articles was not revoked.

Affirmed.

1. Wills ⇨475

The rule of construction which requires that several instruments of a testamentary character be read together, is but a guide for purpose of ascertaining the in-

tention of the testator, and rule cannot be used to inject into a later instrument terms and provisions not found in it, unless by express reference in later instrument or by necessary implication, it appears that such was the testator's intention. Probate Code, §§ 25, 72, 101 to 103.

2. Wills ⇨179

Where the second will is effective to dispose of the entire estate it revokes a former will even though it does not contain an express revocatory clause, but, in such a case, if it appears that there is property in estate which cannot be distributed to legatees named in the second will, it must be distributed according to the terms of the former will in order to avoid intestacy. Probate Code, §§ 25, 72, 101 to 103.

3. Wills ⇨182

Where the provisions in the first will and those in the second will were absolutely irreconcilable insofar as stocks, bonds, money and real estate were concerned, court must give effect to the latter will. Probate Code, § 103.

4. Wills ⇨215

It is not the function of the trial court to construe a will in proceeding brought for admission of will to probate.

5. Wills ⇨207

Where the executors offered two wills of decedent for probate, and the second will did not expressly revoke the first and apparently did not dispose of all the property of decedent, trial court properly admitted both instruments to probate.

6. Wills ⇨215

Where trial court admitted two wills of the decedent to probate, because the later will did not expressly revoke the first, order admitting to probate did not determine what legacies in the earlier will were superseded and revoked by the later will.

7. Wills ⇨475

If a will is admitted to probate, even erroneously, the court must consider it in connection with the later will, but in construing the two, the court must apply the usual rules of construction in order to ascertain the true intention of the testator.

8. Wills ⇐215

The order admitting two instruments to probate does not affect the power of the court to determine the true intention of the testator from the two instruments at a later stage in the proceedings.

9. Wills ⇐183

Where second will was a complete will and purported to dispose of all of the estate of the testator, and will was in fact effective for disposing of estate, except for a few articles of personal property, as to those articles of personal property not disposed of by subsequent will, an earlier will disposing of such property was not revoked.

10. Wills ⇐439, 440

In the construction of wills, the paramount rule, to which all others must yield, is that a will is to be construed according to the intention of the testator, as expressed therein, and this intention must be given effect as far as possible.

11. Wills ⇐488

A will should be given effect according to the meaning of the words that are used, giving to them their ordinary meaning, and in the case of uncertainty as to the meaning of the words that were used, extrinsic evidence may be resorted to in order to resolve the ambiguity.

12. Wills ⇐566, 570, 587(1)

Where testator gave to a devisee "such other stocks, bonds or money that I possess, after all the other parties mentioned in my will have been paid", and then testator gave to a fraternal organization "any money that may remain after all of my bills have been paid, and also Executor's fees", testator intended to leave to specific devisee all of his money and all of his stocks and bonds after the payment of the other legacies, and the bequest to fraternal organization was merely a residuary clause to serve as a catch-all, if there might be some money in the estate that had not been disposed of as of the time of his death.

Hugh K. McKevitt, Jack M. Howard, Eldon C. Friel and Van H. Pinney, all of San Francisco, for appellants.

M. Mitchell Bourquin, San Francisco, for respondent.

DEIRUP, Justice pro tem.

William A. Brodersen died on November 26, 1945. After his death two wills were produced, one dated September 11, 1939, the other September 17, 1944. Both of them were holographic. Leland B. Groezinger was named as executor in the 1939 will; in the 1944 will he and the respondent, Mildred F. Hartter, were named as co-executors. Upon the joint petition of the persons so named both of the documents were admitted to probate as the last will of the decedent. In due course of probate the respondent filed a petition for the construction of the will and for a determination of her interest in the estate. After a full hearing a decree was entered by which the trial court determined that all of the provisions in the 1939 will were superseded and revoked by the provisions in the 1944 will with the exception of legacies of jewelry and tableware, which articles were not disposed of in the 1944 will. It determined also that certain moneys in the estate were bequeathed to the respondent rather than to the appellant Presidio Lodge No. 354. The Presidio Lodge has appealed from this part of the decree. The appellants Lucile Watrous and others are persons who were named in the 1939 will as legatees and were not named as such in the 1944 will, and for that reason were precluded from participating in the distribution of the estate. They have appealed from the entire decree. The two appeals were brought here on the same record.

The 1939 will is technical in form. It begins:

"I, William E. Brodersen, over the age of twenty-one (21) years, and now residing in the City and County of San Francisco, State of California, being of sound & disposing mind and memory, and not acting under duress, menace or fraud, nor undue influence of any person whatsoever, do make, publish and declare this my last will and Testament."

The testator then revoked "all former Wills, Codicils to Wills, and other testamentary dispositions by me made"; di-

rected his executor to pay his debts and funeral expenses and gave directions for funeral services and for the disposition of his ashes, all under the auspices of the appellant Presidio Lodge. He declared that he was a widower and had no children. He gave to Mary E. Woodrum his personal effects, to the Oroville Public Library his books, and to Juana Gerlin his jewelry. He devised his real property to six persons, and bequeathed his stocks to Warren Zanzot. He gave cash legacies, ranging from \$100 to \$2500 in amount and aggregating \$20,200.00, to twenty persons, including all of the appellants. His will ends with the clause:

"To Leland B. Groezinger and his wife Clara C. Groezinger and to Mr. and Mrs. Raymond Zanzot, I give & bequeath the balance of my estate, share & share alike."

The 1944 will is less technically drawn. It bears the earmarks of a will drawn by a layman who wished to make a formal will but, not having an exemplar before him, relied on his memory for the technical phrases. It begins:

"Realizing the uncertainties of life and the certainty of Death, and being of Sound and disposing mind, I hereby make, execute and sign all in my own handwriting, my last Will and testament.

"I hereby appoint as executors of this my last Will, to act *without bonds*, Miss Mildred F. Hartter * * * and also my God Son, Leland Becker Groezinger * * * to act jointly."

In this will the testator named the undertaker and provided that the funeral should be under the auspices of the appellant Presidio Lodge and gave instructions in respect to the disposition of his remains, much as in the 1939 will, but not in the same words. He devised real property in Marin County to two of the five persons to whom he had devised it in 1939, and the wife of a third. Real property in San Anselmo he devised to the Shriners Hospital instead of the persons to whom it had been devised in 1939. He gave all of his stocks to Mildred F. Hartter instead of Warren Zanzot. His cash legacies, other than the one to Miss Hartter, aggregated \$7500 and were given

to seven persons, five of whom were named as legatees in the 1939 will. This will then provides:

"I also give and bequeath to Miss Mildred F. Hartter, residing at No. 818 Steiner Street, San Francisco, California, such other stocks, bonds or money that I possess, after all the other parties mentioned in my will have been paid.

"My savings deposits are in the Anglo California National Bank at Market & Ellis St. and also at Fillmore & Geary Street in San Francisco in the Anglo California Natl Bank, also in the San Francisco Bank at Haight and Ashbury Sts. in San Francisco and the Franklin Savings and Loan Society, Cor. 6th & Market Streets in San Francisco in California.

"Any money that may remain after all of my bills have been paid and also Executors fees, I give to Presidio Lodge No. 354 Free & Accepted Masons in San Francisco California, to be used for the benefit of sick members."

The 1944 will contains no other residuary clause. It does not in terms revoke all former wills nor does it refer to any former will in any manner.

There are significant differences between the two wills. One person who was omitted as a legatee in the 1944 will was devised a larger interest in a parcel of real property. The Shriners' Hospital was also omitted as a legatee but was given considerable real estate. The Presidio Lodge was willed \$500 in 1939 while in 1944 it was made a residuary legatee. Of the five persons (other than Miss Hartter) who were named in both wills as legatees only one was bequeathed the same sum of money. Two other persons were named in 1944 as legatees and thirteen persons formerly named, including all of the appellants, Lucile Watrous and others, were omitted. The name of Warren Zanzot, who was given stocks and real estate in 1939, does not appear in the 1944 will. The outstanding difference between the two wills lies in the generous provision made in 1944 for Miss Hartter, who is also named as co-executor. Her name does not appear in the 1939 will. She and the testator were very good friends

prior to 1915 but had not seen each other after that time until early in the year 1943, at which time their friendship was renewed.

The estate was appraised at \$49,433.45. This includes currency and securities which were in the testator's safe deposit box at the time he made his last will. The amount of the currency was \$25,200, and the securities in the box were appraised at \$2,501. Miss Hartter claims title to the contents of the box as a gift made to her after the execution of the 1944 will, but the validity of the gift is still to be determined in the proper court. Articles of tableware and jewelry which are not mentioned in the 1944 will were appraised at \$299. The real estate was appraised at \$9,000. The balance of the estate consists of stocks, bonds and money in banks.

Appeal of Lucile Watrous and Others.

The trial court found:

"That the two documents dated September 11, 1939 and September 17, 1944, respectively, and admitted to probate as the last will and testament of William E. Brodersen are distinct and separate testaments, not related by reference or otherwise, and said will dated September 17, 1944 does not refer to the earlier will dated September 11, 1939, and does not purport to and does not republish the same.

"That the said will dated September 17, 1944 is a complete, separate and substantive will and purports to and is effective to and actually does dispose of all of the property and estate of said decedent, save and except for the jewelry and tableware listed in the inventory and appraisal filed in this proceeding, and as such, and except for said jewelry and tableware, wholly supersedes and revokes said will of September 11, 1939.

"That it was the intention of said decedent, in the execution of said will of September 17, 1944, to make and publish his last will and testament and to dispose of all his property and estate and to supersede and revoke any and all earlier wills, including said will and testament dated September 11, 1939."

Pursuant to these findings it was decreed that the tableware and jewelry should be distributed to the persons to whom they were given in the 1939 will and that all of the rest of the property of the estate should be distributed pursuant to the terms of the 1944 will. The effect of the decree was to eliminate the legacies to the appellants in the 1939 will, as being superseded and revoked by the 1944 will.

Appellants contend that the established rules for the construction of wills required the court to give effect to the legacies in the 1939 will which are not inconsistent with legacies in the 1944 will. They make the further contention that the trial court was precluded by the order by which the wills were admitted to probate from finding that the second will revoked the first.

"Several testamentary instruments executed by the same testator are to be taken and construed together as one instrument. A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible." (Prob. Code, sec. 101.)

"The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative; and of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy." (Prob. Code, sec. 102.)

"Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will. All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail." (Prob. Code, sec. 103.)

"The execution of a codicil referring to a previous will has the effect to republish the will as modified by the codicil." (Prob. Code, sec. 25.)

"A prior will is not revoked by a subsequent will, unless the latter contains an

express revocation, or provisions wholly inconsistent with the terms of the prior will. In other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will; * * *." (Prob.Code, sec. 72.)

[1,2] The second will obviously is not a codicil to the first, for it does not refer to it. The rule of construction which requires that several instruments of a testamentary character be read together "like any other rule of construction, is but a guide for the purpose of ascertaining the intention of the testator. It cannot be used to inject into the later instrument terms and provisions not found in it, unless by express reference in the later instrument or by necessary implication, it appears that such was the testator's intention. It is always his intention as fairly ascertained and expressed that must govern, and the Code makes the rule quoted, together with other rules of construction, subordinate to this. * * *", *Estate of Bergland*, 180 Cal. 629, 632, 182 P. 277, 278, 5 A.L.R. 1363. Where the second will is effective to dispose of the entire estate it revokes the former will even though it does not contain an express revocatory clause, but, in such a case, if it appears that there is property in the estate which can not be distributed to legatees named in the second will it must be distributed according to the terms of the former will in order to avoid intestacy. *Estate of Marx*, 174 Cal. 762, 164 P. 640, L.R.A.1917F, 234.

In the present case the factual situation is unusual. From the words used in the 1944 will and from its pattern and obvious purpose we are forced to the conclusion that the testator intended to leave all of his property to the legatees named in that will and to supersede (and thereby revoke) all of the provisions in the first will. In two places he denominated the document his last will, and he devised all of his real property and bequeathed all of his stocks, bonds and money to named persons. He bequeathed all other personal property of that nature to Miss Hartter "after all the other parties mentioned in my will have been paid." He did not refer to the 1939 will in any way. By no possible construc-

tion of his language could one conclude that by the term "my will" he meant "my wills" or "my will, consisting of this and the 1939 will." We have noted the manner in which he shifted his legacies and bequests around and omitted a number of beneficiaries, obviously for the purpose of making a generous bequest of stocks, bonds and money to Miss Hartter. By no possible stretch of the meaning of words can we reach any conclusion other than that he intended the beneficiaries who are named in his last will to get all of his estate.

[3] Our conclusion is in accord with the tenets of construction that we have quoted. The primary requirement is that we ascertain from the wills what the intention of the testator was. Obviously, since the provisions in the first will and those in the second will, insofar as stocks, bonds, money and real estate are concerned, are absolutely irreconcilable, we must give effect to the latter will. (Prob.Code, sec. 103.)

It is true that in the second will the testator did not dispose of any personal property other than stocks, bonds and money. We are compelled to infer that the personal property that he did not dispose of was of so little importance to him (a widower) that he forgot about it. Also we must infer that he had in mind the property he had at the time he made the will and (being ill) he was not concerned about such personal property (other than of the kinds mentioned in the will) and such real property as he might possibly acquire before he died. Therefore he felt no need to dispose of such property by means of a residuary clause. As we have noted, he apparently did not have before him a form of a will to follow, and it is not surprising that he did not provide for all possible contingencies.

The executors found the two wills and presented both of them for probate, calling attention to the inconsistencies and asking the court to admit both of them to probate and interpret them later. After a hearing, in which there was a contest as to the total revocation of the first will, the court made the following order:

"Now Therefore, It Is Hereby Ordered that the two certain instruments dated Sept. 11, 1939 and Sept. 17, 1944, heretofore filed with the Clerk of the above entitled Court, purporting to be the last will and testament of the above named deceased, and to be construed together, be admitted to probate as the last will and testament of said deceased; and that the Court hereafter adjudicate all the rights of the devisees and legatees therein mentioned."

[4,5] The trial court was necessarily compelled to admit both of the documents to probate as the last will of the testator, for in the second will he did not expressly revoke the first and apparently did not dispose of all of his property. The two documents, having been admitted to probate, would necessarily be "construed together" and the court would "adjudicate all the rights of the devisees and legatees therein mentioned" when the proper time arrived. It is of no significance that the trial judge referred to the matter of construction in the way he did. It is not the function of the trial court to construe a will in the proceeding brought for the admission of the will to probate. *Estate of Murphy*, 104 Cal. 554, 38 P. 543; *Estate of Cook*, 173 Cal. 465, 160 P. 553; *Estate of Montgomery*, 89 Cal.App.2d 664, 201 P.2d 569; *Estate of Dunn*, 32 Cal.App.2d 240, 89 P.2d 667. If the second will expressly revokes the first or if it disposes of all of the testator's property the first must be held to be revoked and should be denied probate. But here the court could not determine from a reading of the second will whether the first will had been revoked.

In 2 Page on Wills, p. 143, it is said: "A court of probate powers has jurisdiction to pass upon the validity of a will, but not upon its construction. Whether a prior will is revoked by a later will depends, not only upon the validity of the later will, but, in many cases at least, upon its construction. If the probate court has no power to construe either will, it would seem that it ought to admit both to probate if it found that they were properly executed by a testator who had capacity to execute them, leaving the question of construction, involving revocation, for the court before

which such question might be presented in litigation."

In connection with the foregoing quotation and the decisions from other jurisdictions, we must bear in mind that as a rule wills are admitted to probate in the probate court, which is usually the county court, but that contests are tried and determined in a court of general jurisdiction such as the district court or the circuit court.

[6] Appellants have cited many cases which are to the effect that by admitting a will to probate the court makes an adjudication that it had not been revoked and its judgment can be attacked only by an appeal or by a contest after probate. There is no question but that the trial court, in determining the matter of heirship, was bound by the order by which the 1939 will was admitted to probate. But the only effect of that order was to place before the court the 1939 will for construction at the proper time along with the 1944 will. The court did not by its order admitting it to probate purport to determine what, if any, legacies in the 1939 will were superseded and thereby revoked in the later will.

Appellants cite *Deppen's Trustee v. Deppen*, 132 Ky. 755, 117 S.W. 352, 354, to the point that where two instruments are admitted to probate and no appeal is taken, "both are to be considered in endeavoring to ascertain the intention of the testator." The Kentucky court therefore considered both instruments and found that the second will wholly superseded the first excepting for the appointment of the executor. And in *Dicke v. Wagner*, 95 Wis. 260, 70 N.W. 159, the court decreed that the second will superseded the first excepting for a legacy of household furniture which was not mentioned in the second will, and was therefore distributed under the first will—a factual situation much like the one we have before us.

[7] Appellants have cited no pertinent case in which the trial court has been held to be hampered in any way in the construction of two or more testamentary instruments by the order admitting them to probate. If a will is admitted to probate, even erroneously, the court must consider it in

connection with a later will. But in construing the two the court must apply the usual rules of construction in order to ascertain the true intention of the testator.

The decision in *Estate of Parsons*, 196 Cal. 294, 237 P. 744, has no bearing on the issues presented here. There a will had been presented for probate. Lines appeared on the face of the will which might or might not have been drawn by the testator with intent to revoke three legacies. No finding was made to the effect that the will had been partially revoked in this manner. On a petition for partial distribution it was held that the question of revocation could not be raised because it had been adjudicated in the order admitting the will to probate. The question before the probate court was whether parts of the document which was presented to the court as a will had been manually deleted, so that not the whole instrument, but the parts not deleted, constituted the will of the testator. Since it was not found that portions of the will had been deleted, the will necessarily was as originally written and executed, and the order of the court to that effect was held to be *res judicata*.

In the present case both of the wills were admitted to probate because they had been duly executed and the court could not ascertain from the words in the second will that the first will had been totally revoked. It was not incumbent upon the court to determine at that time what parts of the first will had been revoked and admit the rest of it to probate. The only thing it could do was to admit to probate the entire document (as it did) for interpretation in connection with the last will at the proper time.

[8] The law is clear that in such a case as this, where a complete revocation does not appear on the face of the second instrument, the order admitting both of the instruments to probate does not affect the power of the court to determine the true intention of the testator from the two instruments at a later stage in the proceedings.

[9] Objection is made that the findings of the trial court (which are set out in this

opinion) are inconsistent in that the court found that there was an intention to revoke the first will and also that it had not been completely revoked. We think that the findings express the true facts. The 1944 will is a complete will and purports to dispose of all of the estate of the testator. He intended thereby to dispose of his entire estate and to revoke the 1939 will. The 1944 will was in fact effective for this purpose excepting for a few articles of personal property. As to those articles the 1939 will was not revoked.

Appeal of Presidio Lodge No. 354.

The portion of the will to which this appeal relates has been quoted heretofore. The contention of appellant is that the "intent of the testator was to give to appellant the bank accounts after paying executors' fees and bills therefrom, and to respondent the securities and currency in safe deposit after paying therefrom the preceding general cash bequests."

After making many devises and bequests the testator gave to respondent "such other stocks, bonds or money that I possess, after all the other parties mentioned in my will have been paid." He named the banks in which his savings were deposited and then gave to appellant "any money that may remain after all of my bills have been paid and also Executors fees * * * to be used for the benefit of sick members."

At the time of his death the testator had in the bank accounts \$11,817. He had currency amounting to \$25,200 and stocks appraised at \$2501 in a safe deposit box which are now claimed by respondent as a gift. He also had other securities appraised at \$620.

Appellant contends that in the legacy to respondent the testator had in mind only the contents of his safe deposit box; that by the word "money" in that bequest he meant only the currency in that box; and that all of the money legacies were to be paid out of the currency in the box and respondent was to receive the rest. On the other hand, it contends that the word "money" as used in the bequest to the Presidio Lodge referred to all of the money in the banks, out

of which the debts and executors' fees were to be paid and the balance distributed to the Presidio Lodge.

Appellant contends that by such a construction of the will all of the terms are given effect, while under respondent's construction the bequest of the residue of *money*, after all of the money had been given to respondent, is meaningless. The trial court, however, found that the legacy to appellant "was intended by the testator to be and is merely a residuary legacy and was intended by the decedent to take effect only in the event of the lapse of any of the general legacies of money made and provided for in said will of September 17, 1944, including that to petitioner Mildred F. Hartter aforesaid. That decedent knew and understood that if a legatee dies during the lifetime of the decedent, the testamentary disposition to such legatee would fail."

[10] The rules of construction of wills are not of much help to us in determining what the testator intended. As was said in *Estate of Lawrence*, 17 Cal.2d 1, 6, 108 P.2d 893, 896:

"In the construction of wills the paramount rule, to which all others must yield, is that a will is to be construed according to the intention of the testator, as expressed therein, and this intention must be given effect as far as possible. [Citing cases.]

"Of course, as stated in the case of *Estate of Wilson*, supra, 184 Cal. [63] at page 68, 193 P. [581] at page 583: 'Of this class of questions, it may be said, with more truth, perhaps, than of any other, that each case depends upon its own peculiar facts, and that precedents have comparatively small value. Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills.'"

[11] After considering carefully the theories advanced by appellant and respondent, we have concluded that the construction given to the legacies by the trial court is correct. A will should be given effect according to the meaning of the words that

are used, giving to them their ordinary meaning. In the case of uncertainty as to the meaning of the words that were used, extrinsic evidence may be resorted to in order to resolve the ambiguity. But in this case, in order to accept appellant's theory, we should have to strike from respondent's legacy the word "money" (which in ordinary usage includes money in bank) and, in effect, redraft a portion of the will to make it provide that the testator gave to respondent "such other stocks, bonds or *currency* that I possess *in my safe deposit box*, after all the other parties mentioned in my will have been paid *out of the currency in the box*." In this manner we should limit the meaning of one word which is used in the will and add other words which are not in the will, and also have the testator fail to make any bequest of the stocks and bonds which were not in the safe deposit box.

[12] A theory which does not do violence to the words actually used is that the testator, after giving money and land to all the other parties named in the will, intended to give all the rest of his money and all of his stocks and bonds to the respondent. But, having a recollection that a formal will contains a residuary clause to serve as a catch-all, and feeling that there might be some money in the estate that he had not disposed of as of the time of his death, he wrote the residuary clause in favor of the appellant, giving it any "money that may remain * * *" as contrasted with giving to respondent "such * * * money that I possess." The legacy to respondent is clear and distinct and cannot be held to yield to the residuary legacy to the appellant, which is less positive. *Estate of Mallon*, 34 Cal.App.2d 147, 93 P.2d 245; *Estate of Murray*, 70 Cal.App.2d 300, 160 P.2d 880. Our conclusion is that the testator intended to leave to respondent all of his money and all of his stocks and bonds after the payment of the other legacies.

Decree affirmed, without costs.

ADAMS, P. J., and VAN DYKE, J., concur.

102 Cal.App.2d 808

PERRY et al. v. FOWLER et al.

Civ. 17558.

District Court of Appeal, Second District,
Division 1, California.

March 13, 1951.

Action by Ora Ethel Perry and others against A. E. Fowler and others. From an order of the Superior Court of Los Angeles County granting a motion by plaintiffs for new trial, Otto J. Emme, J., the defendants appealed. The District Court of Appeal, Hanson, J., pro tem., held that record did not indicate that the trial court abused its discretion in granting a new trial on ground of errors of law and insufficiency of evidence to sustain the verdict though two juries in same case found that the defendants were not negligent, or if negligent, that the proximate cause of the accident was decedent's contributory negligence.

Order affirmed.

1. New trial ⚡68

A trial judge has the right and power to set aside a general verdict of a jury on the ground that it is not warranted by the evidence.

2. New trial ⚡68

The test employed by trial judge at common law as respects his right and power to set aside a general verdict of a jury on the ground that it is not warranted by the evidence, which was whether a reasonable man could upon the evidence entertain the jury's opinion, is not the rule in California.

3. New trial ⚡68, 69, 77(1)

If a jury mistakes the accuracy of the testimony as to the facts or the credibility of witnesses or permits prejudice to play a part in returning a verdict, trial judge has the power and duty to set aside such verdicts.

4. New trial ⚡68

In setting aside a general verdict of a jury on the ground that it is not warranted by the evidence, the law contemplates that the trial judge will in every case exercise his sound judicial discretion.

5. New trial ⚡68

When the evidence is nearly balanced or is such that different minds would naturally and fairly come to different conclusions thereon, trial judge will not disturb the verdict although his own judgment might incline him the other way.

6. New trial ⚡13, 72

Findings of the jury are to be upheld by the trial judge as against mere doubts of correctness, but when his judgment tells him that a verdict is wrong and that the jury has erred in finding against the fair preponderance of credible evidence or the basic interests of justice, the trial judge will then set the verdict aside.

7. Appeal and error ⚡977(3)

In reviewing the trial judge's decision in setting aside a general verdict of a jury on the ground that it is not warranted by the evidence, an appellate court is not vested with a de novo right or power and the trial judge will not be reversed in his ruling unless it is affirmatively shown or manifestly appears that he has abused the sound discretion confided to him.

8. Appeal and error ⚡977(3)

When a trial judge's ruling on a motion for a new trial is made after a prior trial before a different judge and jury, his ruling will not be reversed unless it is affirmatively shown or manifestly appears that he has abused the sound discretion confided to him.

9. Appeal and error ⚡977(3)

If the evidence is substantially similar at both trials and both juries reach the same conclusion, it is a factor to be considered by an appellate court in determining whether the trial judge has abused his discretion in ruling on a motion for new trial, but that fact taken alone is not controlling.

10. Appeal and error ⚡933(1)

Where trial judge's ruling on a motion for new trial was made after a prior trial before a different judge and jury, the appellate court must assume that the second trial judge gave due consideration to the fact that two juries had reached the same conclusion.

11. New trial *§*163(1)

While there is no requirement that a trial judge in granting a motion for new trial should indicate his reasons therefor such a practice is to be commended, particularly where two or more successive juries in the same case reach the same conclusion.

12. Appeal and error *§*977(3)**New trial** *§*11(1)

The right, power and duty of a trial judge in ruling on a motion for a new trial does not differ whether one or more successive juries have passed on the same facts by concurrent verdicts and in such a case the appellate court may not reverse except for an abuse of discretion.

13. Courts *§*90(1)

No case is ever rightly decided unless it accords with elemental principles of justice.

14. Appeal and error *§*979(2)

Record did not indicate that the trial court abused its discretion in a negligence action in granting a new trial on ground of errors of law and insufficiency of evidence to sustain the verdict though two juries in same case found that the defendants were not negligent, or, if negligent, that the proximate cause of the accident was decedent's contributory negligence.

Parker, Stanbury, Reese & McGee, Los Angeles, for appellants.

Arthur Garrett, Los Angeles, for respondents.

HANSON, Justice pro tem.

The sole question presented by this appeal from an order granting a new trial, on the ground of the insufficiency of the evidence to sustain the verdict, is whether the court abused its discretion in view of the fact that a prior jury had reached the same conclusion on substantially similar evidence.

The verdict of the jury in favor of the defendants on the first trial was set aside by the trial judge on two grounds: *First*, that the verdict was not sustained by the evidence and, *secondly*, because of error of law on the part of the court. On appeal

this court, 86 Cal.App.2d 635, 195 P.2d 78, held that the court had not abused its discretion in granting a new trial. On the second trial before another judge and jury the latter reached the same result as the first jury by returning a verdict for the defendants. Upon a motion for a new trial the judge presiding at the second trial sustained it on the sole ground that the evidence was insufficient to sustain the verdict. It will thus be seen that the order granting a new trial in the first case was based on two grounds, i. e., (1) errors of law and (2) that the evidence was insufficient to sustain the verdict, whereas, in the second case the motion for a new trial was granted on the latter ground *alone*.

As a ground for reversal appellants argue that a reasonable man could have found that the defendants were not negligent and therefore the trial court abused its discretion in granting a new trial particularly where, as here, two juries in the same case have found the defendants were not negligent, or if negligent, that the proximate cause of the accident was decedent's contributory negligence. Appellants further imply that the trial judge granted the new trial merely because he would have reached the opposite conclusion to that of the jury had he been trying the case without a jury and that this is altogether too common a practice today with our trial judges. The fallacies underlying the argument may be easily demonstrated.

The testimony on the two trials was essentially the same. At the second trial the plaintiffs (respondents here) produced two witnesses who had not testified at the first trial. However, their testimony it seems clear was merely cumulative of the testimony of the other witnesses for the plaintiffs. As the second jury found for the defendants (appellants here) as did the first, it is apparent that these witnesses did not strengthen the case for the plaintiffs before the second jury. What effect, if any, this particular testimony had on the second judge is not disclosed by the record.

As we are here concerned not only with a single verdict by a jury in the case but with two concurrent verdicts, we think it important to restate a few fundamental

principles respecting the duties of trial judges in granting or refusing new trials, particularly in view of the contentions made by appellants.

[1,2] Since the early days of the common law it has universally been held that a trial judge has the right and power to set aside a general verdict of a jury on the ground it is not warranted by the evidence. Wood and Gunston, *Style*, 466 [1655]; Scott, *The Reform of Civil Procedure*, 31 *Harv.L.Rev.* 669, 681. While variously phrased the test employed by a trial judge at common law was whether a reasonable man could, upon the evidence, entertain the jury's opinion. Lord Halsbury in *The Metropolitan Railway Company and Wright*, 11 *App.Cas.* 152(1886); Thayer, *Preliminary Treatise on Evidence*, 209. But that test, for which appellants here strenuously argue, is not generally employed in any of our American jurisdictions, and certainly not in California.

[3] Under our modern jury practice, unlike that of the very early common law, the trial court directs the jury hypothetically, adapting its instructions in point of law to the state of the evidence, putting it to the jury to return a verdict in accordance with the facts as it finds them to be, measured by the law as set forth in the instructions. The consequence of this procedure is that the jury in finding a general verdict actually returns a verdict embracing not only matters of fact, but necessarily of law as well. If the jury mistakes or disregards the instructions or takes the law into its own hands *it may* return a verdict manifestly against the law and the credible facts in the case. If the jury mistakes the accuracy of the testimony as to the facts or the credibility of certain witnesses or permits prejudice to play a part in returning a verdict it is plain that grave injustice may likewise occur. To avoid any such untoward result the law necessarily vests in the trial judge the power and duty to set aside such verdicts.

[4-6] The law today, it is true, provides no standard or test to guide the trial judge, but instead contemplates he will in every case exercise his sound judicial dis-

cretion. *Green v. Soule*, 145 Cal. 96, 78 P. 337; *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 P. 1019. The law, moreover, anticipates that "when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon," the trial judge will not disturb the verdict "although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness." *Justice Brewer in Kansas Pac. Ry. Co. v. Kunkel*, 17 Kan. 145 at page 172; see also *City of San Diego v. Cuyamaca Water Co.*, 209 Cal. 105, at page 167, 287 P. 475. But when his judgment tells him that it is wrong, and that the jury has erred, whether from mistake, prejudice, bias, or other cause, in finding against the fair preponderance of the credible evidence or the basic interests of justice, then he will set the verdict aside. The reason for vesting this large discretion in the trial judge it seems to us is altogether apparent. The judge presiding at a jury trial not only has seen and heard the witnesses, as has the jury, but he comes to the task of weighing the evidence on a motion for a new trial with a specialized experience in separating the wheat of evidence from its chaff.

[7] In reviewing the trial judge's decision an appellate court is not vested with a *de novo* right or power such as is possessed and exercised by a trial judge. This for the very good reason that the appellate court does not have before it the witnesses to enable it to judge of their demeanor and credibility. As a consequence it is a long established rule in this state that a trial judge will not be reversed in his ruling on a motion for a new trial, unless it is affirmatively shown or manifestly appears that he has abused the sound discretion confided to him.

[8-10] Where a trial judge's ruling on a motion for a new trial is made, as here, after a prior trial before a different judge and jury it would seem that generally speaking the same basic rule must be applied. Our statute authorizing a judge to grant a new trial makes no distinction as

between single or successive verdicts. If the evidence is substantially similar at both trials and both juries reach the same conclusion it is definitely a factor to be considered by an appellate court in determining whether the trial judge abused his discretion. But taken alone that fact cannot be regarded as controlling. At each trial the judge hearing the case with a jury may have questioned in his own mind the credibility of some one or more of the witnesses and turned the case on that ground or some other ground equally as decisive. That the second trial judge gave due consideration to the fact that two juries had reached the same conclusion in this case, we must assume in the absence of any facts to the contrary.

The gratuitous assumption by appellants that the trial judge in this case and that trial judges generally too readily grant new trials and then solely because they would have rendered a different judgment is without data to support it. On the contrary we think that the true fact was well expressed by the Supreme Court in *Green v. Soule*, 145 Cal. 96, 78 P. 337, 340, where it said: "We frequently have cause to believe that the judges of the superior court are too reluctant to exercise their power of granting a new trial for insufficiency of the evidence, and too much inclined to acquiesce in a verdict of the jury which does not meet with their own approval. * * * 'Where the decision is against the weight of the evidence, it is the duty of that court to grant a new trial.'"

[11] In the instant case the trial judge did not make any record of his reasons for granting the new trial. While there is no requirement that a trial judge in granting a motion for a new trial should indicate his reasons for doing so, such a practice would be most helpful to an appellate court and indeed may often deter the taking of needless appeals. This is particularly true, we feel, where two or more successive juries in the same case reach the same conclusion. By saying this we do not mean to imply that the trial court's decision in this case may have been erroneous. On the contrary we note that the operator of the

crane, whose duty it was to guide the driver of the truck on which the crane was mounted, testified he was looking in the direction of the pole to which the truck was backing, but even so that he did not see the decedent on the pole and did not know he was there. On the other hand there was testimony by other witnesses that a rigger, such as was decedent, was always on the pole about to be removed before the crane-truck reached it. Moreover, some of these witnesses testified, contrary to the crane operator, that he was not looking toward the pole at all to which the truck was backing. A failure to look on his part under the circumstances would be negligence. Accordingly, the trial judge may have concluded he could not credit the testimony of the crane operator on a very vital fact in the case, and if that was his considered opinion he did not err in ordering a new trial.

[12-14] From what we have said so far, it seems plain that the right, power and duty of a trial judge in ruling on a motion for a new trial does not differ whether one or more successive juries have passed on the facts by concurrent verdicts, and hence it follows that we may not in this case reverse except for an abuse of discretion. *Petroff v. Nunes*, 136 Cal.App. 416, 29 P.2d 293; *Whitfield v. de Brincat*, 35 Cal.App. 2d 476, 96 P.2d 156; *Bayley v. Souza*, 55 Cal.App.2d 776, 131 P.2d 584; see dicta, *Estate of Caspar*, 172 Cal. 147, 155 P. 631. To be sure there must in the long run be an end to litigation, but on the other hand it may equally as well be said that no case is ever rightly decided unless it accords with elemental principles of justice. See *Meinrenken v. New York Cent. & H. R. R. Co.*, 103 App.Div. 319, 92 N.Y.S. 1015; *McCann v. New York & Q. C. Ry. Co.*, 73 App.Div. 305, 76 N.Y.S. 684. We have no occasion here to grasp either horn of the dilemma. It will be time enough to bid the devil "good morrow" when we meet him.

The order is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

103 Cal.App.2d 19

CHUNG GEE et al. v. QUAN WING et al.

Civ. 14450.

District Court of Appeal, First District,
Division 2, California.

March 21, 1951.

Hearing Denied May 17, 1951.

Action by Chung Gee and Lee Jun, copartners doing business under the firm name and style of Kwong Yick Company, against Quan Wing, and others, to set aside a judgment recovered in another action. The Superior Court for the City and County of San Francisco, Herbert C. Kaufman, J., entered judgment for defendant and plaintiffs appealed. The District Court of Appeal, Schottky, J., pro tem., held that there was no showing of extrinsic fraud in procurement of judgment which authorized its being set aside after time for appeal and other direct attack had expired.

Judgment affirmed.

1. Judgment ⇨435, 443(1)

The final judgment of a court having jurisdiction over the persons and subject matter can be set aside, after the time for appeal or other direct attack has expired, by an independent action in equity only for extrinsic fraud or mistake. Code Civ.Proc. § 473.

2. Judgment ⇨443(1)

In action by partners, after time for direct attack had expired, to set aside judgment which allegedly had been obtained by extrinsic fraud through failure of partner obtaining judgment to disclose his membership in partnership to court, where service had been made on one of partners who had mailed process to partnership office, and partnership had allowed default to be entered in reliance on claim that person served was not member of partnership, partnership had not been prevented by any fraud or mistake from full participation in action and was not entitled to relief on ground of extrinsic fraud. Code Civ.Proc. § 473.

3. Partnership ⇨108

The rule that a member of partnership cannot sue another partner upon demand arising out of partnership transaction in

absence of an accounting does not apply where the transaction is not a partnership matter.

Thomas J. Riordan, Ralph Bancroft, San Francisco, for appellants.

Alden Ames, Paul Taylor, San Francisco, for respondents Quan Wing and Quan Yow Yuen.

SCHOTTKY, Justice pro tem.

Plaintiffs and appellants commenced this action against defendants and respondents on February 19, 1949 to set aside a judgment recovered in the Superior Court of Los Angeles County by Quan Wing and Quan Yow Yuen (defendants and respondents here) against the Kwong Yick Company (plaintiff and appellant here). The complaint alleged, in substance, that respondent Quan Wing was a partner in the firm of Kwong Yick Company; that he and his attorney in fact, respondent Quan Yow Yuen, by falsely conspiring with defendant Quan Min pretended that defendant Quan Min was a member of the copartnership of Kwong Yick Company, and obtained the judgment against appellants by default judgment entered after service upon said Quan Min; that said Quan Min was not a partner in the firm of Kwong Yick Company and that respondents Quan Wing and Quan Yow Yuen intentionally withheld from the court the fact that Quan Wing was a partner and the fact that Quan Min was not a partner in Kwong Yick Company; that appellants were not indebted to respondent Quan Wing, as alleged in the said action filed in Los Angeles County; and that said judgment was obtained by extrinsic fraud and is void.

Issue was joined and after a trial the court found, among other things, that the judgment in favor of respondent Quan Wing and against appellants was in all respects duly and regularly entered; that appellants had full knowledge of the commencement of said action and of the service of summons upon Quan Min, one of the partners of said copartnership in March

1947; that it was not true that defendants Quan Wing, Quan Yow Yuen and Quan Min conspired together to obtain said judgment; that Quan Min was a copartner and had all the powers and responsibilities of a partner of said firm; that it is not true that said judgment was obtained by extrinsic fraud. Judgment was entered in accordance with said findings and this appeal is from said judgment.

The record discloses that on February 21, 1947, Quan Wing and Quan Yow Yuen (defendants and respondents here) commenced an action in the Superior Court of Los Angeles County against the Kwong Yick Company and a writ of attachment was issued and levied upon money in two banks in the account of said company. Complaint and summons were served upon Quan Min in Los Angeles on March 3, 1947, and he sent same to Kwong Yick Company in San Francisco. The company took the matter up with their attorney, who testified at the trial that they informed him that Quan Min was not a partner, and that he then advised them that no valid judgment could be obtained against them if Quan Min was not a partner. The default of Kwong Yick Company was entered on March 19, 1948 and on April 6, 1948 judgment was entered in the Los Angeles action. A writ of execution was issued on October 25, 1948 and levied by the Sheriff of the City and County of San Francisco. Appellants then made a motion in the Superior Court of Los Angeles County to set aside the judgment which motion was denied on January 18, 1949. Appellants appealed from that ruling but dismissed the appeal and on February 18, 1949 filed the present action.

At the trial in the court below appellants contended vigorously that Quan Min was not a partner and most of the evidence in the case was directed to that issue. However the court, upon sufficient evidence, found that Quan Min was a partner, and appellants stated that no attack will be made upon that finding in this appeal.

We have, therefore, a situation in which an action was commenced by Quan Wing, whom the court in the instant case found

to be a partner, against Kwong Yick Company, a copartnership, for money claimed to be due to him from said company. Service of summons was made upon Quan Min, whom the court in the instant case likewise found to be a partner in Kwong Yick Company, and no answer having been filed, the default of the copartnership was entered more than a year after service of summons and a judgment was thereafter rendered. Appellants now contend that respondent Quan Wing should have disclosed to the court that he was a partner of Kwong Yick Company and that the judgment was obtained as the result of extrinsic fraud practiced upon the trial court in that respondents failed to disclose to the court that their claim was based upon a partnership debt between the partners and that no accounting has been had between the partners.

[1] After the time for an appeal has expired, and after the 6 months period set forth in section 473 of the Code of Civ. Proc. has expired, a judgment of a court can only be set aside in an independent action in equity if there has been extrinsic fraud or mistake. The rule is well expressed in *Westphal v. Westphal*, 20 Cal.2d 393, at page 397, 126 P.2d 105, at page 106, as follows:

"The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic. (Citations.) Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. (Citations.) If an unsuccessful party to an action has been kept in ignorance thereof (citations) or has been prevented from fully participating therein (citation), there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. (Citations.) Fraud perpetrated

under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court. Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for appeal or other direct attack. (Citations.)"

And in *Jorgensen v. Jorgensen*, 32 Cal.2d 13, at page 18, 193 P.2d 728, at page 731 the court said:

"Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074, and Milekovich v. Quinn, 40 Cal.App. 537, 181 P. 256, as well as Howard v. Howard, 27 Cal.2d 319, 163 P.2d 439, recognize that when equitable relief from a final judgment is sought, it makes an important difference whether the fraud or mistake is intrinsic or extrinsic to the issues involved in the case in which the judgment was entered. The public policy underlying the principle of res judicata that there must be an end to litigation requires that the issues involved in a case be set at rest by a final judgment, even though a party has persuaded the court or the jury by false allegations supported by perjured testimony. This policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case. Thus, equitable relief will be denied where it is sought to relitigate an issue involved in the former proceeding on the ground that allegations or proof of either party was fraudulent or based on mistake, but such relief may be granted if the party seeking it was precluded by fraud or the mistake of the other party from participating in the proceeding or from fully presenting his case. (Citations.)" See also *Rogers v. Mulkey*, 63 Cal.App.2d 567, 147 P.2d 62.

[2] We are unable to understand how, under the authorities, it can be held in the instant case that the judgment here attacked was obtained as the result of extrinsic fraud. Appellants were named as parties to the action and service was made upon a partner of the firm who sent the complaint and summons to the San Francisco office of the firm. Appellants were thus made

fully aware that Quan Wing was asserting a claim for money against the firm and that service had been made on Quan Min. Instead of appearing to contest the action they chose to rely upon a claim that Quan Min was not a partner, and allowed a default to be entered and a judgment to be rendered against them, even though their bank account had been attached at the time the action was filed. The default and judgment were not entered until more than a year after service of summons was made. Certainly appellants were not prevented by any fraud or mistake from full participation in the action or from the opportunity to present their case to the court and protect themselves from any attempted fraud. In the language of *Westphal v. Westphal*, supra: "Having had an opportunity to protect his (their) interest, he (they) cannot attack the judgment once the time has elapsed for appeal or other direct attack."

[3] The authorities cited by appellants as to the fiduciary relationship between a partner and the partnership and the obligations of a partner have no bearing upon the instant case. Furthermore, as stated in *Emerzian v. Emerzian*, 6 Cal.App.2d 721, 722, 44 P.2d 656: "While it is well settled in this state that one partner cannot sue another partner upon a demand arising out of a partnership transaction, in the absence of an accounting, it is equally well settled that this rule does not apply where the transaction is not a partnership matter. *Bull v. Coe*, 77 Cal. 54, 18 P. 808." If, as appellants now assert, the claim of respondent Quan Wing was based upon a partnership debt between the partners and no accounting had been had between the partners they should have appeared and asserted it in the action filed against them as they were given every opportunity to do.

Appellants make the further contention that they were not permitted to prove that the subject of the claim before the Los Angeles court was a debt arising out of a partnership transaction. It is true that the trial court stated frankly that it believed that the determination that Quan Min was a partner was determinative of the action but it is also true that no proper offer of proof was made by appellants.

However, we deem it unnecessary to discuss this contention further as we are convinced that the trial court correctly decided that the judgment in the Los Angeles County case was duly and regularly entered and was not the result of any extrinsic fraud.

No other points raised in the briefs require discussion.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



103 Cal.App.2d 35

PEOPLE v. KRAMER.

Cr. 4567.

District Court of Appeal, Second District,
Division 2, California.

March 21, 1951.

Maurice Kramer was convicted in the Superior Court, Los Angeles County, William M. Byrne, J., for robbery and burglary and defendant appealed. The District Court of Appeal, Moore, P. J., held that the evidence sustained the conviction.

Affirmed.

1. Criminal law ⇨1159(2)

Before the findings of the trial court can be set aside on appeal by reason of insufficiency of the evidence, it must clearly appear that upon no hypothesis is there sufficient substantial evidence to support the conclusion of the trial court.

2. Robbery ⇨24(1)

Evidence sustained conviction for robbery.

3. Burglary ⇨41(1)

Evidence sustained conviction for burglary. Pen.Code, §§ 459, 490a.

4. Criminal law ⇨618

Where defendant in two instances had hidden in the back room of a food market at closing time after entering and posing

as a customer, and he used the same disguise and wore the same hat and jacket on both occasions and carried the same gun, and after the robbery he tied his victims with a rope, where after the burglary he was found in possession of a rope, a joinder of robbery and burglary counts for trial was proper, notwithstanding that the crimes were committed on different days.

5. Criminal law ⇨566

Identity of a criminal can be established by the mere belief of the witnesses if they satisfy the trier of the facts.

6. Criminal law ⇨1128(1)

In prosecution for robbery and burglary, where defendant in his motion for severance stated merely that the charges were unrelated and that he would be prejudiced without stating reasons why his rights would be prejudiced, the District Court of Appeal was required to consider the facts presented to the trial court and not subsequent revelations.

Harry T. Shafer, Compton, and Angelo Iacoboni, Long Beach, for appellant.

Fred N. Howser, Atty. Gen., Gilbert Harelson, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was convicted of two felonies: (1) robbery and (2) burglary. Displeased with the treatment he received he demands reversal of both judgments on the grounds that (1) the crime of burglary was "in fact not even attempted"; (2) the joinder for trial of the two counts was prejudicial error.

The Robber Identified.

The robbery occurred in a Pasadena market. About 9 o'clock on an April evening, assistant manager Christianson locked the doors, removed the money from the cash registers and placed it in money bags. He entered the rear room of the market and put the money in the safe. Having turned off the lights, as he donned his jacket and started to leave, a disguised person approached him with the salutation: "Stand still or I will blow your brains out, this is

a hold up." After learning of the presence of clerk Topalian in the main store appellant, holding a gun, commanded the clerk to come into the back room "or you are going to get hurt." After Topalian arrived at Christianson's side the two employees were ordered by the intruder to turn on the light. After the room was further illuminated with an oath appellant ordered Christianson to open the safe. This accomplished, the stranger ordered his victim to "slide the money over to him." Having placed \$91 in the sacks he forced the two men into the corner where he had been concealed before first approaching Christianson. He ordered the men to lie face down on the floor. He tied Christianson's wrists and feet with a rope and tied Topalian's wrists behind his back. In response to his inquiry, Christianson told him that the only way out was through the front door. Promptly after the bandit had made his exit, Topalian unloosened the thongs that bound him and untied his companion. Both men suffered fear during the robbery.

[1, 2] Both employees recognized appellant at the trial as the robber. Also, prior to the trial Christianson was taken to the Hollywood police station and there identified appellant in a line-up of six men as the robber after he had been dressed in the disguise he had worn at the robbery, also by his general appearance, his ears, his bushy eyebrows, his accent and by the revolver which had been taken from the prisoner in Hollywood. Notwithstanding appellant's denial of his guilt and other testimony favorable to his contention the testimony of Topalian and Christianson was sufficient to establish appellant's identity as the robber of the Pasadena market on that April evening. It is the primary duty of the fact finder to determine what has been established by the evidence and no amount of argument or fine words can alter that rule. Also, before the findings of the trial court can be set aside on appeal by reason of insufficiency of the evidence it must clearly appear that upon no hypothesis is there sufficient substantial evidence to support the conclusion of the trial court. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778. His conviction of the robbery was justified.

The Burglary Proved.

The burglary occurred at a grocery and meat market on Melrose avenue in Los Angeles at about 5:45 p.m. six days after the robbery in Pasadena. On discovering appellant crouched behind some packing cases in the rear of the store, the manager telephoned the police. On his arrival officer Fisher found appellant still crouched behind boxes in the stock room.

Appellant contends that since there was "no overt prohibited act and no concurrent criminal intent there cannot be a crime of burglary"; that "it is admitted that he entered the store premises during business hours and was lawfully on the premises at the time of the alleged commission of the crime * * * in fact behaving in a manner not unbecoming a person shopping therein."

[3] But the statute makes every person who enters any store with intent to commit any felony guilty of burglary. Penal Code, secs. 459, 490a. The store entered by appellant for the purpose of committing a robbery falls within the class of buildings named in section 459. *People v. Corral*, 60 Cal.App.2d 66, 70, 140 P.2d 172. While it is true that his entry was made during business hours when the public was invited to enter, still he entered with intent to steal or rob. Hence, his entry was burglarious and the crime was complete the moment he entered. *People v. Corral*, supra, 60 Cal. App. at page 71, 140 P.2d at page 172. Not only did he admit to the officers that he had got the idea of burglarizing the market two days before his entry, but he confessed to them that he went there to "knock the place over * * * to stick it up." Also, when arrested as a suspected burglar, he was armed with an automatic loaded revolver, carried a piece of twine, a rope, a mask and a pair of goggles, wore rubber gloves and was hiding in the back room. From his possession of such trappings and his confessed purposes it was a fair inference that his intent to steal or rob was concomitant with his entry into the store. *People v. Smith*, 84 Cal.App.2d 509, 512, 190 P.2d 941. The question of the existence of his criminal intent was for the determination of the trial court.

People v. Lynch, 60 Cal.App.2d 133, 139, 140 P.2d 418. Likewise, it was empowered to disregard appellant's exculpatory testimony on finding it unworthy of credence.

Joinder of Both Counts for Trial.

[4, 5] Despite the wholesome rule enunciated in *People v. Newland*, supra, appellant opines that he was unjustly convicted of the robbery because he was tried for that crime along with the burglary charge and the People had an unfair advantage on the issue of identity. He contends that whereas the testimony introduced to prove that he was the robber was weak and unsatisfactory there was nothing wanting in the proof that he had committed the burglary. Therefore, he argues that his trial for robbery was aided by the proof of the burglary; that the attention of the jury was distracted and his rights were adversely affected by the proof of the burglary, and that in the interest of fair play he should have had separate trials for the two crimes. He cites Orfield's "Criminal Procedure from Arrest to Appeal"; *Commonwealth v. Slavski*, 245 Mass. 405, 140 N.E. 465, 29 A.L.R. 281; *McElroy v. U.S.*, 164 U.S. 76, 17 S.Ct. 31, 41 L.Ed. 355. However, the consolidation of a number of charges is proper practice where there is a "common element" prominent in all the crimes. *People v. Duane*, 21 Cal.2d 71, 74, 130 P.2d 123. There was a common element in the two crimes of which appellant was accused. The plan for their commission was identical. In each instance he had hidden in the back room of a food market at closing time after entering and posing as a customer. His intention in entering both was to commit robbery. He used the same disguise and wore the same hat and jacket on both occasions and carried the same gun. After the robbery he tied his victims with a rope; after his burglary he was found in possession of a rope. All these elements were of substantial importance in the commission of the crimes. Under such circumstances a joinder of two distinct offenses was proper. In *re Pearson*, 30 Cal.2d 871, 874, 186 P.2d 401. It is not required that two crimes should have occurred on the same day or have been

aimed against the same person or group. *People v. Duane*, supra; *People v. Bundte*, 87 Cal.App.2d 735, 745, 197 P.2d 823. From the evidence believed by the court the identification of appellant by the victims of his crimes as the robber was complete. *People v. Ash*, 88 Cal.App.2d 819, 825, 199 P.2d 711. Identity can be established by the mere belief of the witnesses if they satisfy the trier of facts. *Id.*, 88 Cal.App.2d at page 826, 199 P.2d 711. In *People v. Gryszkiewicz*, 88 Cal.App.2d 230, 233, 198 P.2d 585, a prosecution for grand theft and attempted grand theft, while conceding that under Penal Code section 954 the trial court might by the exercise of discretion join two counts for trial, the accused contended that it was an abuse of discretion in his case to deny him a severance because the trial court knew from the record of the preliminary examination offered in support of his motion that the evidence of defendant's identity on the grand theft charge would be much weaker than that available on the attempted grand theft charge. He maintained that his chances of acquittal of grand theft would be much better if not tried with the companion count. The court denied the appeal on the strength of *People v. Kelly*, 203 Cal. 128, 263 P. 226, which supports the construction of section 954, supra, in conferring discretion on the trial court.

[6] Moreover, in presenting his motion for a severance appellant stated merely that the charges were unrelated and that he would be prejudiced without stating reasons why his rights would be prejudiced. In such circumstances the appellate court is required to consider the facts presented to the trial court and not subsequent revelations. *People v. Eudy*, 12 Cal.2d 41, 82 P.2d 359. Furthermore, had the two crimes been tried separately, evidence of the burglary would have established a common scheme, plan and method to rob, an identical disguise, eyebrows, ears, size, voice, and means of gaining entrance to the depository of the money. *People v. Ross*, 98 Cal. App.2d 805, 221 P.2d 280.

Judgments affirmed.

McCOMB and WILSON, JJ., concur.

103 Cal.App.2d 135

BRUNER v. VAN'S MARKETS.

Civ. 17623.

District Court of Appeal, Second District,
Division 3, California.

March 28, 1951.

Hearing Denied May 24, 1951.

J. Brandon Bruner brought action against Van's Markets, to recover broker's commission for services rendered in connection with sale of real property. A judgment for plaintiff was entered in the Superior Court of Los Angeles County, J. A. Smith, Judge assigned, and the defendant appealed. The District Court of Appeal, Wood, J., held that letter written by defendant to plaintiff was sufficient written memorandum of employment to meet requirements of the statute of frauds.

Judgment affirmed.

1. Brokers $\S$ 43(3)

A memorandum employing broker to sell real property required by statute of frauds need not include a statement that a commission will be paid. Civ.Code, $\S$ 1624 subd. 5.

2. Brokers $\S$ 39

In absence of any agreement as to commission, the agent, if authorized in writing to negotiate sale of real estate, is entitled to reasonable compensation for his services. Civ.Code, $\S$ 1624, subd. 5.

3. Brokers $\S$ 43(1)

An agreement to pay commission to broker for his services in connection with sale of real property may be shown by parol if broker is authorized in writing to negotiate a sale of the real property. Civ.Code, $\S$ 1624, subd. 5.

4. Brokers $\S$ 43(3)

A letter by builder of warehouse to broker advising broker that warehouse cost about \$200,000 more than original estimate for which builder had agreed to sell property to insurance company, that builder wanted to resell the property to same purchaser at a higher price than price for which insurance company was then entitled to buy the property, and authorizing broker to negotiate with insurance company and to resell the property at the higher price,

was sufficient written memorandum to comply with statute of frauds, notwithstanding that letter did not state that broker would be paid a commission. Civ.Code $\S$ 1624, subd. 5.

5. Brokers $\S$ 86(1)

Evidence failed to establish that broker, because of fact that he had rendered prior service in original sale of warehouse to insurance company while vice president of company which negotiated original sale under contract fixing compensation not to exceed \$12,000 and such amount had been paid in full, was not to be paid for his services, in his individual capacity, in subsequent transaction regarding increase in selling price of the property.

6. Brokers $\S$ 86(1)

Evidence supported finding that there was oral agreement to pay broker the reasonable value of his services in negotiating with insurance company in regard to reselling company warehouse property at a higher price than originally agreed because cost of construction had exceeded original estimate.

7. Appeal and error $\S$ 1122(2)

Where there was no finding in trial court regarding defendant's contention that plaintiff was estopped from claiming broker's commission for services rendered in connection with sale of real property, and it could not be said properly that if finding had been made regarding estoppel it would necessarily have been favorable to defendant, District Court of Appeal was not empowered to make finding regarding estoppel.

Mitchell, Johnson & Bates, Los Angeles, for appellants.

Meserve, Mumper & Hughes, and William Larrabee, all of Los Angeles, for respondent.

PARKER WOOD, Justice.

Action to recover broker's commission for services rendered in connection with a sale of real property. Defendant appeals from judgment in favor of plaintiff for \$5,280.

Appellant (defendant) contends that plaintiff is not entitled to any commission since there was no writing signed by defendant unequivocally showing the employment of plaintiff as required by the statute of frauds.

In January, 1946, defendant, Van's Markets, contemplated the construction of a warehouse, the estimated cost of which at that time was \$350,000. On January 31, 1946, the plaintiff, who was vice-president of Nelson Douglass & Co., wrote a letter, as such vice-president, in behalf of said company to defendant wherein that company offered to obtain for defendant a sale and lease-back agreement as a means of financing the construction of a warehouse. In that letter it was stated that the commission payable to Nelson Douglass & Co. for its services "upon completion and signing of all papers incident hereto" should be 4% of the total amount involved, but in no event should the compensation exceed \$12,000. In a letter dated February 11, 1946, defendant accepted the offer of Nelson Douglass & Co. and agreed therein to pay said company for its services 4% of the total amount involved, "but in no event shall said compensation exceed the sum of \$12,000.00." As a result of the services of Nelson Douglass & Co., acting through its vice-president, the plaintiff herein, the defendant (Van's Markets) and the Occidental Life Insurance Company entered into a written agreement on May 27, 1946, which provided, among other things, (1) that the insurance company would purchase the warehouse when completed and the land upon which it was built at the actual cost of the warehouse and the land, which cost should include the commission of \$12,000; and (2) that it would then lease the property to defendant for 40 years, and give defendant an option to repurchase the property at the end of the lease term for \$37,500, which amount was the cost of the land. It was estimated therein that the cost of the warehouse would be \$400,000. On May 28, 1946, after the signing of the agreement but before the building was completed and before all the documents pertaining to the transaction with the insurance company had been executed, the defendant paid to Nelson

Douglass & Co. as broker's commission \$12,000 in full payment for all services rendered or to be rendered. In September, 1946, there was a dissolution of the Nelson Douglass & Co.

During the first part of January, 1947, or the latter part of December, 1946, Mr. Garrett, the treasurer of defendant, called plaintiff by telephone and said (according to plaintiff's testimony) that "[W]e find now that the building is going to considerably exceed the original estimated cost and our contracted figure for delivery," and that he would like for plaintiff to take it up with the officials of the insurance company and ascertain whether they would be willing to make some concession in view of the fact that the costs were exceeding considerably the price for which they were committed to deliver the property, and that the cost would be \$100,000 more than the contract price of \$400,000. Plaintiff then explained to Mr. Clark, the president of the insurance company, the situation in which defendant found itself, and asked him if he thought the insurance company would be willing to make some concessions. Mr. Clark replied that his company was willing to give the matter consideration, and he (Mr. Clark) suggested that rather than to try to establish a new figure at that time "it would be better if they deferred consideration of the matter until the completion of the building at which time they would have the property price in its completed state and try to establish a fair value at that time." Plaintiff then related that conversation to Mr. Garrett, the treasurer of defendant. Thereafter, during the period until September, 1947, plaintiff had various conversations with officers of the insurance company and with Mr. Garrett regarding the matter.

On September 6, 1947, plaintiff went to defendant's office and told Mr. Garrett that plaintiff needed a letter to present to the insurance company in presenting a request for a change in the amount of the purchase price. Mr. Garrett said, "All right," and that plaintiff could dictate to Mr. Garrett's secretary approximately what he would like to have included in that letter. Plaintiff then dictated a draft of the letter, which

draft was received in evidence as defendant's exhibit D. That exhibit is a sheet of yellow paper with typewriting upon it, and it shows that the letter was to be addressed to "Mr. J. Brandon Bruner 510 South Spring Street Los Angeles, California." There was no statement in the draft that any commission was to be paid to plaintiff or anyone for services in connection with the proposed increase in the selling price. Mr. Garrett, as treasurer of defendant, wrote a letter to Mr. Bruner on September 6, 1947,¹ and he testified that said letter was made from the said draft (Exhibit D). At the time that letter was written the warehouse had been completed and the cost of it was known. Also at that time the defendant knew there had been a dissolution of Nelson Douglass & Co. In that letter it was stated, among other things, as follows:

1. "Los Angeles 54, California
September 6, 1947

"Mr. J. Brandon Bruner
634 South Spring Street
Los Angeles 14, California

"Dear Mr. Bruner:

"We are enclosing herewith a schedule of the final cost on the Warehouse and General Office we have had under construction during the past year. This cost is submitted to you in connection with a resale agreement that you negotiated for us with the Occidental Life Insurance Company.

"As you will recall, at the time that the agreement was entered into, we were unable to secure a fixed bid on the cost of this construction but estimated that the cost would be approximately \$400,000.00, and the agreement was written up on the basis of this estimated cost.

"We now find, however, that the cost has run considerably over this estimate due to the rise in labor and material costs, even though, during the construction of the same, we made every effort to hold down these costs by allowing no work to be done on Saturdays or other overtime periods.

"We are also attaching herewith a series of statements from the Joshua H. Marks Company which further amplify the reason for the additional cost.

"In view of the wide discrepancy between the cost and the stipulated sales price, we wish you would ascertain whether or not the Occidental Life Insurance Company is willing to consider a re-appraisal of this property in the

(1) "[W]e wish you would ascertain whether or not the Occidental Life Insurance Company is willing to consider a re-appraisal of this property in the light of these new developments, and to consider a change in the sale price to one which is more realistic in view of the actual cost of this project."; and (2) "We ask that you take this matter up with the Occidental Life Insurance Company and, as soon as you are able to determine their position on these two matters, we would appreciate talking with you further." The schedule of costs which was enclosed in the letter is omitted from the footnote herein. That schedule contained an item of \$12,000 for commission, but it did not contain any other item regarding commission.

Plaintiff received said letter of September 6th and delivered it to the insurance

light of these new developments, and to consider a change in the sale price to one which is more realistic in view of the actual cost of this project.

"Since the loan was negotiated, the invested capital has been doubled, with an addition of \$375,000.00 in Preferred stock. The statement for the year ending December 31, 1946, shows a substantial improvement in the net worth. An additional \$250,000.00 in preferred stock is now being sold and the proceeds will have been received by the 25th of September, bringing the Capital Investment over the \$1,000,000.00 and the net worth in excess of \$1,500,000.00.

"We feel that with these changes in our net worth structure, we are in a position to ask for an adjustment in the terms of this sales agreement. We would like the sales price to be increased to the actual cost of the completed building as reflected in the attached schedule. We also believe that our agreement to deposit \$105,000.00 in Government Bonds as security is not now necessary.

"We ask that you take this matter up with the Occidental Life Insurance Company and, as soon as you are able to determine their position on these two matters, we would appreciate talking with you further.

"Yours very truly
Van's Markets
By J. E. Garrett
J. E. Garrett
Treasurer"

company. The insurance company reappraised the property at \$576,000. On November 17, 1947, the insurance company and defendant entered into an escrow, and they signed escrow instructions whereby the insurance company agreed to buy the warehouse and land for \$576,000, which was an increase of \$176,000 in the purchase price. On November 26, 1947, the deed, lease, and other documents required to complete the transaction were executed and the sale was made to the insurance company for \$576,000. Thereafter plaintiff asserted that defendant should pay a commission of \$8,800.

As above stated, appellant contends that the letter of September 6, 1947, did not constitute a written contract of employment of plaintiff as required by the statute of frauds. He argues that the letter fails to show unequivocally that plaintiff was employed; that the letter shows doubt and uncertainty as to the intention of the parties; and that the letter was not intended to be an employment contract or a memorandum of such a contract. The letter referred to the first resale agreement and to the circumstances under which that agreement was written. Then the letter stated the financial problem with which defendant was confronted, at the time the letter was written, by reason of the fact that the cost of the warehouse was considerably more than the original estimate. Reference was made therein to the increased value of defendant's assets, and it was then stated that the defendant felt that by reason of those changes in its net worth it was in a position to ask the insurance company for an adjustment in the terms of the first sales agreement. It was also stated therein that defendant wanted the sales price of \$400,000 (which the insurance company had already agreed to pay) increased to the actual cost of the building as shown by the attached schedule (which was \$621,738.86). As above stated, defendant also said therein, in substance, that it wished that plaintiff would ascertain whether the insurance company would be willing to consider a reappraisal of the property in the light of the new developments and to consider a change in the sales price in view of the actual cost of the project.

Also as above stated, defendant asked the plaintiff, in that letter, to take the matter up with the insurance company, and then the defendant said therein that as soon as plaintiff was able to determine the insurance company's position in the two matters the defendant would appreciate talking further with plaintiff.

[1-4] It therefore appears from the letter (1) that defendant advised plaintiff concerning defendant's financial problem, which was that the warehouse had cost about \$200,000 more than the original estimate of \$400,000 for which it had agreed to sell the property to the insurance company; (2) that defendant wanted to resell the property to the same purchaser (the insurance company) at a price which was about \$200,000 higher than the price for which the insurance company was then entitled to buy the property; and (3) that defendant authorized and employed plaintiff to negotiate with the insurance company and to resell the property at the higher price, namely, the actual cost of the property. In other words, the defendant stated in the letter what it desired to have done, and it authorized and asked defendant to do it. It is true that the letter did not state that plaintiff would be paid a commission. A memorandum required by the statute of frauds, Civ.Code, sec. 1624, subdiv. 5, need not include a statement that a commission will be paid. *Caminetti v. National Guar. Life Co.*, 56 Cal.App.2d 92, 95, 132 P.2d 318, 320. "In the absence of any agreement as to commission, the agent, if authorized in writing to negotiate a sale of real estate, is entitled to a reasonable compensation for his services." (*Ibid.*) In the present case there was testimony that in the telephone conversation between Mr. Garrett and plaintiff, about January, 1947, Mr. Garrett said: "Mr. Bruner, this is a very serious matter and we are not expecting you to work for nothing." An agreement to pay a commission may be shown by parol. *Caminetti v. National Guar. Life Co.*, supra, 56 Cal.App.2d at page 95, 132 P.2d 318.

[5] Appellant also contends that since it (Van's Markets) had paid Nelson Doug-

lass & Co. \$12,000 in full payment for all services rendered or to be rendered, and since plaintiff was vice-president of that company when it agreed that in no event should the commission exceed \$12,000, and since plaintiff had rendered the prior services on behalf of that company, that it was not intended that any commission should be paid for plaintiff's services in the subsequent transaction regarding the increase in the selling price of the property. It also argues that a further indication that no commission was intended on the subsequent transaction is that the schedule of costs enclosed in the letter of September 6th (which plaintiff presented to the insurance company) did not include an item for additional commission. As stated above, there was a dissolution of Nelson Douglass & Co. in September, 1946. Plaintiff testified that he discussed the dissolution of that company with Mr. Garrett at "one of the very early conversations" with Mr. Garrett after the telephone call from Mr. Garrett in which Mr. Garrett asked him "to do the new deal." Mr. Garrett testified that "some time later than this first conversation" plaintiff told him that the company had been dissolved. In any event, defendant knew at the time the letter of September 6, 1947, was sent to plaintiff that there had been a dissolution of Nelson Douglass & Co. about one year previously—in September, 1946. The letter was addressed to plaintiff individually. The court found that at all times during the employment of plaintiff in connection with the sale for \$576,000 plaintiff was acting in his individual capacity and defendant knew that plaintiff was acting in his individual capacity as a broker and not as an officer or agent of Nelson Douglass & Co.; and that it is not true that, at any time during which plaintiff rendered services in connection with the sale for \$576,000, it was understood or intended by plaintiff and defendant that the services of plaintiff were being rendered by or for Nelson Douglass & Co. or its successor within the terms of the agreement of February 11, 1946, or for a total compensation not to exceed \$12,000. Those findings are supported by the evidence. The

contention that it was not intended that plaintiff should be paid a commission is not sustainable.

[6] Appellant also contends that the evidence does not support the finding that defendant "agreed orally with plaintiff to pay him the reasonable value of his services under his written contract of employment." There was testimony, as above shown, that about the first of January, 1947, the treasurer of defendant told plaintiff that the financial problem confronting defendant was a very serious matter and the defendant did not expect him to work for nothing. Thereafter during a period of approximately 10 months plaintiff had various conversations with officers of the insurance company and said treasurer regarding the resale of the property at an increased price. In November, 1947, the insurance company bought the property for \$576,000 and defendant was released from its prior contract to sell the property to the same insurance company for \$400,000. Defendant accepted the benefits of plaintiff's services. Said finding that there was an oral agreement to pay plaintiff the reasonable value of his services is supported by the evidence.

[7] Appellant also contends that plaintiff is estopped to claim a commission because he did not expressly include an agreement for a commission in the letter of September 6th, because an additional commission was not included in the schedule of costs which was enclosed in that letter, and because plaintiff did not ask for a commission before the increase in the selling price had been obtained. This contention is not sustainable. Estoppel was not pleaded. That alleged defense was raised for the first time on appeal. There was no finding regarding such an estoppel. It seems that appellant is arguing that this court should find as a fact that plaintiff was estopped to claim a commission. It cannot be said properly that if a finding had been made regarding estoppel it would necessarily have been favorable to defendant. All intendments are in favor of the judgment. This court is not empowered under the circumstances here to make a

finding regarding estoppel. The evidence was legally sufficient to support a finding that plaintiff was not estopped.

By reason of the above conclusions, it is not necessary to determine other contentions of appellant.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



103 Cal.App.2d 69

PEOPLE v. BLACK.

Cr. 740.

District Court of Appeal, Fourth District,
California.

March 23, 1951.

Hearing Denied April 19, 1951.

Gloria Gould Black was convicted in the Superior Court of San Diego County, L. N. Turrentine, J., of manslaughter, and she appealed from the judgment and from an order denying a new trial. The District Court of Appeal, Barnard, P. J., held that the evidence was sufficient to establish the corpus delicti.

Judgment and order affirmed.

1. Criminal law ⚡563

The corpus delicti may be proved by circumstantial evidence and the reasonable inferences drawn therefrom.

2. Criminal law ⚡563

To warrant a conviction, corpus delicti must be proved to a moral certainty and beyond a reasonable doubt, but it is not necessary that it should be so proven before corroborative evidence is introduced.

3. Homicide ⚡228(1)

In homicide prosecution, if a prima facie case is presented that deceased met death by means of an unlawful act of another, evidence is sufficient to prove corpus delicti.

4. Homicide ⚡228(2)

In prosecution of a wife for murder of her husband who died as result of a knife wound below left arm pit, evidence was sufficient to establish corpus delicti.

5. Homicide ⚡228(2)

A death which results from wound which could not have been self-inflicted sufficiently discloses a corpus delicti, but the corpus delicti may be established in other ways.

6. Homicide ⚡339

In prosecution of a wife for murder of a husband who died as a result of a knife wound below left arm pit, where-in entire defense was that defendant had not killed her husband and was not present when husband suffered wound which caused death, refusal of trial court to admit evidence offered to show that at time of alleged offense defendant did not have mental capacity to form intent to kill her husband was not error requiring reversal of conviction.

7. Criminal law ⚡829(18)

In prosecution of a wife for murder of her husband who died as a result of a knife wound below left arm pit, refusal to give instruction reciting that when case against defendant rests entirely or chiefly on circumstantial evidence, and in any case before jury may find a defendant guilty basing its findings on such evidence, each fact which is essential to complete a chain of circumstances that will establish defendant's guilt must be proved beyond a reasonable doubt, was not error prejudicial to defendant in view of other given instructions.

8. Criminal law ⚡829(3)

In prosecution of a wife for murder of her husband who died as a result of a knife wound below left arm pit, trial court properly refused to give an instruction reciting that in case of murder or voluntary manslaughter a necessary element is existence in mind of perpetrator of specific intent to take life of another, on ground that instruction was covered by other given instructions.

9. Homicide Ⓒ304

In prosecution of a wife for murder of her husband who died as a result of a knife wound below left arm pit, given instruction that prosecution must establish that death was result of act of somebody, and that a criminal agency caused the death, and that such proof must necessarily exclude theory of accident, accidental death or theory of suicide or self-inflicted death, and that a reasonable doubt as to whether death was accident or suicide must be resolved in defendant's favor, and other given instructions, were sufficient under evidence on subject of excusable homicide. Pen.Code, §§ 26, subd. 6, 195.

10. Homicide Ⓒ304

In prosecution of a wife for murder of her husband who died as result of a knife wound below left arm pit, instruction requiring defendant to be found not guilty if death resulted from accident and misfortune brought about by husband's use of force and if defendant grabbed at knife for self-protection and knife was plunged into body of defendant's husband, went beyond scope of evidence received and was properly refused.

11. Criminal law Ⓒ829(5)

In prosecution of a wife for murder of her husband who died as result of a knife wound below left arm pit, law of self defense was covered by given instructions and trial court properly refused to give instruction that law does not require a person to retreat before such person may act lawfully in self defense.

12. Criminal law Ⓒ814(3), 824(15), 847

In prosecution of a wife for murder of her husband who died as result of a knife wound below left arm pit, submission to jury of only one form of verdict on question of manslaughter, such instruction being based on voluntary manslaughter, was not error where no objection was made and no request for form of verdict covering involuntary manslaughter was made, and evidence did not require submission of verdict covering involuntary manslaughter.

13. Criminal law Ⓒ1041

Where point that trial court in murder prosecution erred in denying defendant's motion for a new trial, since remarks made by trial court in passing upon motion disclosed that trial court believed that he was without authority to interfere with jury verdict, was raised by defendant for first time on appeal in defendant's closing brief, such point was raised too late.

Thomas Whelan, Ann Wansley, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Ariel C. Hilton, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the murder of her husband. A jury found her guilty of manslaughter and she appeals from the judgment and from an order denying her motion for a new trial.

The defendant and her husband, who was a dentist, lived in Escondido. About 1:30 p. m. on March 7, 1950, she telephoned to the office of Dr. Adams saying that her husband was lying on the floor and that she wanted the doctor to come at once. The doctor arrived at the Black home shortly before 2:00 p. m. He found the body of Dr. Black on the kitchen floor in a twisted position, with the upper portion of the body lying on its left side. He first noticed a wound across the nose, noting that it was a fresh wound but not bleeding at that time. He rolled the body on its back, pulled up the shirt, and using a stethoscope and other tests determined that death had occurred. He told the defendant her husband was dead, remarking that it was probably a heart attack. The defendant then called the doctor's attention to a wound twelve inches below the left arm pit of the deceased, which he had not previously noticed. The doctor looked at the wound and wondered whether it was superficial or deep. He then noticed a knife with a long narrow blade, which he had not before seen, and picked it up. There were signs of blood the full length of the blade, and

he concluded from the appearance of the knife that the wound was deep. The doctor noticed that the deceased was holding a few common matches in his clenched left hand, and that an unlighted cigarette lay on the floor near the hand. He phoned for a mortician and, when he came, asked him to keep his eyes open. The doctor again picked up the knife, showed it to the mortician, and then threw it on the floor near where he had found it. The doctor then left, after asking the mortician to stay until the coroner came. The coroner and other officers arrived, observations were made of the surrounding conditions, and the defendant was questioned during the afternoon and later.

It conclusively appears that death occurred as a result of the wound on the left side of the body below the arm pit, death being caused by excessive internal bleeding, and that this wound was caused by the knife found under or near the body. The knife had pierced the abdominal muscles, the intercostal muscle, the diaphragm, and the wall of the stomach. There was evidence that it would take considerable force to drive the knife in in order to cause this wound. The wound went straight in and not at an angle and there was no wound of exit, the knife having been withdrawn.

While there are some inconsistencies in the story told by the defendant she at all times told essentially the same story to the officers and on the stand. She testified that her husband had had two drinks before going to the office that morning; that she had pleaded with him not to drink any more because they intended to go to San Diego about noon; that he returned about 11:00 a. m. appearing to be under the influence of liquor; that he placed some packages in their car and then she noticed him putting a bottle of gin in his pocket; that she tried to get the bottle and he pushed her down on the steps; that she reminded him that he had broken her ribs once and he became angry; that he then left in the car; that thinking he was in no condition to go to San Diego she changed her clothes, putting on a pair of slacks and a blouse; that her husband returned later and she did not know how long he had been gone; that she heard

a noise in he kitchen like he was "bumping" into something and then he went outside and sat in the patio; that she went out and tried to get him to help her with their income tax but he refused to do so; that she went into the house and saw her husband going toward the lath house; that she saw him take hold of something trying to steady himself; that he had been wearing his glasses when she talked to him in the patio; that she went into the back bedroom and later heard him come into the kitchen; that he said he was going to make a sandwich; that his speech was thick and not normal; that she heard a rattle when he took a knife from the knife rack; that she heard him at the bread drawer and he asked where the mustard was; that she knew he was stumbling because of the way he went to the bread drawer; that she thought she heard a fall followed by a moment of silence; and that she then came into the kitchen and found him on the floor, lying on his side.

She further testified that she had not seen the knife at this time and had not turned him over; that she had noticed blood on his face and that he was breathing; that she asked him to get up, thinking he had fainted; that she went to the phone and called Dr. Adams' office; that just as she was calling the third time the doctor came; that Dr. Adams rolled the deceased over on his back and after pushing up his shirt and listening, told her that he was dead and that it must have been a heart attack; that she threw herself on the body trying to kiss him and was raised up by Dr. Adams; that she then observed the wound on his side and called Dr. Adams' attention to it; that Dr. Adams felt around under the body and came up with the knife in his hand; and that she told Dr. Adams that her husband had said he was going to make a sandwich. She denied that she had stuck the knife into Dr. Black's body.

The defendant testified that she had carried on a conversation with her husband all the time after his last return to the house and that she knew no one else was present. There was no direct evidence as to the stabbing itself and the case rests largely on circumstantial evidence. There was a great

deal of evidence of quarreling and some violence or threats of violence between these parties over a number of years. There was evidence that both drank too much, that their quarrels were largely the result of drinking, and that the defendant was frequently intoxicated, possibly more often than was her husband. At one time he had broken two of her ribs and at another had injured her spine. She admitted throwing things at him on several occasions. There was evidence that on three occasions she had threatened him with a knife, which was taken away from her; that on a number of occasions she had called in people saying her husband was intoxicated when it developed that she was intoxicated and he was not; and that during their quarrels she frequently talked the loudest and he was trying to move away or to quiet her. Seven witnesses testified that they heard the Blacks arguing and screaming at each other for some ten minutes shortly after 1 o'clock on that day. One neighbor testified that she heard enough to know that the argument concerned something about the income tax.

While the doctors testified that the laceration on the deceased's nose would necessarily have caused excessive bleeding, very little blood was found around the body. There was a small amount of blood on the floor where the face had lain. There was very little blood on the deceased's clothing. There were blood stains on the deceased's shirt where a sharp instrument had penetrated, but these were diffused as though sponged by water or other solvent, and the shirt was wet. A spot of blood was found inside a bread wrapper around some bread, and one slice of bread was out on the table. The defendant said she had done no mopping that day, but a mop which was dry when a servant left about 11:45 a. m. on that day was wet when found by the officers. The evidence rather conclusively shows that a considerable attempt to clean up had been made before Dr. Adams arrived at the scene. The defendant was the only person present at the time when this could have been done. The pocket on the blouse worn by the defendant was torn and a button from the chest

of this blouse was missing. This button was found on the kitchen floor. The evidence shows that it had been torn from this blouse, taking some of the material with it. The fact that this button was not noticed by the officers on their first inspection of the premises and was found several hours later, relied on by the defendant, merely goes to the weight of this evidence. The deceased's glasses were not found, but two months later a broken pair was found in the lath house. The defendant argues that the deceased might have cut his nose on a nail or sharp piece of wood when he went to the lath house. However, the officers were unable to find any blood there, or between that point and the house, and there was no such blood on the deceased's clothing as would naturally be expected if this had occurred.

There was evidence that on March 9, 1950, the defendant told her sister-in-law that "I did it in self defense." A matron in the sheriff's office testified that at the defendant's arraignment on March 9, the defendant was crying and was very disturbed when her attorney arrived; that at that time she said to this attorney "You've got to get me out of this. You can't let them do anything to me. I want to plead self defense"; and that the attorney told her to "shut up" and not talk so much.

The appellant contends that the evidence is insufficient to sustain the verdict and that the verdict is contrary to law. While admitting that the evidence is sufficient to sustain the verdict if the corpus delicti was established, it is urged that the corpus delicti was not established and that it follows that the verdict is contrary to law and that the evidence is insufficient. It is argued that while the death is undisputed there was no evidence to show criminal agency since it failed to show that the appellant had the knife in her hand on the day in question, and since there was no evidence that the wound causing death could not have been self-inflicted or the result of accident.

[1-3] The rules here applicable are stated in *People v. Ives*, 17 Cal.2d 459, 110 P.2d 408, 411, as follows:

"The *corpus delicti* may be proven by circumstantial evidence, and the reasonable inferences drawn therefrom. To warrant a conviction it must be proven to a moral certainty and beyond a reasonable doubt, but it is not necessary that it should be so proven before other evidence is introduced which corroborates it or strengthens reasonable inferences drawn therefrom. If a *prima facie* case is presented that the deceased met his death by means of an unlawful act of another, the evidence is sufficient. (Citing cases.) * * *

"To prove a *prima facie* case of *corpus delicti*, all that was required was to show a reasonable probability that a criminal act of another had been the direct cause of the death of Sherrard."

[4, 5] While some doctors expressed the opinion that the wound causing death could have been self-inflicted or could have been accidentally caused by the deceased falling upon the knife, it does not follow that such a thing is probable, especially in view of the other evidence. While a death which results from wounds which could not have been self inflicted sufficiently discloses a *corpus delicti*, *People v. DuBois*, 16 Cal. App.2d 81, 60 P.2d 190 this may be established in other ways. The autopsy surgeon expressed the opinion that the wound was not self inflicted. From the record, including the exhibits, it seems improbable that the deceased could have inflicted such a wound under his left arm pit while holding the knife in his right hand. It seems equally improbable that, with his left hand grasping matches and his right hand holding the knife, he could have fallen in such a manner as to drive this knife straight into his left side, without any angle. That he could then have withdrawn the knife presents a further improbability. There was evidence indicating that the appellant was not telling the truth, and that a considerable amount of cleaning up had been done. Without reviewing the entire evidence it must be held that the circumstantial evidence, with the reasonable inferences therefrom, was sufficient to establish a *corpus delicti* under the established rules, and that when viewed in connection with all of the evidence the

corpus delicti was established beyond a reasonable doubt. Conceding that there might have been a possible doubt, the evidence was such as to justify the jury in believing beyond a reasonable doubt that the appellant inflicted the wound which resulted in the death of her husband. We have no doubt that the evidence is sufficient to support the verdict.

[6] It is next contended that the court erred in refusing to admit evidence offered to show that at the time of the alleged offense the appellant did not have the mental capacity to form an intent to kill her husband. A doctor was asked "Do you believe that on March 7, 1950, she had the mental capacity to form an intent to kill her husband?" An objection was sustained. This doctor had first examined the appellant on April third, and there is nothing in the record to indicate that he knew anything of her condition a month before. No offer of proof was made, and the evidence indicates that if a reply to the question had been permitted it would necessarily have been unfavorable to the appellant. The doctor testified that from his examination he believed that the appellant was telling the truth about this affair. If she was, her entire testimony strongly indicates that there was nothing the matter with her mental capacity at that time. The entire defense was that she had not killed her husband, and was in another room when he suffered the wound which caused his death. Under all of the circumstances, we find no reversible error in the ruling complained of. *People v. Rielly*, 101 Cal.App.2d 233, 225 P.2d 314.

[7] Prejudicial error is assigned in the court's refusal to give four instructions asked for by the appellant. The first of these, which was refused as covered, reads: "You are instructed that when the case which has been made out by the People against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt."

The court stated to the jury in its instructions that "This case is dependent nearly altogether on circumstantial evidence." It further instructed the jury in the identical language contained in the instructions in the first three paragraphs on page 675 of the opinion in *People v. Huizenga*, 34 Cal.2d 669, 213 P.2d 710. The evidence here was sufficient to prove each fact in the chain of circumstances showing guilt beyond a reasonable doubt, and the instructions given sufficiently told the jury that each fact essential to the chain of circumstances showing guilt must be established beyond a reasonable doubt. Under the circumstances, no prejudicial error appears. *People v. Huizenga*, 34 Cal.2d 669, 213 P.2d 710; *People v. Webster*, 79 Cal.App.2d 321, 179 P.2d 633. In the latter case, an instruction identical with the one here in question was also refused but was held to be sufficiently covered by the other instructions.

[8] The second of these instructions, which was refused as covered, reads: "You are instructed that in the case of certain crimes, it is necessary that in addition to the intended act which characterizes the offense, the act must be accompanied by a specific or particular intent without which such a crime may not be committed. Thus in the crime of murder or voluntary manslaughter a necessary element is the existence in the mind of the perpetrator of the specific intent to take the life of another and unless such intent so exists those crimes are not committed."

It is argued that a specific intent is required in voluntary manslaughter; that this element was not covered in the instructions given by the court; that the court aggravated the prejudicial effect by referring to specific intention in connection with malice, in discussing the matter of intoxication; and that, in effect, the court left the jury with the impression that specific intent was no element of the offense of voluntary manslaughter.

The court instructed the jury as follows: "In every criminal case there must be a joint operation of act and intent which means a deliberate and knowing intent to

do the act. It doesn't imply knowledge that it is against the law because there is no excuse for ignorance of the law. It means there must be a knowing and deliberate intent to do what they do. Willful has substantially the same meaning. That means a consciousness of doing the act, doing it knowingly, doing it wilfully. It is of course, as I say, it doesn't imply an ignorance of the law. Intoxication in a case is no justification or excuse for the commission of crime. However, when a particular state of mind is a part of the crime it may be taken into consideration by you on that particular issue. As applied to this lawsuit, it would apply to the crime of murder of second degree. In the malice aforethought, whether or not there was malice in the case is one of the elements of the crime, and intoxication of the person committing the crime, if that exists, could be taken into consideration solely as bearing on that situation."

And also, "Manslaughter is the unlawful killing of a human being without malice. You see, right in there you get distinction with malice aforethought on one side and the other, without malice. It is the unlawful killing of a human being without malice. It is of three kinds, and as far as we are concerned in this case, it is two kinds because the third relates to the driving of an automobile.

"1. Voluntary manslaughter, which is that committed upon a sudden quarrel or heat of passion.

"2. Involuntary manslaughter, which is that done in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner.

"Going back to voluntary manslaughter upon a sudden quarrel or heat of passion, the term heat of passion means such heat of passion as would arouse the mind of the ordinarily reasonable, prudent, careful person. It doesn't mean that the defendant would say, 'I just got mad and did it.' You must consider all of the circumstances and if it was heat of passion, determine whether a reasonable man would be so swayed by those facts and circumstances, as

would cause his passions to rise to the extent where he would act without malice but at the same time act in an unlawful manner which could and did result in death. The other definition is pretty well self explanatory."

The general instruction on intent referred also to a knowing and deliberate intent, and the limitation to the crime of murder of the second degree was applied only in connection with the matter of intoxication. Manslaughter of both kinds was defined and distinguished from the malice involved in murder, thus calling attention to the intent. In further defining voluntary manslaughter attention was called to the heat of passion which would cause a reasonable man to act without malice, but at the same time to act in an unlawful manner which could result in death. While the requested instruction could well have been given, we are unable to hold that refusal to give it constituted prejudicial error under the circumstances of this case. The appellant testified that she was not in the room at the time her husband received the fatal wound and that she had nothing to do with causing it. The instructions on manslaughter were more favorable to the appellant than otherwise, and were as favorable as was warranted by the evidence. It cannot be believed that the giving of this instruction could conceivably have changed the result, that the jury was in any way misled, or that it failed to understand what sort of intent was necessary. The matter was sufficiently covered under the circumstances, and no prejudicial error appears.

[9,10] The third of these refused instructions was on excusable homicide as covered by section 195 and section 26, subd. six of the Penal Code. This was followed by a direction to find the appellant not guilty if the jury found that the death of her husband resulted from accident and misfortune brought about by the husband's use of force and that the appellant grabbed at a knife for the purpose of protecting herself, and without any unlawful intent or malice on her part the knife was plunged into the body of the husband, by either

one or the other of the parties, which resulted in his death. It is argued that this instruction was necessary since several doctors testified to the effect that the wound which caused the death of the husband could have been either self inflicted or the result of an accidental falling, and that no instruction on accidental death or excusable homicide was given. Not only did this instruction go beyond the scope of the evidence received, but the court in one of its instructions told the jury that the prosecution must establish that the death of the husband was the result of the act of some person, that it must further be proved beyond a reasonable doubt that there was some criminal agency which was the cause of death, and that "proof of those things must necessarily exclude the theory of accident, accidental death or the theory of suicide or self inflicted death. If there is a reasonable doubt in your minds as to whether or not it was an accident or as to whether or not it was suicide, it would be your duty to resolve that in favor of the defendant and bring in a verdict of not guilty." Under the evidence received, this and the other instructions were sufficient and no reversible error appears in this connection.

[11] The fourth refused instruction was to the effect that the law does not require a person to retreat before she may act lawfully in self defense. The only argument made is that if any instruction on self defense was applicable it was error to refuse this one. If any instruction on the law of self defense was applicable, in view of the evidence, the matter was very fully, fairly and correctly covered in a long instruction given covering all elements of that subject.

[12] It is next contended that the court erred in submitting to the jury only one form of verdict on the question of manslaughter, this being based on voluntary manslaughter. It is argued that an additional form of verdict covering involuntary manslaughter should also have been submitted since the indirect penalties from voluntary manslaughter might be greater than involuntary manslaughter. No objection was made, no request for such a form

of verdict was made, and there is nothing in the evidence which required the submission of such an additional form.

[13] In her closing brief the appellant raises for the first time the further point that the court erred in denying her motion for a new trial, since the remarks made by the court in passing upon the motion disclosed that he believed he was without authority to interfere with the jury's verdict. Not only was this point raised too late but it is completely without support in the record.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concur.



103 Cal.App.2d 192

In re HARVEY'S ESTATE.

GALL et al. v. HARVEY.

Civ. 18013.

District Court of Appeal, Second District,
Division 3, California.

March 29, 1951.

Rehearing Denied April 18, 1951.

Hearing Denied May 24, 1951.

Proceeding in the matter of the estate of Frank A. Harvey, deceased. Petition by Herbert Gall and another, for an allowance for legal services against Alice B. Harvey, administratrix of the will annexed of the estate opposed by the administratrix. From an order of the Superior Court of Los Angeles County allowing \$7,000 as fees for extraordinary legal services the administratrix appealed. The District Court of Appeal, Wood, J., held that the allowance was not an abuse of discretion in view of the circumstances.

Order affirmed.

1. Executors and administrators Ⓒ497

In probate matters, it is particularly within power of the trial judge who has all the records before him to fix and determine what attorney's fees are proper. Probate Code, § 910.

2. Executors and administrators Ⓒ497

In fixing fees for attorney's services in probate matters, court must determine whether the services dominated as extraordinary were necessarily required in administration of the estate and if so what would be a just and reasonable allowance, and in making an order fixing the fees, the court has a large discretion and its judgment will not be interfered with on appeal, except only in case of plain abuse of discretion. Probate Code, § 910.

3. Executors and administrators Ⓒ497

Evidence justified an award of \$7,000 for extraordinary legal services rendered in behalf of an administratrix in a probate matter involving an estate of the appraised value of over \$46,000 where attorneys exercised a high degree of skill, competence and diligence and were successful in obtaining a reversal of an adverse judgment of vital importance to the estate and where as the result of the services the gross income of the administratrix on the property received in settlement was about \$15,000 per year. Probate Code, § 910.

Simpson & Wise, Long Beach, for appellant.

Herbert Gall, Los Angeles, for respondents.

PARKER WOOD, Justice.

Alice B. Harvey, administratrix with-the-will-annexed of the estate of Frank A. Harvey, deceased, appeals from an order directing said administratrix to pay to Herbert Gall \$7,000 for extraordinary legal services rendered in behalf of said administratrix.

Appellant contends that the evidence is insufficient to support the finding that such services were of the reasonable value of \$7,000.

In 1908 Frank A. Harvey (decedent) and his brothers, Jesse and James, formed a partnership for the purpose of supplying rock, gravel, and cement to contractors. In 1926 they formed a corporation known as Harvey Brothers, Inc., and they transferred to the corporation all the assets of

the partnership except its good will, and in exchange therefor they received the stock of the corporation which they divided equally among themselves. After the corporation was formed they continued the partnership and used the corporation's property in the partnership business. Frank A. Harvey died in 1946, and thereafter the two brothers continued to conduct the corporation and partnership in the manner those businesses had theretofore been conducted. There is a provision in the will of Frank (decedent) purporting to give his interest in the partnership to Jesse and James in trust to continue the partnership for 20 years in every respect as if he had not departed this life, and to pay to his widow (administratrix) and his brothers and sisters certain portions of the income from the partnership; and at the expiration of the 20 years to convert his partnership interest into cash and distribute the cash in a certain manner. The administratrix of the estate of Frank A. Harvey commenced an action against the two brothers, Jesse and James, and alleged that they had received all funds accruing for the benefit of the corporation; that they had transferred such funds to the partnership and to themselves; and that unless they were restrained and required to account they would continue to dissipate the corporate funds, and the stock which she held as administratrix would become worthless. The judgment in that action (entered on January 8, 1948) was in favor of defendants.

About February 11, 1948, the petitioners herein, Herbert Gall and Thomas F. McGrath, became attorneys of record for the administratrix in the probate proceeding and in said action against the two brothers. Those attorneys perfected an appeal from the judgment in said action. The reporter's transcript on appeal contained 180 pages. Appellant's opening and reply briefs therein contained 27 and 16 pages respectively. Respondent's brief therein contained 16 pages. In respondents' (the two brothers') brief on that appeal they asserted that under their "theory of the case, sustained by the trial court's judgment, the equal division of the ownership of the two

organizations was not disturbed by Frank A. Harvey's death, and the practice is consequently still harmless and permissible." The judgment was reversed with instructions to the trial court (1) to determine whether any disbursements of corporate funds had been made to the defendants without consideration; (2) to enjoin the defendants from making such payments; and (3) to adjudge that the corporation be reimbursed for such payments if any. See *Harvey v. Harvey*, 90 Cal.App.2d 549, 558, 203 P.2d 112. In that decision on appeal the court said at page 554, of 90 Cal.App., at page 115 of 203 P.2d: "The fact that respondents asserted that they would continue to operate said business for themselves and as trustees under the will did not justify continued payments of money to the partnership if it was not entitled thereto. * * * While such payments may have been the custom in decedent's lifetime, it by no means follows that it is proper to continue them after the dissolution of the partnership by his death." Mr. Gall testified that approximately 100 hours of his time were involved on that appeal, and that his services therein were of the reasonable value of \$20 per hour or \$2,000. Mr. McGrath testified that he spent 10 hours in matters pertaining to the appeal, and that his services were of the reasonable value of \$20 per hour. Edward Fitzpatrick, an attorney associated with Mr. Gall, testified that he spent 53-1/2 hours in connection with the appeal, and that his services were of the reasonable value of \$1,070. The total value of such services, according to the testimony of said attorneys, was \$3,270.

Before said attorneys had been employed by the administratrix, the superior court had issued a citation directing the two brothers to file in the probate proceeding an account of the affairs of the partnership. Said attorneys filed objections to the account on the ground that it was inadequate. Soon after the hearing upon said account and objections had commenced, the judge suggested that the will should be construed, and thereupon the matter regarding said account was placed off calendar. Mr. Gall testified that, in preparation for that hear-

ing, he had studied the account, had conferences with the administratrix, and had subpoenaed Jesse and Jesse's son and two or three of the employees of the partnership; that he spent about 12 hours in the matter of the account, and that his services were of the reasonable value of \$250. Mr. McGrath testified that he spent 14 hours thereon and that his services were of the reasonable value of \$280. Mr. Fitzpatrick testified that he spent 4 hours in the matter of the account and that his services were of the reasonable value of \$80. The total value of such services, according to the testimony of said attorneys, was \$610.

Said attorneys, on June 8, 1948, filed a petition on behalf of the administratrix for determination of heirship and for construction of the will of decedent. They asserted therein that the provision in the will purporting to create a trust in decedent's estate in the partnership was void; and that the property of decedent was community property. The two brothers filed an answer and resisted those contentions. The hearing required two days, and the matter was submitted upon briefs. The attorneys for the administratrix filed opening and reply briefs consisting of 21 and 16 pages respectively. The brothers' brief contained 19 pages. The decision was in favor of the administratrix—that the provision regarding a trust was void, and all the property was community property except a parcel of real estate. Mr. Gall testified that he spent 75 hours on this matter, and that his services were reasonably worth \$1,500. Mr. McGrath testified that he spent 6 hours on this matter, and that his services were reasonably worth \$120. Mr. Fitzpatrick testified that he spent 28 hours, and that his services were reasonably worth \$560. The total value of such services, according to the testimony of said attorneys, was \$2,380.

Said attorneys, on June 20, 1949, filed a stockholders' suit on behalf of Mrs. Alice B. Harvey, individually, and as administratrix, to dissolve the corporation, to require it to account for money wrongfully transferred to others, to enjoin it from wrongfully disposing of its property, to dissolve the copartnership, to require the

surviving partners to account, to obtain a decree declaring the rights of the parties to the property in controversy, and to obtain the appointment of a receiver. An order to show cause why a receiver should not be appointed, and an order restraining defendants from disposing of assets of the corporation pending the hearing on the order to show cause, were issued on June 21, 1949. The order to show cause was continued several times, and upon each continuance it was ordered that the restraining order remain in effect. (The employment of Mr. McGrath as attorney for administratrix was terminated in September, 1949.) On September 28, 1949, the two brothers and Mrs. Harvey entered into an agreement (hereinafter referred to) settling their controversies, which agreement provided among other things that the corporation be dissolved and the assets distributed equally among the three stockholders. (The employment of Mr. Gall was terminated in February, 1950.) The action was dismissed on May 19, 1950, upon the written request of Mr. Cleveland, who succeeded Mr. Gall as attorney for Mrs. Harvey individually and as administratrix. Mr. Gall testified that he spent 40 hours in preparing the complaint and the papers pertaining to the receivership, and his services were reasonably worth \$800. Mr. McGrath testified that he spent 4 hours on those matters, and his services were reasonably worth \$80. Mr. Fitzpatrick testified that he spent 23 hours thereon, and his services were reasonably worth \$460.

When said attorneys were employed by the administratrix (about 13 months after death of Mr. Harvey) she was in default in filing a preliminary notice of federal estate tax (form 704) and a federal estate tax return (form 706). Mr. Gall secured an extension of time within which to file the return, and no penalty was imposed for the delinquency. He, with the assistance of Mr. Fitzpatrick, prepared and filed such return on form 706. A copy of that return was filed as exhibit 14 herein. It consists of 26 pages—5 pages being in typewriting and 21 pages being printed forms with typewriting thereon. An inventory and ap-

praisement had not been filed at the time the return was filed. Mr. Gall testified that he spent 20 hours in connection with the filing of the return, and his services were reasonably worth \$400. Mr. Fitzpatrick testified that he spent 2 hours thereon, and his services were reasonably worth \$40.

Another action was pending when said attorneys were employed. It was commenced by the administratrix and was for the purpose of obtaining a declaration of her rights under a life insurance policy on the life of Frank A. Harvey. She alleged therein that the premiums on the policy had been paid from community funds. The action had been set for trial. Mr. Gall concluded that the action should remain dormant. He testified that his services, in checking the file to determine whether the action should be tried, were reasonably worth \$20.

A creditor's claim for \$7,235.38, filed by James Harvey, was rejected and he commenced an action based thereon. Mr. Gall and the attorney for James entered into a stipulation extending the time to answer. Mr. Gall testified that his services therein were reasonably worth \$20.

As above stated, the two brothers and the administratrix entered into an agreement on September 28, 1949, whereby they agreed to settle the pending litigation and all their other controversies. Mr. Gall and the attorneys who represented the brothers prepared the agreement. Mr. Gall prepared a petition for instructions concerning the compromise agreement. Under the agreement the corporation was to be dissolved and the assets distributed equally among the three stockholders. Mr. Gall testified that he spent 100 hours in the matter of the agreement, and that his services therefor were reasonably worth \$2,000. He also testified that the brothers first offered her \$12,000 for her interest in the corporation; that since the funds of the corporation and the partnership had been commingled for approximately 20 years it was necessary to have the accounting brought up to date; he studied the account and explained it to Mrs. Harvey and her nephew and her brother; he had many conferences with Mrs. Harvey and counsel

for the brothers; the agreement settled about 20 controversial questions; that under the agreement various claims of the brothers against the estate amounting to approximately \$5,100 were waived; that certain machinery of the corporation, which had been charged off on the books as having no value (being fully depreciated according to tax returns), was sold at auction for \$12,000; that when the administratrix employed Mr. Gall the estate had no income, and the financial condition of the estate was such that the family allowance of \$350 per month could not be paid; the gross income of the administratrix from the property received on the settlement is about \$15,000 per year.

The estate's one-third interest in the corporation was appraised (about August, 1948) at \$42,749.99. The total appraised value of the estate is \$46,976.03. The administratrix and decedent were married January 15, 1919.

From the above mentioned testimony of said attorneys, it appears (1) that approximately the total time spent by each attorney, and the reasonable value of his services, were as follows: Mr. Gall, 349 hours, \$6,970; Mr. McGrath, 34 hours, \$680; and Mr. Fitzpatrick, 110-½ hours, \$2,210; and (2) that approximately the total time spent by all said attorneys was 493-½ hours, and the reasonable value of their services was \$9,870. The said attorneys, Mr. Gall and Mr. McGrath, petitioned for an allowance of \$8,000 for said services. As above stated, the court allowed \$7,000.

Appellant contends, as above stated, that the evidence is insufficient to support the finding that the services for extraordinary legal services were of the reasonable value of \$7,000. She argues that the services rendered in four of the matters above mentioned were not properly classifiable as extraordinary services. The matters so referred to are: (1) The petition for construction of the will; (2) the preparation of federal estate tax return; (3) the action regarding the life insurance policy; (4) the action by James upon his rejected claim; and (5) the agreement settling all the litigation and other controversies. As above indicated, the court did not fix a fee

for each item of service but fixed a total fee for extraordinary services rendered.

As to the petition for construction of the will, Mr. Gall conceded at the hearing wherein the fees were fixed that about one-half the services in connection with said petition should be regarded as ordinary services. It appears that a substantial part of the services pertaining to said petition consisted of extraordinary services. The appeal from the judgment in the action to restrain the two brothers from transferring the corporation funds to the partnership was pending at the time the said petition for construction of the will was heard. The two brothers were the objectors to said petition for construction of the will. In their brief which was filed in that proceeding they asserted as an issue therein that said appeal was "pending and undecided" and that the facts found in that action "would be res judicata" in the proceeding for construction of the will. They argued in that brief that the court sitting in equity had to invade the normal province of the court sitting in probate in order to settle questions which the administratrix had raised by bringing the action and which the probate court with its restricted jurisdiction could not settle, namely, whether the officers of the corporation had wrongfully transferred funds to the partnership. They also argued therein that the court in equity had to determine the community property question in order to decide the other questions in that action. As above stated, the briefs in said proceeding for construction of the will were extensive. Substantial portions of the briefs were devoted to the discussion of the issues and the law involved in the action on said appeal.

As to the federal estate tax return, it consisted of 26 pages, as above stated, and by reason of the transactions between the corporation and the partnership, covering many years and involving community property and the alleged wrongful transfer of funds, the work required in connection with the tax return was extensive and complicated. The preparation of that return under the circumstances here should be regarded as extraordinary.

As to the other matters, namely, the actions regarding the insurance policy and the rejected claim, and the settlement agreement, it appears that those matters involved extraordinary services.

[1,2] Appellant also argues that the amount allowed for services rendered in all the matters was unreasonable. She asserts that the award of \$7,000 for extraordinary fees, in an estate of the appraised value of \$46,976.03, is an abuse of discretion. In *Estate of Neff*, 56 Cal.App.2d 728, it was said at page 731, 133 P.2d 413, at page 415, in quoting from another case: "In a probate matter, it is particularly within the power of the trial judge, who has all of the records before him, to fix and determine what fees are proper. [Citation.] Section 910 of the Probate Code provides that attorneys for executors shall be allowed such amount as the court 'may deem just and reasonable for extraordinary services.' It is the duty of the court to determine whether or not services denominated 'extraordinary' were necessarily required in the administration of the particular estate, and if so, to decide what would be a just and reasonable allowance. In making its order fixing such fees, the court has a large discretion, and when the court has made its determination in respect thereto, its judgment will not be interfered with on appeal, except only in the face of a plain abuse of discretion."

[3] The trial judge in the present case said, in his memorandum of decision, that the attorneys represented the administratrix with a high degree of skill, competence and diligence, that their success in obtaining a reversal of the adverse judgment was of vital importance to the estate, that the successful handling of the heirship proceedings required the application of a high order of ability, that these proceedings were complicated and difficult in both their factual and legal aspects, that the settlement agreement appears to have been favorable and was the result of extended negotiations. When said attorneys were employed by the administratrix the estate was in poor financial condition and a judgment had been rendered against the administratrix in her action to restrain

the two brothers from transferring funds of the corporation to the partnership. The appraisal of the estate was made while that litigation was pending. It appears that as a result of services rendered by said attorneys the gross income of the administratrix from the property she received in the settlement of all litigation and controversies is about \$15,000 per year. An attorney at law, who was qualified to give an opinion as to the reasonable value of legal services and who heard the testimony given at the hearing herein, was called as a witness by the appellant (the administratrix). He testified that the services rendered, except those pertaining to the tax return (as to which he had no opinion), were of the reasonable value of \$3,750 to \$4,000. There was no abuse of discretion in determining the amount of compensation for services rendered.

The order is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



103 Cal.App.2d 146

PEOPLE v. RUIZ.

Cr. 4559.

District Court of Appeal, Second District,
Division 3, California.

March 28, 1951.

Joe Vasquez Ruiz was convicted in Superior Court, Los Angeles County, William M. Byrne, J., of forging and uttering a check, and he appealed. The District Court of Appeals, Vallée, J., held that the evidence was sufficient to sustain conviction.

Affirmed.

1. Indictment and Information $\S$ 110(15)

Information was not invalid, where it charged the offense of forgery in the language prescribed by statute. Pen.Code, $\S$ 470.

2. Forgery $\S$ 44

Evidence was sufficient to sustain conviction of forging and uttering a check. Pen.Code, $\S$ 470.

3. Forgery $\S$ 44

In prosecution for forgery, the fact that the evidence did not establish that defendant intended to cheat and defraud one of the persons named in the information, was immaterial. Pen.Code, $\S$ 470.

4. Criminal law $\S$ 661

In prosecution for forgery, the fact that the state did not call an expert to prove that defendant signed the checks was immaterial where evidence was sufficient to warrant the inference that defendant signed it. Pen.Code, $\S$ 470.

5. Forgery $\S$ 44

Possession of an instrument recently forged by one claiming under it is evidence against the possessor.

6. Forgery $\S$ 16

Merely presenting a forged check for payment constitutes an uttering.

7. Criminal law $\S$ 351(3)

Attempted flight by defendant was evidence of consciousness of guilt.

8. Criminal law $\S$ 1128(2)

Unsworn statements in defendant's brief which had not been presented to the trial court for consideration, could not be considered on appeal.

9. Criminal law $\S$ 1128(1)

Matters not in the record cannot be considered on appeal.

10. Criminal law $\S$ 1119(4)

Alleged misconduct of district attorney could not be considered where there was nothing in the record to support it.

Joe Vasquez Ruiz, in pro per.

Edmund G. Brown, Atty. Gen., Donald D. Stoker, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was charged with, and convicted of, forging and uttering a check in

the amount of \$47.58 and with a prior conviction of robbery. He admitted the prior conviction. He appeals from the judgment. Appearing in propria persona, he makes a number of points which we discuss *seriatim*.

[1] 1. The first point is that the information is "invalid." Defendant did not move to set the information aside. It charged defendant with forgery committed as follows: "That the said Joe Vasquez Ruiz on or about the 14th day of February, 1950, * * * with intent then and there to cheat and defraud Aurora Romero, Eastern Cabinet & Furniture Company, Bank of America National Trust and Savings Association, Jefferson-San Pedro Branch, a corporation, did then and there willfully, unlawfully, fraudulently and feloniously make, forge and counterfeit a certain check and order in writing for the payment of money, in the sum of Forty-seven and 58/100 Dollars (47.58) and did then and there utter, publish and pass the same, knowing that said check was false, forged and counterfeited as aforesaid, with intent then and there to cheat and defraud the said Aurora Romero, Eastern Cabinet & Furniture Company, Bank of America National Trust and Savings Association, Jefferson-San Pedro Branch, a corporation, as aforesaid." The information charged the offense in the language of the statute, Pen.Code, § 470, and is therefore sufficient. *People v. Holt*, 93 Cal.App.2d 473, 476, 209 P.2d 94.

2. The second point is that the evidence is insufficient to sustain the judgment. On February 14, 1950, defendant entered a store in Los Angeles. He handed a check to Aurora Romero's mother. The check was on the form of Eastern Cabinet & Furniture Company, 2040 East 45th Street, Los Angeles. It was dated February 13, 1950, in the amount of \$47.58, and named Frank Noriega as payee. It was drawn on Bank of America, Jefferson-San Pedro Branch, and was signed "Eastern Cabinet & Furniture Company by E. W. Gillious." Defendant asked Miss Romero's mother if she (the mother) would cash the check. The mother asked the amount of the check, and defendant replied "47." Defendant

handed the check to her and she "opened it," and they (Aurora and her mother) saw that it was "the same company we had received another check the day before that, on the 13th, I believe, that we received a check for \$58." The mother told defendant she was going to get the change, went to Miss Romero's father, and told him about it. The father approached defendant and asked him for a Social Security card. Defendant handed him a card with the same name on it as the payee of the check, Frank Noriega. The father then said that that was the check he was waiting for. He had the check and the card in his hand at the time. Defendant grabbed the check and started to run. He ran to the door and tried to throw the check outside. A man on the other side of the store stopped defendant. The father then got a hold of him and held him until the police arrived.

S. Gillis testified that he and his partner S. Paull were the owners of Eastern Cabinet & Furniture Company; no one but his partner and himself were authorized to sign checks for the company; the signature on the check was not his and the name was spelled wrong; there was no one in the firm by the name of "E. W. Gillious"; he did not give any one permission to sign his name to the check; a short time before February 14, 1950, a window at the firm's place of business was broken during the night and in the morning a number of blank checks, similar to the check in question, were missing; defendant did not have permission to enter the place of business or take anything from it.

[2-7] The evidence was thus sufficient to establish that the check was forged and uttered by defendant with intent to cheat and defraud Eastern Cabinet & Furniture Company and Bank of America. The fact that the evidence did not establish that defendant intended to cheat and defraud Aurora Romero, who was named in the information as one of the persons he intended to cheat, is immaterial. *People v. Williams*, 27 Cal.2d 220, 225, 226, 163 P.2d 692; *People v. McGilver*, 67 Cal. 55, 7 P. 49; *People v. Amy*, 100 Cal.App.2d 126, 223 P.2d 69; *People v. Geibel*, 93 Cal.App. 2d 147, 163, 208 P.2d 743; *People v. Gon-*

PEOPLE v. MORGAN.

Cr. 4630.

District Court of Appeal, Second District,
Division 1, California.

April 3, 1951.

zales, 69 Cal.App. 609, 612, 231 P. 1014. The fact that the People did not call an expert to prove that defendant signed the check is of no consequence. The evidence was sufficient to warrant the inference that he signed it. Possession of an instrument recently forged by one claiming under it, like the possession of goods recently stolen, is evidence against the possessor. *People v. Cline*, 79 Cal.App.2d 11, 14, 179 P.2d 89. Merely presenting a forged check for payment constitutes an uttering. *People v. Tomlinson*, 35 Cal. 503, 509. Defendant's attempted flight was evidence of a consciousness of guilt. *People v. Anderson*, 90 Cal.App.2d 326, 333, 202 P.2d 1044.

[8,9] 3. The third point is that defendant was denied due process of law in that he was denied the assistance of counsel. The only bases for the point are unsworn statements in defendant's brief. There is nothing in the record to support the claim. "On appeal from a judgment, matters raised in the brief, which appear to be merely unsworn statements of the defendant as to certain purported facts in the case, which purported facts were not before presented to the trial court for consideration, cannot be considered on appeal. *People v. Gilpin*, 38 Cal.App.2d 24, 26, 100 P.2d 356." *People v. Evans*, 102 Cal.App. 2d 320, 227 P.2d 461, 462. The record discloses that defendant was at all times represented by counsel and that if he had desired to change counsel he had ample time to do so. With his reply brief defendant has submitted a number of affidavits. Matters not in the record cannot be considered on appeal. *People v. Black*, 89 Cal.App. 219, 222, 264 P. 343; *Estate of Tubbs*, 82 Cal.App.2d 305, 307, 186 P.2d 7.

[10] 4. The fourth point is that the district attorney was guilty of prejudicial misconduct. This point is also based on unsworn statements in defendant's brief. There is nothing in the record to support it.

There is no prejudicial error in the record.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

Alvin V. Morgan was convicted of burglary and he filed an application in the Superior Court of Los Angeles County, Clement D. Nye, J., for a writ of error coram nobis and from an order denying the motion defendant appealed. The District Court of Appeal, Doran, J., held that where notice of appeal from the order was not filed within ten days motion to dismiss must be granted.

Appeal dismissed.

Criminal law 1081

Where notice of appeal by defendant was not filed within ten days from an order denying a writ of error coram nobis, the motion to dismiss must be granted.

Alvin V. Morgan, in pro. per.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is a motion by respondent to dismiss the above-entitled appeal. It appears from the record that appellant was convicted on April 5, 1948, of the crime of burglary and sentenced. On September 29, 1950, appellant, in pro. per., filed an application with the superior court for a writ of Error Coram Nobis. Said application was heard and denied on November 15, 1950 and appellant duly notified. A notice of appeal was filed on December 11, 1950 which notice was sworn to and notarized on December 6 which was 21 days after said order was made and entered.

Inasmuch as the notice of appeal was not filed within 10 days the motion must be granted. *Ex parte Horowitz*, 33 Cal.2d 534, 203 P.2d 513.

The appeal is dismissed.

WHITE, P. J., and DRAPEAU, J., concur.

103 Cal.App.2d 200

PEOPLE v. SANDERS.

Cr. 2212.

District Court of Appeal
Third District, California.

March 30, 1951.

Otto Kenneth Sanders was convicted in the Superior Court, Solano County, Harlow V. Greenwood, J., for incest, and he appealed. The District Court of Appeal, Van Dyke, J., held that the dismissal, on district attorney's motion, of prosecution for incest alleged to have occurred on June 5, 1949, did not constitute such double jeopardy as would bar prosecution of defendant for incest with the same daughter committed on May 22, 1949.

Judgment affirmed.

Criminal law — 198

The dismissal on district attorney's motion of prosecution for incest alleged to have occurred on June 5, 1949 did not constitute such double jeopardy as would bar prosecution of defendant for incest with the same daughter committed on May 22, 1949.

John Charles Henderson, Oakland, for appellant.

Atty. Gen. by C. J. Scott, Asst. Atty. Gen. for respondent.

VAN DYKE, Justice.

Appellant, Otto Kenneth Sanders, was accused by the grand jury of Solano County of the crime of incest charged to have been committed as follows: Appellant on May 22, 1949, within Solano County, did "knowingly and incestuously have sexual intercourse with * * *, the daughter" of appellant. To this charge he pleaded not guilty and upon trial to a jury was convicted. He makes no contention that the evidence was not sufficient to support the verdict.

It appears in the evidence that, some four months prior to his conviction under the indictment, he had been informed against for the crime of incest upon the same minor daughter, the act being alleged to have oc-

curred on June 5, 1949, and that when put to trial upon that charge the minor daughter and her mother repudiated their former testimony at the preliminary examination, with the result that the action was dismissed on motion of the district attorney. Appellant now asserts that he has been twice put in jeopardy for the same offense. He claims in his briefs that in respect of the charge now before the court he entered pleas of former acquittal and former jeopardy, but the record does not disclose the entry of such pleas. We will, however, assume that such pleas were entered. Upon that foundation appellant urges that the crime of incest is a continuing offense and the prosecution may not try a person for an act of incestuous intercourse antedating a similar act of which he has been previously acquitted. The contention is without merit. A similar contention was made in the case of *People v. Lachuk*, 5 Cal.App.2d 729, 731, 43 P.2d 579, 580. The court there said: "Assuming that the record shows that defendant had been previously acquitted of charges of rape and of incest alleged to have been committed on July 18, 1934, still it cannot be said that a subsequent charge of the same nature on other dates would constitute double jeopardy. The acts of June 20, 1934, and of July 27, 1934, charged in the second information, were distinct and separate crimes from the acts of July 18, 1934, involved in such former trial. The acquittal of defendant of the latter acts was not a finding as to the truth of the charges covering the acts of June 20, 1934, and of July 27, 1934, even if evidence of these latter acts had been used at the former trial. *People v. Wilson*, 79 Cal.App. 709, 250 P. 879."

See, also, 27 *American Jurisprudence*, page 293, where the following statement is made: "* * * However, an acquittal on trial of one indictment for incest is not a bar to prosecution on another indictment for incest with the same female, upon other dates."

The judgment is affirmed.

ADAMS, P. J., and DEIRUP, Justice pro tem., concur.

103 Cal.App.2d 271

PEOPLE v. PONCE.

Cr. 4636.

District Court of Appeal, Second District,
Division 1, California.

April 4, 1951.

Louis D. Ponce filed a petition for writ of error coram nobis or in the alternative for a writ of habeas corpus. The Superior Court of Los Angeles County, Thomas J. Cunningham, J., entered an order denying petition and petitioner appealed. The District Court of Appeal, White, P. J., held that where petitioner's conviction in the superior court had been affirmed by the District Court of Appeal, the superior court was without jurisdiction to entertain petition for writ of error coram nobis, since the District Court of Appeal had exclusive jurisdiction.

Appeal dismissed.

1. Criminal law ⇨997

Where defendant's conviction in the superior court had been affirmed by the District Court of Appeal, superior court was without jurisdiction to entertain petition for writ of error coram nobis, since the District Court of Appeal had exclusive jurisdiction. Pen.Code, §§ 644(a), 1265.

2. Habeas corpus ⇨113(3)

An appeal from an order denying a writ of habeas corpus is not authorized. Pen.Code, § 1506.

3. Habeas corpus ⇨48

Where petitioner at the time of filing of application for writ of habeas corpus was confined at state prison in the County of Sacramento, it was to the superior court of that county that petitioner was required to present his application and not the superior court of Los Angeles County. Pen.Code, § 1506.

Louis D. Ponce, in pro. per.

Edmund G. Brown, Atty. Gen., Gilbert Harelson, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

This is a motion by respondent to dismiss an appeal taken from an order of the

Superior Court of Los Angeles County denying a petition for writ of error coram nobis or in the alternative for a writ of habeas corpus.

The record reflects that appellant was convicted on July 29, 1949, of two counts of robbery in the first degree, and one count of kidnapping for the purpose of robbery; that he admitted two prior convictions of a felony and that he had served terms of imprisonment therefor.

Pursuant to the provisions of section 644, subdivision (a) of the Penal Code, the court adjudged respondent to be an habitual criminal. He was sentenced to the state prison for the term prescribed by law upon the conviction of the foregoing robbery counts, and for the offense of kidnapping for the purpose of robbery he was sentenced to the state prison for the term of his natural life with possibility of parole.

From the foregoing judgments appellant appealed, and on March 2, 1950, the judgments were affirmed by Division Three of this court. *People v. Ponce*, 96 Cal.App. 2d 327, 215 P.2d 75.

On January 2, 1951, appellant filed in the Superior Court of Los Angeles County a petition for a writ of error coram nobis or alternative writ of habeas corpus, and on January 11, 1951, said writs were denied. On January 12, 1951, appellant filed a notice of appeal in this court from the order of the Superior Court denying his petition for the foregoing writs.

[1] Section 1265 of the Penal Code provides that after the judgment has been affirmed on appeal no motion shall be made or proceeding in the nature of a petition for writ of error coram nobis shall be brought to vacate said judgment except in the court which affirmed the judgment on appeal; and when a judgment is affirmed by a district court of appeal and, as in the instant case, a hearing is not granted by the Supreme Court, the application for the writ shall be made to the District Court of Appeal. The superior court was without jurisdiction to entertain appellant's petition for a writ of error coram nobis because this court had exclusive jurisdiction. *People v. Dunlop*, 102 Cal.App.2d 314, 227 P.2d

281; *People v. Schunke*, 1951, Cal.App., 228 P.2d 620.

[2, 3] Appellant's attempted appeal from the order denying that portion of his petition through which he sought a writ of habeas corpus is also unavailing, for two reasons. As stated by this court, in *People v. Schunke*, supra, 228 P.2d 620, an appeal by petitioner from the order denying a writ of habeas corpus is not authorized by law. *Loustalot v. Superior Court*, 30 Cal. 2d 905, 913, 186 P.2d 673, Penal Code, sec. 1506. Also, at the time appellant filed his petition for a writ of habeas corpus he was confined in the state prison at Represa, in the County of Sacramento, and it is to the superior court of that county that he was required to present his application for such writ. *People v. Dunlop*, supra, 102 Cal.App.2d at page 318, 227 P.2d 281.

For the foregoing reasons, the appeal is dismissed.

DORAN and DRAPEAU, JJ., concur.



PEOPLE v. GOULD et al.

Cr. 4549.

District Court of Appeal, Second District,
Division 1, California.

March 26, 1951.

Hearing Ordered April 19, 1951.*

Ruth Gould and S. P. Diamond were convicted in the Superior Court of Los Angeles County, Thomas J. Cunningham, J., for violations of the Corporate Securities Act, and they appealed. The District Court of Appeal, Drapeau, J., held that contracts prepared by defendants for division of a specified percentage of the net profits from productions of television films among the participants on sale of and payment for the productions and contracts for division of profits up to a stated amount paid by parents of each child participating in such productions constituted securities within the Corporate

Securities Act requiring approval thereof by the Corporation Commissioner.

Judgments affirmed.

Doran, J., dissented.

1. Licenses $\hookrightarrow$ 18½(14)

Contracts providing for division of specified percentage of net profits from production of television films among participants and division of profits up to stated amount made by parents of each child participating constituted "securities" within Corporate Securities Act requiring approval of such securities by Corporation Commissioner, as contracts embodied profit sharing. Gen.Laws, Act 3814, §§ 1 et seq., 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Security".

2. Licenses $\hookrightarrow$ 18½(4)

A statute regulating sale of securities must be construed according to fair import of its terms with view to effect its object, as well as to promote justice, though proceeding for violation thereof is penal. Gen.Laws, Act 3814, § 1 et seq.

3. Contracts $\hookrightarrow$ 143

The substance, not form, of agreements determines real character of transactions.

4. Licenses $\hookrightarrow$ 18½(14)

Any certificate of interest in profit-sharing agreement is a "security" within Corporate Securities Act. Gen.Laws, Act 3814, §§ 1 et seq., 2.

5. Licenses $\hookrightarrow$ 18½(14)

A writing, issued by individual and creating present right to present or future participation in profits of enterprise undertaken for profit, constitutes "security" within Corporate Securities Act. Gen.Laws, Act 3814, §§ 1 et seq., 2.

6. Licenses $\hookrightarrow$ 18½(34)

Persons making and entering into agreements for sharing of profits from productions of television films without first securing permit from Corporation Commissioner to issue securities violated Corporate Securities Act, though they had legal advice that agreements did not violate law and acted in good faith, there was no fraud or failure of performance, and no televi-

* Subsequent opinion 235 P.2d 604.

sion films made under contracts had been sent out over any television station at time of trial. Gen.Laws, Act 3814, § 1 et seq.

7. Licenses ⇨18½(34)

Innocence of intent to violate Corporate Securities Act is no excuse for its violation, but one doing act prohibited thereby, with knowledge of facts bringing such act within statute, becomes amenable thereto, and burden is on him to ascertain at his peril whether act is prohibited by statute. Gen.Laws, Act 3814, § 1 et seq.

8. Licenses ⇨18½(10)

The test of whether contract is "security" within Corporate Securities Act, so as to require approval thereof by Corporation Commissioner, is whether it contemplates sharing in profits. Gen.Laws, Act 3814, §§ 1 et seq., 2.

9. Licenses ⇨18½(31)

An employee, signing contracts as his employer's agent for division of net profits from productions of television films, violated Corporate Securities Act, in absence of approval of contracts by Corporation Commissioner, as such act includes every person unlawfully aiding in issuance of any security requiring Commissioner's approval. Gen.Laws, Act 3814, § 1 et seq.

10. Licenses ⇨18½(31)

All persons, officers and agents, personally participating or aiding in any way in violation of provisions of Corporate Securities Act requiring permits from Corporation Commissioner for issuance of securities, is criminally, as well as civilly, liable for such violation. Gen.Laws, Act 3814, § 1 et seq.

—◆—
Cletus J. Hanifin, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., William E. Simpson, Dist. Atty., Robert Wheeler, Deputy Dist. Atty., Los Angeles, for respondent.

DRAPEAU, Justice.

Defendant, Ruth Gould, was a teacher of dancing and drama. She named her place of business and professional teaching,

"Studio of Theatre Arts." Her brother, the other defendant, worked for her. In parts of his time he kept books for the studio, took care of the funds, sent notices to students, signed contracts, and performed other duties. Concededly he was an employee, with no interest in the profits of the studio.

One of Miss Gould's enterprises was to teach children to take parts in television shows. Boys and girls were trained in dancing and drama. Then a certain number took part in a show, filmed to be broadcast by television, if a purchaser could be found.

Written contracts were prepared by defendants, to be signed by parents of children, providing for a specified number of lessons in dancing and drama. Most of the contracts cost parents \$150 for each child.

If defendants had stopped there, and agreed only to teach the children, no trouble would have followed. But, in addition to teaching the children, five contracts between Miss Gould and parents had clauses providing that from production of television films, "Forty percent (40%) of the net profit shall be divided equally among the participants upon the sale and payment of the production." Three additional contracts provided for a division of profits up to \$150 paid by parents for each boy and girl.

The District Attorney filed an information, charging defendants with eight counts of violation of the Corporate Securities Act, Gen.Laws, Act 3814, § 1 et seq. They were tried by the court without a jury. Defendant Miss Gould was convicted on all eight counts; her brother was convicted on four counts based upon contracts which he signed as agent for his sister. Defendants were granted probation, with suspended county jail sentences, and fined.

Defendants appeal from the judgments, and contend: First, that the brother bookkeeper was an employee only, and that although he signed some of the agreements for his sister, he was not a party to any of them; and secondly, that the contracts themselves did not constitute "securities" within the meaning of the Corporate Securities Act.

The principal question here involved is whether the contracts were such securities. All of the other facts necessary to uphold the convictions were stipulated to, or are supported by the evidence. Therefore, this phase of the case will be first considered.

[1] The Corporate Securities Act provides that a "security" is any certificate of interest or participation; any certificate of interest in a profit-sharing agreement; or beneficial interest in title to property, profits, or earnings. It further provides that every officer, agent, or employee of any company and every other person, who knowingly authorizes, directs, or aids in the issue or sale of any security contrary to the provisions of the Act is guilty of a public offense.

The language used in the agreements compels the conclusion that the contracts embody profit sharing, and thus fall within the provisions of the Corporate Securities Act. While the last three counts refer to contracts in which the amount of profit to be shared is limited to \$150, such limitation may not take such contracts out of the legislative requirement that they must first be approved by the Corporation Commissioner. Otherwise, the law could be circumvented by the simple expedient of fixing a limitation—any limitation great or small—on the amount of profits to be shared.

[2] Even though the proceeding is penal, a statute regulating the sale of securities is to be construed according to the fair import of its terms with a view to effect the object of the statute as well as to promote justice. *People v. Jackson*, 24 Cal.App.2d 182, 74 P.2d 1085.

[3] It is the substance not the form of agreements which determines the real character of the transactions. *Domestic & Foreign Pet. Co., Ltd. v. Long*, 4 Cal.2d 547, 51 P.2d 73.

[4] Any certificate of interest in a profit-sharing agreement is a security. *People v. Marr*, 46 Cal.App.2d 39, 115 P.2d 214. A contract providing for services of experts in raising chinchillas, and sharing in profits of the enterprise, is a security within the purview of the Corporate Se-

curities Act. *Hollywood State Bank v. Wilde*, 70 Cal.App.2d 103, 160 P.2d 846.

[5] If a writing issued by an individual creates a present right to a present or a future participation in the profits of an enterprise undertaken for profit it constitutes a security. *People v. McCabe*, 60 Cal. App.2d 492, 141 P.2d 54; *People v. Hoshor*, 92 Cal.App.2d 250, 206 P.2d 882.

Defendants argue that all of the contracts come within the class under consideration by our Supreme Court in *People v. Davenport*, 13 Cal.2d 681, 91 P.2d 892, and therefore, are not securities contemplated by the Corporate Securities Act.

People v. Davenport has no application to the facts in this case. In that case the defendant entered into an agreement to buy building and loan certificates, and to pay for them in twenty-five monthly installments, with interest on deferred payments. The defendant proposed to sell the certificates and use the money to purchase Mexican gold and silver bullion, from which he proposed to make a large profit. The seller of building and loan certificates was not given any interest in the defendant's business; all he was to get was the amount agreed to be paid him for his certificates, with interest.

In the *Davenport* case the Supreme Court declined to consider what the defendant intended to do with the money, and held that an agreement to pay interest does not make a transaction a security within the meaning of the Corporate Securities Act, the purchaser having the right to be paid in any event.

[6] In fairness it should be said that defendants had legal advice to the effect that their contracts did not violate the law. And there was no fraud, or failure of performance in any respect. What was done was done in good faith. Television films called "Samson's Dilemma," "The Timid Bandit," and "Ghost of a Chance" were made by the children and Miss Gould, but up to time of the trial had not been sent out over any television station. The legal offense committed by defendants was the making and entering into the agreements without first having secured a permit

to issue securities from the Commissioner of Corporations.

[7] However, innocence of any intent to violate the terms of the Corporate Securities Act is no excuse for its violation. Where the defendant does the prohibited act with a knowledge of the facts which bring his act within the provisions of the statute he becomes amenable to the law. For the effective protection of the public, the burden is placed upon the individual to ascertain at his peril whether his act is prohibited by statute. *People v. McCalla*, 63 Cal.App. 783, 220 P. 436; *People v. Arensen*, 91 Cal.App.2d 26, 204 P.2d 389, 957.

The parents of the children were to share in the profits or proceeds of the enterprise. While the children were to take parts in the television shows, neither they nor their parents had any part in the conduct of the enterprise, as was the case in *Austin v. Hallmark Oil Co.*, 21 Cal.2d 718, 134 P.2d 777.

[8] If defendants were advised, or the contracts were drawn, in the light of *People v. Davenport*, supra, the scrivener did not think the problem through, because the test is whether the security contemplates sharing in profits by the holder thereof. When this test is applied, all of the contracts in this case, including the last three, must be held to come within the Corporate Securities Act.

[9,10] With reference to defendants' first contention, that the brother was an employee only, little need be said. The statute includes every person who unlawfully aids in the issue of any security which requires the approval of the Corporation Commissioner. All persons, officers, and agents of the issuer who personally participate, or aid in any way, in violation of the permit provisions of the Corporate Securities Act are civilly liable. *Mary Pickford Co. v. Bayly Bros., Inc.*, 12 Cal.2d 501, 86 P.2d 102. The same rule applies to criminal liability.

The judgments are affirmed.

WHITE, P. J., concurs.

DORAN, J., dissents.

PEOPLE v. SYDE et al.

Cr. 4563.

District Court of Appeal, Second District,
Division 1, California.

March 26, 1951.

Rehearing Denied April 5, 1951.

Hearing Granted April 19, 1951.*

Milton Syde and Harry Syde were charged by information with criminal conspiracy to violate the Corporate Securities Act and issuance of securities without prior approval by the Corporation Commissioner. From an order of the Superior Court of Los Angeles County, Stanley N. Barnes, J., granting defendants' motion to set aside the information as to all the counts except the conspiracy charge, the People, by the District Attorney, appealed. The District Court of Appeal, Drapeau, J., held that contracts for division of profits from television productions among members of the casts and defendant producers were profit-sharing agreements within the Corporate Securities Act and hence securities required thereby to be approved by the Corporation Commissioner.

Order reversed.

Doran, J., dissented.

Licenses ⇐ 18½(14)

Contracts providing for payment from reimbursement fund of stated portions of profits from television productions to members of casts and producers, with limitation of amount payable to each member, and for reimbursement of actors by distributing up to stated percentage of gross receipts to them without limitation, were profit-sharing agreements, and hence "securities", within Corporate Securities Act, requiring approval thereof by Corporation Commissioner. Gen.Laws, Act 3814, §§ 1 et seq., 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Security".

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen., William E. Simpson, Dist. Atty., and H. L. Arterberry, Deputy Dist. Atty., Los Angeles, for appellant.

Garner, Lillie & Bryant, Los Angeles, for respondents.

* Subsequent opinion 235 P.2d 601.

DRAPEAU, Justice.

The law to be applied in this case has been stated in *People v. Gould*, Cal.App., 229 P.2d 78, this day decided by this Court.

In this case defendants were charged with criminal conspiracy to violate the Corporate Securities Act, Gen.Laws, Act 3814, § 1 et seq., and also with fifteen counts of substantive offenses of issuing securities without prior approval by the Corporation Commissioner.

The contracts in this case were similar to those in the *Gould* case.

There were two forms. One form provided that 60% of the profits was to be put into a reimbursement fund, and divided equally among the cast, and 40% of the reimbursement fund was to go to the producers; that the cast was not to exceed twenty-five in number; and that the amount of profits to be divided among the cast was limited to \$198 to each, and was to be a refund of the money paid by parents for each member of the cast. These contracts declared that the money paid was for enrollment fees, lessons, and rehearsals, and was not an investment.

The other form contained a straight-out agreement to "reimburse artist" by distributing to the artists 60% of the gross receipts, with no limitation. For this form of contract, trainees' parents paid defendants \$98.

Defendants were bound over on preliminary examination. Penal Code, sec. 872. They then appeared in Superior Court and moved to set aside the information under Section 995 of the Penal Code. The motion was denied as to the conspiracy charge, and granted as to all the other counts. The District Attorney appeals from the order.

The trial judge stated that the order was made for the reason that, in his opinion, the contracts did not come under the definition of securities in the Corporate Securities Act.

Defendants argue that the agreements contain no provision for profit or gain; that the trainees or clients of defendants were to be reimbursed only for the sums paid by them for training and rehearsals, and no more.

Neither the word "reimburse," descriptive of the distribution of profits, nor the designation of the fund from which profits were to be paid as a "reimbursement fund" changed the fact that the contracts provided for sharing in the profits of a business enterprise.

All such contracts as these, whether the profit be paid from a reimbursement fund or be designated "reimbursement," or whether there be a limitation, large or small, on the amount of the profit to be paid, come within the category of profit-sharing agreements as contemplated by the Corporate Securities Act.

Defendants, as did defendants in the *Gould* case, rely upon *People v. Davenport*, 13 Cal.2d 681, 91 P.2d 892. As in the *Gould* case, the *Davenport* case has no application to the facts in this case.

Defendants in this case rely further upon *People v. Steele*, 2 Cal.App.2d 370, 36 P.2d 40. Again the facts are readily distinguished. In the *Steele* case the agreement contemplated no return on the money invested, other than the right to use certain property, and any anticipated profits could come only from operations to be conducted by the complaining witness. Such was not the case here.

Having concluded that such contracts as these come within the purview of the Corporate Securities Act, and must be approved by the Corporation Commissioner before being offered to the public, it necessarily follows that the order in this case must be, and the same is hereby reversed.

WHITE, P. J., concurs.

DORAN, J., dissents.

PEOPLE v. MENDOZA et al.

Cr. 745.

District Court of Appeal, Fourth District,
California.

March 27, 1951.

Rehearing Denied April 6, 1951.

Hearing Denied April 26, 1951.

Manuel Mendoza was convicted in the Superior Court of Imperial County, L. J. Mouser, J., for obtaining money by fraudulent game or trick, and he and Rudolph Ponce were convicted in such court for conspiracy to obtain money by fraudulent game or trick, and they appealed. The District Court of Appeal, Mussell, J., held that the evidence supported the convictions.

Judgments affirmed.

1. Conspiracy ☞47

False pretenses ☞49(1)

Evidence supported convictions of obtaining and conspiring to obtain money by fraudulent game or trick. Pen.Code, § 332.

2. Criminal law ☞1159(4)

An appellate court should not interfere with jury's verdict and trial court's judgment thereon on ground of inherent incredibility of complaining witness' testimony, unless it is so obviously and inherently improbable as to leave appellate court no recourse, without self-stultification, except to reverse judgment.

3. Criminal law ☞1159(4)

Contradictions and inconsistencies in complaining witness' testimony or disclosure of unusual circumstances thereby do not render it so inherently improbable as to require reversal of convictions.

4. Criminal law ☞741(1), 742(1)

A witness' credibility and weight of his testimony are solely for jury or trier of facts.

5. Criminal law ☞1159(2)

An appellate court is authorized to reverse judgment of conviction on ground of inherent incredibility of testimony relied on by prosecution only where it is so inherently improbable as to amount to no evidence at all.

6. Criminal law ☞1159(4)

In prosecution for obtaining and conspiring to obtain money by fraudulent game or trick, credibility of complaining witness' testimony was question for jury, and such testimony was not inherently incredible, as required to warrant reversal, though record disclosed unusual circumstances. Pen.Code, § 332.

7. Criminal law ☞369(2), 371(12), 372(1)

Evidence of defendants' commission of other criminal acts similar to those charged is admissible, when not too remote, to prove material fact or show motive, scheme, plan or system, whether such acts were committed before or after perpetration of crime charged.

8. Criminal law ☞369(2)

In criminal case, evidence tending logically, naturally, and by reasonable inference to establish any fact material for people or to overcome any material matter sought to be proved by defense is admissible, regardless of whether it embraces commission of another crime or whether such crime is similar in kind to that charged and part of single design.

9. Criminal law ☞370, 371(3)

In prosecution of two defendants for obtaining and conspiring to obtain money by fraudulent game or trick through inducement of complaining witness to participate in poker game for ostensible purpose of obtaining money from man with whose aid defendants fraudulently obtained witness' money, another witness' testimony as to having been similarly defrauded in poker game, in which he was persuaded to participate by one defendant was admissible against such defendant as tending to prove his guilty knowledge of nature of transaction with complaining witness and criminal intent in participating therein. Pen.Code, § 332.

10. Criminal law ☞783(1)

In prosecution of two defendants for obtaining and conspiring to obtain money by fraudulent game or trick, instructions to jury that testimony as to previous similar transaction between witness and one de-

fendant might be considered only as to such defendant on question whether it showed knowledge as part of his criminal intent, in absence of good faith on his part in connection with offense charged, were not erroneous. Pen.Code, § 332.

11. Criminal law ☞878(4)

In prosecution of two defendants for obtaining and conspiring to obtain money by fraudulent game or trick, jury's verdicts finding one defendant guilty of both offenses and other defendant guilty of conspiracy, but not guilty of overt act charged, were not inconsistent as finding that overt act was done pursuant to conspiracy, but that substantive crime was not committed as result thereof. Pen.Code, § 332.

C. W. Dickenson, El Centro and Wm. J. Clark, Alhambra, for appellant Manuel Mendoza.

C. W. Dickenson, El Centro, for appellant Rudolph Ponce.

Edmund G. Brown, Atty. Gen. and Frank Richards, Deputy Atty. Gen., Don C. Bitler, Dist. Atty. of Imperial County, and D. M. McGahey, Deputy Dist. Atty., El Centro, for respondent.

MUSSELL, Justice.

Prosecution for obtaining money by fraudulent game or trick and conspiracy.

Defendants were charged in count two of an information with obtaining money by fraudulent game or trick in violation of section 332 of the Penal Code and in count four with conspiracy to obtain money by fraudulent game or trick in violation of said section.

At the second jury trial of the case, defendant Mendoza was found guilty on both counts and defendant Ponce was found guilty on count four and not guilty on count two. After the denial of motions for a new trial, the defendants were sentenced to imprisonment in the State prison and this appeal followed.

The judgments are attacked on the following grounds: (1) Insufficiency of the evidence; (2) The testimony of the complaining witness is inherently incredible;

(3) Error in the reception of evidence; (4) Error in instructions given; and (5) Inconsistency of the verdicts.

Facts

The complaining witness, Manuel Valesquez is a farmer (of Mexican descent) in Imperial county. On August 3, 1949, the defendants, who are Philipinos, drove out to Valesquez' farm and asked him to gamble with a Chinaman who was "wasting a lot of money on a white girl." They suggested that they had just as well get the money but that they couldn't do it themselves as they were Orientals and the Chinaman wouldn't play with Orientals. On the following day Valesquez went to Calexico and was approached by the defendants, who told him to get in their car; that they were "going to have a game" and "get" the Chinaman. They all drove to the De Anza Hotel in Calexico, where Mendoza registered for a room. They then went up to the room and shortly thereafter Mendoza went out to contact Sam Kee, the assertedly "rich Chinaman" of the case. While Mendoza was away, defendant Ponce stated to Valesquez "This Chinaman has got a lot of money and you can get him for \$50,000 or \$100,000; that's nothing for him; that's nothing, but don't be afraid. * * * Nothing is going to happen to you. * * * There's nothing, nothing that you could lose." Ponce described to Valesquez a set of signals that he, Ponce, would use to indicate the cards held by the Chinaman in the proposed game of "draw poker." In a few moments Mendoza returned with Kee and gave Valesquez \$100 with which to gamble.

Valesquez testified that he bought from Mendoza \$100 worth of chips, with the money Mendoza had previously given him and that Kee gave Ponce \$150 for the purchase of chips; that Kee and Ponce were seated side by side on a bed directly across a table from Valesquez; that he and Ponce started playing and that Ponce lost not only the original \$150 worth of chips, but also an additional \$500 in chips which Kee bought from Mendoza on credit for Ponce; that after Ponce lost the \$500 worth of chips purchased by Kee on credit, Kee

asked Mendoza, who was the banker for the game, for an additional \$500 in chips for Ponce. These were furnished and after about one hand, Ponce traded places on the bed with Kee and Kee started playing with Valesquez in place of Ponce; that after a couple of hands, Kee took a check from an envelope and handed it to Mendoza; that Valesquez saw that the check was made out to Kee and was for \$10,000; that Mendoza refused the check and told Kee to go out and get the cash; that they were playing a hand at that time and Ponce had been giving the previously arranged signals indicating the cards held by Kee; that after both he and Kee had drawn cards, he, Valesquez, had a "full hand" (three tens and a pair); that at this point Mendoza asked if Kee could go out and get his check cashed; that Valesquez agreed; that Mendoza and Kee left; that Kee left his cards on the table and during his absence, Ponce showed them to Valesquez, who observed that Kee's hand contained three nines; that after a few minutes, Mendoza and Kee returned, Mendoza carrying a paper bag from which he took some bundles that looked like money bound with \$500 bank wrappers; that Kee then ordered chips for all the money above the \$1,000 owing by him for chips previously furnished to Ponce; that Kee "tapped" (called) and raised Valesquez \$5,000; that Mendoza then told Valesquez "he needed \$5,000; that he could get some from the bank; that they needed cash and that a check would not do"; that at Mendoza's request, Kee agreed to let Valesquez go after some money; that Kee gave Mendoza his cards and Valesquez kept his own hand; that Mendoza drove Valesquez to the bank and told him to write a check for \$7,000 rather than \$5,000; that Valesquez walked out with \$7,000 (mostly in small bills) in his hand; that Mendoza then went to a safeway store, got a paper bag and had Valesquez put the money in it; that they then returned to the hotel room, where Mendoza gave him chips and pennies, used in lieu of chips, for the entire \$7,000; that Mendoza then asked if Valesquez was going to bet the \$5,000 (to call Kee's bet on the partially played hand); that Valesquez

bet on and won that hand; that immediately thereafter Kee asked for and obtained another deck of cards, which he shuffled and dealt and which were not "cut"; that Kee "bid" (bet); that Mendoza "told" Valesquez "all of it" and then asked Valesquez if he would bet; that Valesquez said "yes" and Mendoza put all of Valesquez' pennies and chips in the "pot"; that Mendoza told him to show his cards then, "told him he lost" and that Kee immediately got up, went to the end of the bed where the paper bags were—apparently picked up the money and started to leave; that Mendoza told him to shake hands with Valesquez; that he did so and left immediately; that he could not recall how many chips Kee put in for the last hand; that he, Valesquez, had all the chips at the time the next to the last hand was partially played; that then Kee bought \$9,000 in chips in addition to repaying the \$1,000 owed for chips previously bought on credit; that Kee had no conversation with Mendoza concerning cashing in the chips at the close of the game.

The testimony of the complaining witness was in many particulars corroborated by the defendants who testified at the trial. Both stated that they met Valesquez on the day of the game; that Mendoza engaged the hotel room and furnished the cards and chips; that Mendoza left the room to contact Sam Kee, the "rich Chinaman" and returned a few minutes later with him; that a poker game was engaged in with Mendoza as banker was conceded and it was also conceded that by reason thereof, the complaining witness paid out \$7,000. The details of the play, as related by Mendoza, who admitted that he and Kee were "gambling associates", differed from those testified to by Valesquez. Mendoza testified that Valesquez and Kee commenced the game and that Ponce did not play; that Kee borrowed the \$500 and in about thirty minutes wanted to borrow a like amount; that Valesquez insisted on cash and he, Mendoza, took Kee to a bank in Mexicali; that he let Kee drive his car over the international border; that Kee returned in about fifteen minutes carrying a paper bag; that they then returned to the

hotel room, where, while Kee was in the bathroom, Valesquez proposed that Mendoza should signal what cards Kee was holding and that they would split the winnings; that Kee ordered and bought \$3,500 worth of chips, paying for them in American money from a paper bag; that he took Valesquez to a bank where Valesquez cashed a check for \$7,000; that he obtained a paper bag in which Valesquez placed this money and they returned to the hotel; that Valesquez bought \$7,000 worth of chips; that Kee and Valesquez played for about an hour during which Mendoza gave the prearranged signals and Valesquez won all of Kee's chips; that he then gave Kee \$2,000 in chips against the Mexican money (supposed to be in the paper bag and which was never counted); that he gave Kee the additional chips because "Kee was losing and this was a 'sociable game'." That the play proceeded until Valesquez was down to about \$600, which he lost on the last hand.

Ponce, who was in the hotel room during the entire time of the card game, which he stated continued from 11:00 A.M. to approximately 3:00 o'clock in the afternoon, testified that he was reading the sports news in the Los Angeles Times; that he did not engage in the game; that all he was doing there was "waiting for Manuel until they got through."

Mendoza and Ponce were arrested a few days after the game. At the time, Mendoza was driving and Ponce was riding in a Buick automobile, in the glove compartment of which, in an envelope with some personal papers belonging to Mendoza, was what purported to be a cashier's check drawn on the First National Bank of San Francisco, dated May 10, 1949, payable to the order of Sam Kee, in the sum of \$10,000. This check bears no endorsement and it was stipulated by counsel for defendant that there has been no such bank during at least the last fifteen years. Mendoza testified that he had not seen the check from the time Kee allegedly left him to go to the bank in Mexicali until it was shown to him at the sheriff's office following his arrest.

Mendoza, when first questioned by the officers, denied having received any money

from the game. Later he stated this his "cut" out of it was \$900. At the trial he testified that Kee gave him \$200 as a "tip" for his services.

Defendant Ponce, when first questioned by the officers, stated that he had not been involved in the game. He later admitted that he had been present but stated that he did not play. He also admitted that he had been previously convicted of a felony (grand theft).

Evidence was introduced by the prosecution of a similar alleged poker game previously engaged in by defendant Ponce. That evidence was admitted as against Ponce only and for a limited purpose. It consisted of the testimony of one Basilio Gacer who stated that in 1943, Ponce persuaded him to participate in a purported poker game to win money by means of prearranged signals from a supposedly rich Chinaman; that Ponce gave him money with which to start the play; that he, Gacer, started playing against Ponce with the money given him and Ponce played with money furnished by Wong (the Chinaman); that Gacer won at first and Wong took Ponce's place; that Ponce gave signals indicating the cards held by Wong; that Wong at first let Gacer win approximately \$1,000, then when Gacer had all his money in the pot, acting upon Ponce's signal, Wong raised him \$1,000 in the middle of a hand; that Ponce persuaded Gacer to go to the bank and draw out \$580; that Ponce took both Wong's cards and Gacer's with him when he took Gacer to the bank; that Ponce showed Gacer the cards and Gacer's was the better hand; that Gacer won that hand and wanted to quit but Ponce persuaded him to play one more hand; that Ponce signaled him to bet everything he had; that he did and that Wong won and the game was concluded.

[1] Defendants first argue that the evidence is insufficient to support the judgment. The statute applicable and upon which the prosecution is based, Penal Code section 332, is quite broad in its terms. It provides in part: "Every person who by the game of 'three-card monte,' so-called, or any other game, device * * *, trick,

or other means whatever, by use of cards * * * or while betting on sides or hands of any such play or game, fraudulently obtains from another person money or property of any description, shall be punished as in case of larceny of property of like value."

Viewing the entire record, it is apparent that the defendants conspired to obtain money from the complaining witness by fraudulent game, device or other means within the meaning of the statute. There is substantial evidence that the complaining witness was the victim of a "bunco game" conducted by the defendants; that he was induced to believe that money could be obtained from a supposedly "rich Chinaman" by means of a card game; that the defendants induced Valesquez to participate in such a game ostensibly for that purpose, when in fact the real purpose and scheme was to fraudulently obtain Valesquez' money; that this was accomplished with the aid of Kee, who agreed to divide the spoils with them. Valesquez was permitted to win steadily until the last hand of the game, when his money was quickly taken from him. The purported cashier's check for \$10,000, exhibited and used by Kee, was never cashed and was found in the car in which the defendants were riding at the time of their arrest. Mendoza admitted to the officers that he contacted Kee after the game and obtained a \$900 "cut" from him and at the trial testified that Kee gave him \$200 as a "tip" because Mendoza made arrangements for the game and was banker. The purported game of draw poker was not an essential part of the scheme. It was merely part of the stage setting and afforded an opportunity to build up Valesquez' confidence. Ponce testified in this connection as follows: "Allright, the Chinaman come. Well, I know we are there to play cards. Of course, I don't know what kind of game we are going to play, see."

[2-5] Defendants next argue that the testimony of Valesquez is so inherently incredible as to be unworthy of belief. The rules governing the power of an appellate court to review a judgment by reason of

the inherent incredibility of the prosecution's evidence are as set forth in *People v. Moreno*, 26 Cal.App.2d 334, 336, 79 P.2d 390, 392, as follows: "Unless the appellate court can say that the testimony is so obviously and inherently improbable as to leave the court no recourse without self-stultification, except to reverse the judgment, the reviewing court should not interfere with the verdict and the judgment of the trial court upon that ground. *People v. Antunez*, 28 Cal.App. 740, 153 P. 963; *People v. Becker*, 140 Cal.App. 162, 35 P. 2d 196. Such improbability must 'plainly appear before the reviewing court should assume the functions of the trial jury.' *People v. Antunez*, supra. 'Contradictions and inconsistencies in the testimony of a witness alone will not constitute inherent improbability' (*People v. Amadio*, 25 Cal. App. 729, 145 P. 151, 152), and 'it is not sufficient that the testimony may disclose circumstances which are unusual' (*People v. Collier*, 111 Cal.App. 215, 226, 295 P. 898, 902)."

And in *People v. Phillips*, 76 Cal.App.2d 515, 520, 173 P.2d 392, 395, in the following language: "The credibility of a witness and the weight to be given to his testimony are, of course, issues solely for the jury or trier of facts. *People v. Marble*, 8 Cal.2d 139, 141, 64 P.2d 135; *People v. Voice*, 68 Cal.App.2d 610, 614, 157 P.2d 436; *People v. Santora*, 51 Cal.App.2d 707, 711 and 712, 125 P.2d 606. It is only where the testimony relied upon by the prosecution is so inherently improbable as to amount to no evidence at all that an appellate court is authorized to reverse a judgment (*People v. Stephens*, 66 Cal.App.2d 755, 757, 152 P.2d 1019; *People v. Moreno* 26 Cal.App.2d 334, 336, 79 P.2d 390), and contradictions or inconsistencies in the testimony of a witness do not render it inherently improbable within this rule. *People v. Carlisle*, 66 Cal.App.2d 874, 876, 153 P.2d 401; *People v. Moreno*, supra."

[6] In the instant case the credibility to be given to the testimony of Valesquez was a matter for the determination of the jury. It was supported in many respects by the testimony of the defendants them-

selves and by other testimony in the record. While the record discloses circumstances which are unusual, we are not able to say as a matter of law that the testimony of the complaining witness, under the circumstances disclosed, was inherently incredible.

[7] It is next contended that the court erred in receiving the testimony of the witness, Basilio Gacer, over the objections of the defendants. This evidence was admitted for a limited purpose and before the witness testified, the court very carefully and emphatically instructed the jury that the anticipated testimony was being admitted in a very limited way only; that it was not to be considered in connection with defendant Mendoza; that it might be considered by the jury only as to defendant Ponce, stating, "It may be considered by you as to whether or not it shows knowledge as a part of criminal intent in absence of good faith on the part of Ponce in connection with the offense with which he is charged and with which he is on trial at this time and for that purpose only." At the close of the trial, before the case was sent to the jury, the judge again cautioned and instructed the jury in similar language. This court had occasion to consider the question of the admissibility of evidence of similar offense in *People v. Darnell*, 97 Cal. App.2d 630, and there held, at page 634, 218 P.2d 172, that evidence of other acts of a similar nature may be admitted, when not too remote, to prove a material fact or where they tend to show motive, scheme, plan or system, citing *People v. Henderson*, 79 Cal.App.2d 94, 119, 179 P.2d 406, and that such similar acts may be either before or after the perpetration of the crime charged. Citing *People v. Weir*, 30 Cal. App. 766, 767, 159 P. 442; *People v. Talbot*, 220 Cal. 3, 17, 18, 28 P.2d 1057.

[8] As was said in *People v. Peete*, 28 Cal.2d 306, 315, 169 P.2d 924, 929: "The general tests of the admissibility of evidence in a criminal case are: * * * does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any

material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not." (Citing many cases.)

[9] The evidence produced by Gacer definitely tended to prove Ponce's guilty knowledge as to the nature of the transaction taking place and his criminal intent in participating therein. Ponce's defense was that he was present with innocent intentions; that he had no knowledge of any conspiracy between Kee, Mendoza and himself and that all the acts done were completely innocent of any fraudulent intentions toward Valesquez. Ponce did not deny that he had been present when the game was played nor that he was with Mendoza when they visited Valesquez at his ranch the day before the game and did not deny that a game of purported draw poker was played nor that Mendoza, he and Kee were all present at the time, and there was no denial by him or Mendoza that Valesquez lost his \$7,000.

We find no error in the court's ruling admitting the testimony of Gacer under the circumstances.

[10] It is next claimed that the court erred in giving certain instructions. These instructions related to the purpose for which the testimony of Gracer was admitted, and in view of what we have said relating to the admissibility of the testimony, we see no error in the criticized instructions in that respect.

[11] Finally, it is contended that the verdicts are inconsistent and repugnant to each other. This contention is without merit. The argument is that the jury in finding Ponce not guilty of violation of section 332 of the Penal Code was, in effect, a finding that an overt act had been done pursuant to the conspiracy but that the substantive crime had not been committed as a result thereof. However, the jury may have concluded that while Ponce engaged in the conspiracy and committed the overt acts thereof that he did not actually obtain

a "cut" from the Chinaman and that Mendoza did in fact obtain \$900 from Kee. Under these circumstances, we find no inconsistencies in the verdicts.

Judgments and orders affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



103 Cal.App.2d 187

GALICH v. BRKICH et al.

Civ. 17842.

District Court of Appeal, Second District,
Division 1, California.

March 29, 1951.

Hearing Denied May 24, 1951.

John Galich brought suit against Martin Brkich and the Martin Construction Co., Inc., a corporation, for dissolution of alleged partnership or joint adventure. The Superior Court of Los Angeles County, Leroy Dawson, J., rendered an order appointing a receiver, and the defendants appealed. The District Court of Appeal, Doran, J., held that there was no abuse in appointment of receiver.

Order affirmed.

1. Joint adventures ⇐8

Partnership ⇐325(1)

Where evidence in suit for dissolution of alleged partnership or joint adventure disclosed a conflict as to certain phases of the transaction, and it was conceded that realty and personalty had been purchased with partnership or joint adventure funds, and considerable confusion existed in reference to accounts because there had been a complete commingling of individual funds and business funds, trial court did not abuse its discretion in appointment of a receiver. Code Civ.Proc. § 564, subd. 1.

2. Appeal and error ⇐955

Receivers ⇐8

The sound discretion of the trial court in passing on motion for appointment of a receiver must be exercised in light of all facts, and decision rendered should not be

interfered with on appeal except on clear showing of some abuse of that discretion. Code Civ.Proc. § 564, subd. 1.

3. Licenses ⇐39.44

Where alleged partnership or joint adventure was created to do contracting business, but no license was obtained as required by the Business and Professions Code because of corporation of which one of the members of the partnership or joint adventure was president and sole stockholder with the exception of one share, had such a license, it was no defense to suit by the other member of the partnership or joint adventure for dissolution thereof that it had no license and that contractual relation was therefore allegedly illegal. Business and Professions Code, § 7029.

Maurice Rose, and Ralph Rosenstock, Los Angeles (Maurice Rose, Los Angeles, of counsel), for appellant.

Stephen Monteleone and Wellborn, Barrett & Rodi, all of Los Angeles (Owen F. Goodman, Los Angeles, of counsel), for respondent.

DORAN, Justice.

The complaint herein prays for a dissolution and termination of an alleged partnership or joint adventure between the plaintiff Galich and the defendant Martin Brkich. The defendant Martin Construction Co., Inc. holding a contractor's license under which activities were carried on, is alleged to be the *alter ego* of Martin Brkich, its president.

The receivership in question was granted after a partial hearing of the case, and after informal findings of fact to the effect that a partnership or joint adventure existed, that Brkich had breached the fiduciary relation and that the relationship between the parties should be dissolved. Plaintiff's motion for appointment of a receiver was submitted to the trial court on September 12, 1949, and the order for such receivership entered on November 28, 1949. Prior to the receivership there had been an injunction pendente lite and a reference for an accounting.

It is conceded that the relationship between the parties commenced on July 1, 1941 when an oral agreement was entered into "to thereafter conduct a contracting business as co-partners". At that time the Martin Construction Co. Ltd., of which Martin Brkich was president and owner of 99 of the 100 shares of stock, was interested in a pending contract for construction of sewers in Riverside Drive. There is evidence that neither party had much cash; respondent Galich, however, owned valuable property which would serve as a basis for credit. Galich contributed \$134 or \$200; Brkich's contribution was \$150 in tools and \$100 in cash. Profits and losses were to be equally shared. Each party was to draw \$50 per week as wages.

Either in its original form, or pursuant to additional written agreements as claimed by appellants, the joint adventure continued at least until January 4, 1948. During this period various construction contracts were handled. Both personal and real property were purchased with joint adventure funds, some property being held in the individual names, some in the corporate name, and some in the names of Galich and the corporation.

Under date of April 28, 1945, Brkich and Galich executed a written agreement which recites that the Martin Construction Co., Inc. has entered into a contract for construction of a sanitary sewer job in connection with a U. S. Navy project known as Homoja Housing Facilities at San Pedro, California. This agreement states that Galich "will advance to the Martin Construction Co., Inc." the sum of \$2,000, "to be used for the payment of labor and/or materials and incidentals in direct connection with said contract", which advance was evidenced by a note. "It is further agreed that the Martin Construction Company, Inc. and/or Martin Brkich shall share equally with John Galich any profits derived from this contract and likewise share equally any loss which may be sustained on said contract".

A further written agreement was executed on July 5, 1946, providing for an

equal division of profits and losses, and stipulating that "when it becomes necessary both Parties will contribute to the business everything they own." It is also agreed "that all of the machinery, yard, and the office will be divided equally * * * in the event of a dissolution of this agreement".

According to appellant Brkich's testimony, a conversation occurred on January 5, 1948 in which respondent Galich accused Brkich of using "\$60,000 out of my money" to buy real estate, demanded half of such sum and stated, "I am through. We just going to finish up the job that we have on Escalon and I don't want any more". The trial court, however, was convinced "that there was no dissolution on January the 5th of 1948". Plaintiff's complaint alleged that the partnership or joint adventure had "realized profits in excess of \$150,000.00" which had been wrongfully withdrawn by the appellant Brkich.

The points raised in appellants' brief have been reduced to two general propositions, namely: "(a) The trial court abused its discretion in appointing a receiver and (b) the partnership was illegal and, for that reason, no relief should be granted Respondents". The illegality feature is predicated upon the proposition that "Since no Contractor's license was ever issued to any partnership or joint adventure or which either the Respondent, or the Appellant Martin Brkich, or the corporate Appellant, was a member, it was unlawful under section 7029 of the Business and Professions Code for said individuals or corporation to bid or perform the construction work in question as a partnership or joint adventure either under the name of the corporate Appellant or under any other name".

Appellants also argue that a receiver should not be appointed "where ample protection * * * can be insured by an available remedy less drastic and harsh", in this case a surety bond offered by the appellants. It is insisted that "The authority of the Court to appoint a receiver must be found in section 564, subdivision 1 of the Code of Civil Procedure"; that the statute

"makes both the danger to the funds and property and applicant's probable interest therein as conditions precedent", and that neither fact was shown to exist.

The respondent's brief denies any abuse of discretion in the appointment of a receiver, and calls attention to the fact that the appointment was not made *ex parte* but "only after a trial of four days duration during which a searching examination had been made of Brkich's management", and only after it was indicated "that the injunction and appointment of a referee were not serving the purpose anticipated".

Although the record discloses a conflict of evidence as to certain phases of the transaction, it is conceded that real and personal property had been purchased with joint adventure funds. That considerable confusion existed in reference to the accounts of the joint enterprise, is evident from the trial court's statement: "There has been such a complete commingling of the individual funds and the business funds * * * that I don't know how you are going to find out anything without having all the latitude in the world."

[1,2] In view of the situation disclosed by the record it cannot be said that there has been a manifest abuse of the trial court's discretion in the appointment of a receiver. Various cases have been cited by appellant in some of which the giving of a surety bond has been deemed adequate security to protect the interests of the complaining party. None of these cases, however, attempt to lay down a rule that, by posting a bond, a defendant may thereby deprive a plaintiff of the right to a receiver. The sound discretion of the trial court must be exercised in the light of all the facts, and the decision rendered should not be interfered with on appeal except upon a clear showing of some abuse of that discretion.

[3] Appellants' brief makes much of the fact that no contractor's license was ever procured by the joint adventure and alleges complete illegality of the contractual relation because of that fact. As hereinbefore indicated the joint adventure had operated under the name and license of

the Martin Construction Co., Inc. There is evidence that at the inception of the contract Brkich took Galich to the Contractors' State License Board, and according to Galich, "Well, we go in—we go into the State building to get a license. I told him 'How we going to work without license?' He (Brkich) say he has got a license, * * * and he going first in the window and talked for that guy. He told me I can't get no license now, 'lets go in the other room as we sign up.'" It appears that Galich at Brkich's direction then signed an application for renewal of the corporate appellant's license, "He (Brkich) say, 'I am President, you Vice President'."

A somewhat similar situation occurred in *Norwood v. Judd*, 93 Cal.App.2d 276, 209 P.2d 24, 31, where a partner was permitted to maintain an action for dissolution and accounting notwithstanding the fact that only one of the partners had taken out a license. The court there said that the rule that courts will not lend aid to the enforcement of an illegal agreement should not be "blindly" extended "to every case where illegality appears somewhere in the transaction". The court further observed that "licensing statutes are passed primarily for the protection and safety of the public. They are not passed for the benefit of a greedy partner who seeks to keep for himself all of the fruits of the partnership enterprise to the exclusion of another partner entitled to share therein".

The contract in question was not *per se* contrary to any statute; public welfare and safety were not threatened, and public policy would not be protected or served by denying one partner relief against the other. Appellants' endeavor to distinguish the *Norwood* case from that here involved is not persuasive, for, while the facts are not identical, the principle announced is clearly applicable to the instant controversy. Other cases cited, such as *Young v. Hampton*, 1950, Cal.App., 221 P.2d 195, have nothing in common with the facts here involved and do not support appellants' contentions.

Due consideration of the various points raised in appellants' briefs leads but to the conclusion that the same are untenable.

The necessity of receivership was a matter within the sound discretion of the trial court and no interference with the exercise of such discretion has been made apparent.

The order appealed from is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.



103 Cal.App.2d 258

REINA v. ERASSARRET, Ex'x et al.
Civ. 4081.

District Court of Appeal, Fourth District,
California.

April 3, 1951.

Frank Reina brought action against Rose Erassarret, executrix of the will of Lizzie Reina, deceased, and others to set aside a gift deed and to quiet title to the realty in the plaintiff, and the defendants filed a cross-complaint seeking reformation of deed. The Superior Court of Kern County, W. L. Bradshaw, J., rendered a judgment, and plaintiff and defendants appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained finding that there was no fraud practiced by defendants in inducing deed, and that they were entitled to have deed reformed to correct mistake therein.

Judgment reversed in part and affirmed in part.

1. Deeds ⇨196(2)

In action by father against daughter to set aside a gift deed to the daughters by deceased mother of her interest in realty which had been owned by father and mother as joint tenants, and to quiet title, on ground that daughters had induced execution of deed of gift by false representations, evidence sustained finding that daughters made no false representations, and that deed would not be set aside.

2. Appeal and error ⇨1054(1)

Where part of letter was material, and there was no jury, any possible error in admission of letter on ground that it con-

tained an offer of compromise, was not prejudicial error.

3. Appeal and error ⇨1058(1)

Exclusion of certain evidence was not reversible error, where there was other evidence to the same effect admitted.

4. Reformation of instruments ⇨26

Where mother and father owned realty as joint tenants, and mother was afraid that after her death father would remarry and five children would never receive any part of the realty, and mother conveyed her interest to the five children, but description in deed of gift was erroneous, and thereafter father induced three of the children to reconvey to mother, and mother died and father remarried, the two children who refused to reconvey were entitled to have the deed reformed, though they had never paid any consideration for deed.

West, Vizzard, Howden & Baker, Bakersfield, for appellant and cross-respondent.

Johnston, Baker & Palmer, Bakersfield, for respondents and cross-appellants.

BARNARD, Presiding Justice.

This is an action to set aside a gift deed and to quiet title to the property in the plaintiff.

The plaintiff and his wife, Lizzie Reina, owned certain properties as joint tenants. They were the parents of Samuel Reina, Josephine Reina, Rose Erassarret, Frances Argain and John L. Reina. On August 27, 1946, Lizzie Reina executed a deed of gift of her interest in these properties to these five children, and also made a will leaving to them any interest she might have in any and all property, including community property. The deed was promptly recorded. On September 30, 1946, Samuel Reina quitclaimed to his mother the property described in this deed of gift and on October 11, 1946, John L. Reina and Josephine Reina executed similar quitclaim deeds. On the same dates the plaintiff caused these quitclaim deeds to be recorded. On October 17, 1946, an action was filed in the name of Lizzie Reina against Rose Erassarret

and Frances Argain seeking to recover the title conveyed to them by the gift deed, but Mrs. Reina did not swear to the complaint. On October 22, 1946, Rose Erassarret and Frances Argain conveyed to the law firm of Harvey, Johnston, Baker & Palmer a portion of their interest in the property described in the gift deed.

Lizzie Reina died testate on November 22, 1946, and on January 28, 1947, letters testamentary were issued to Rose Erassarret, who has since acted as executrix. On February 24, 1947, on stipulation of the attorneys for the plaintiff Frank Reina and for the executrix, the action brought by Lizzie Reina on October 17, 1946, was dismissed.

On February 7, 1947, Frank Reina brought this action. The complaint alleged that the plaintiff and Lizzie Reina were the owners in joint tenancy of certain described properties, nearly the same as those described in the gift deed; that Rose Erassarret and Frances Argain had induced their mother to execute the gift deed by falsely and fraudulently representing to her that it did not convey any present interest in the properties but would take effect only after her death; that Lizzie Reina was then sick and feeble in mind and body, unable to read, and did not know the contents of the gift deed; that Rose Erassarret and Frances Argain made the same false representations to Josephine Reina and John L. Reina, as a result of which those defendants encouraged the mother to sign the gift deed; that after the gift deed was recorded Lizzie Reina discovered its import and demanded a reconveyance from the children; that Samuel, Josephine and John L. Reina executed quitclaim deeds back to her; and that Rose Erassarret and Frances Argain refused to do so. The plaintiff prayed for a cancellation of the gift deed and for a judgment declaring that the plaintiff and Lizzie Reina were the owners of these lands in joint tenancy at the time of her death, that her interest was terminated by her death, and that the plaintiff is the owner of all of the properties.

Samuel, Josephine and John L. Reina defaulted. The other defendants answered and filed a cross-complaint. At the first

trial the court entered, in effect, a judgment on the pleadings in favor of the defendants. On appeal that judgment was reversed, this court holding that the plaintiff had such an interest in the subject-matter as would entitle him to maintain the action. *Reina v. Erassarret*, 90 Cal.App.2d 418, 203 P.2d 72, 7 A.L.R.2d 1309.

At the trial which followed the plaintiff abandoned any issue of mental incompetency on the part of Mrs. Reina. The court found in all respects in favor of the defendants finding, among other things, that on August 27, 1946, Lizzie Reina was in full possession of her faculties and fully competent to transact business, to make the deed of gift and to execute a will; that acting through Rose Erassarret she procured legal counsel and caused the gift deed to be prepared; that by this deed she intended to convey to her children all properties in which she had any interest, whether joint tenancy, community or otherwise; that through inadvertence and mistake certain properties were not included in the gift deed; that neither Rose Erassarret nor Frances Argain made any of the misrepresentations alleged in the complaint; that the deed of gift was read to Lizzie Reina; that when she signed and delivered it she knew its contents, meaning and effect; that she intended then and there to divest herself of all present right and interest in the properties; that she was not induced to execute the deed of gift by any false representations or importunities of her daughters; that Lizzie Reina caused the deed of gift to be recorded; that Samuel, Josephine and John L. Reina delivered quitclaim deeds to Lizzie Reina during her lifetime; that Lizzie Reina thereafter and her estate since her death has been the owner of the realty covered by these quitclaim deeds; that Lizzie Reina never demanded any reconveyance from Rose Erassarret and Frances Argain; that Frank Reina, acting for Lizzie Reina, did request such a reconveyance from Samuel, Josephine and John L. Reina; that the plaintiff, during the lifetime of Lizzie Reina, received for her the deeds of reconveyance from Samuel, Josephine and John L. Reina, caused the same to be recorded and thereby accepted the

same; that the plaintiff is estopped from asserting that the estate of Lizzie Reina should be deprived of the property thus deeded to Lizzie Reina by Samuel, Josephine and John L. Reina, and is estopped from maintaining that Lizzie Reina was at the time of her death a joint tenant of the plaintiff; that the will of Lizzie Reina was admitted to probate and no appeal has been taken from that order; that the estate of Lizzie Reina is the owner of an undivided 30% interest in the real property in question, being the portion reconveyed to Lizzie Reina by John L. Reina, Josephine and Samuel Reina; and that Rose Erassarret, Frances Argain and Harvey, Johnston, Baker & Palmer are the owners of a 20% interest in the said lands. Judgment was entered against the plaintiff, but only partly in favor of the cross-complainants. Both sides have appealed.

The plaintiff has appealed from the judgment rendered against him on his complaint. He first contends that the evidence is not sufficient to support a number of the findings. Relying on portions of the evidence and suggested inferences therefrom, he contends that the evidence shows that when the gift deed was executed Mrs. Reina was old and infirm, and unable to read or write; that she did not have independent advice; that a fiduciary relation existed between her and the grantees; that the grantees were active in procuring the instrument in question; that the execution of the gift was concealed from the plaintiff; and that there was no consideration for the gift deed. It is further argued that the burden of proving the absence of fraud or undue influence was on the defendants.

Without setting forth all of the evidence it appears that Mrs. Reina was in ill health when the deed was executed, that she realized she had not long to live, that she was unable to read or write other than to sign her name, and that she had had considerable business experience. Shortly before the deed was executed she was troubled because her husband was spending so much time away from home assisting "sisters" of his church; she told her husband that she was going to give her property to her children, since he would remarry when she

died and "my children won't get a thing"; and she told two friends that she was going to "get some papers signed" at once as she wanted her children to have her property. Shortly before August 27, 1946, she told her daughters Josephine and Rose that she wanted to do this before her husband returned from an extended absence. At her request and in her presence one of them called a lawyer, and told him what was wanted. The lawyer asked whether it was joint tenancy or community property. The daughter inquired of the mother who said she thought it was joint tenancy but there might be some community property. The lawyer said it would be advisable to make a deed, and also a will. Mrs. Reina did not have the description of the properties and the lawyer advised that these could be obtained from the tax collectors where the properties were situated. At Mrs. Reina's request the daughters obtained the descriptions and Rose and John went to the lawyer's office. The deed and will were prepared and Rose took them home. The father was there, and the mother told Rose to put the papers away, and that she would sign them as soon as he went away again. A few days later, in the father's absence, Mrs. Reina said she wanted to execute the papers. Josephine read both papers to her mother, and Mrs. Reina said "That is good." She then directed her daughters to go and get a Mr. Boydston, a real estate agent with whom the mother had had dealings, and a Mrs. Manning. Mr. Boydston came, bringing his partner who was a notary, Mrs. Manning was also brought. The notary read the deed to Mrs. Reina before it was signed and explained its meaning to her. Mr. Boydston told Mrs. Reina just before she signed the deed that if she signed it the children could charge her rent or put her out of the house if they wanted to. Mrs. Reina replied "This is just the way I want it." The will was also read to and signed by Mrs. Reina at the same time, Mrs. Manning signing as one of the witnesses. While Rose Erassarret and Frances Argain were present, neither took part in the proceedings there.

There is no evidence that Rose Erassarret or Frances Argain exerted any pres-

sure at all upon their mother, or that either did anything in connection with the execution of these instruments except at the suggestion or direction of the mother. Most of the material facts, as found by the court, were testified to by several witnesses and their testimony, which was accepted by the court, clearly shows that Mrs. Reina knew exactly what she was doing on this occasion, that she fully understood the effect of the deed of gift, and that she fully intended at that time to make a present gift to her children of such interest as she had in these properties. Moreover, a few days after the deed of gift was executed and recorded the plaintiff asked his wife to sign a deed to one of the properties, which he had arranged to sell. She told him that she could not sign it because she had conveyed her interest to the children. The evidence also justifies the inference that the plaintiff was the prime mover in thereafter obtaining quitclaim deeds from three of the children, and in bringing suit against the other two.

[1] So far as can be told from a reading of the record, it would be difficult to see how the court could have found to the contrary on this main issue. The evidence amply supports the material findings in this connection, and is sufficient regardless of where the burden of proof lay.

[2, 3] The only other point raised by the plaintiff is that the court erred in the admission and rejection of evidence. The first objection relates to a letter written to Rose Erassarret on September 30, 1946, by the lawyer who drew the gift deed. It is argued that this was an offer of compromise and was inadmissible. This letter did not refer to a settlement with the plaintiff. Strictly speaking, it was not an offer of compromise although in connection with correcting the error in description in the deed it referred to a suggestion made by another attorney that a new deed be given, reserving a life estate to the mother. Part of the letter was material, there was no jury, and any possible error could not be prejudicial. It is next urged that the court erred in allowing the witness Boydstun to give his opinion and conclusion as to whether Mrs. Reina was acting of her own free will when she signed the gift deed. This

witness merely answered a question as to the appearance and manner of Mrs. Reina at the time. The next assignment of error in this connection is immaterial and requires no comment. Finally, it is argued that the court erred in refusing to permit the appellant to introduce evidence as to the value of the property attempted to be transferred by the gift deed. It was admitted throughout that there was no money consideration for the deed. If it be assumed that the value was in any way material, it sufficiently appeared in other evidence of the appraisal, in the estate proceeding, of an undivided $\frac{3}{10}$ interest in the properties.

The appeal taken by the cross-complainants relates to a mistake in the description of a part of the property, as described in the gift deed. The descriptions were unknown to Mrs. Reina, as her husband had the papers, and at her request they were obtained from the tax collectors in the counties where the properties were situated. Because of an error in the descriptions thus obtained two portions of the property were left out of the gift deed. The parts left out consist of two parallel 7-foot strips running the full length of an improved property, the strips being about 18 feet apart, and one of these strips going through the middle of the house located upon the property.

The cross-complainants sought, in their first cause of action, to reform the gift deed by correcting this mistake in description, thus making the deed conform to the intention of the grantor therein. A second cause of action was to quiet their title as against the plaintiff.

With respect to the error in description the court found that Mr. and Mrs. Reina were, on August 27, 1946, the owners in joint tenancy of certain property as described in the findings; that when she executed the gift deed Mrs. Reina intended to include therein all property of any nature or description then owned by her, whether in joint tenancy or otherwise; that through errors in the descriptions furnished to her by the tax collectors' offices, which errors were unknown to her, the properties were incorrectly described in the gift deed; and

that for this reason the deed of gift did not include all of the realty interests and properties owned by Mrs. Reina and which she believed and intended were included therein.

However, the court found, as one of its conclusions of law, that a decree should be entered denying the requested reformation of the deed of gift for the reason that there was no consideration for that deed, other than love and affection and except provision for the better maintenance, support and protection of the grantee children.

The cross-complainants have appealed from that part of the judgment which denied such a reformation of the gift deed. As the plaintiff states, the sole question on the cross-appeal is "whether or not, under the circumstances of the instant case, the court will reform a deed given for a consideration consisting solely of love and affection." The plaintiff relies on *Enos v. Stewart*, 138 Cal. 112, 70 P. 1005 and *Fickes v. Baker*, 36 Cal.App. 129, 171 P. 819. It is argued that the reasoning of these cases is that equity will not interfere in favor of a volunteer to reform an instrument for which he gave no consideration; that having paid nothing the grantee should not be heard to complain; and that since the plaintiff originally owned an interest in the entire title to the land, equity should not permit him to be vexed by an action for reformation brought by grantees of his cotenant who gave no consideration for the grant.

As we read the cases cited, the governing principle is not the presence or absence of a money consideration but is whether or not one of the parties has equities which are superior to those of the other. In the *Enos* case both parties were heirs of the grantor, with equal equities, and the conveyance sought to be reformed covered an entirely different tract of land than the one intended to be conveyed.

It may well be questioned whether the doctrine of the cases cited should be so extended as to cover such a situation as here appears, where the reformation sought applies only with respect to an incidental mistake in describing land which was clearly

intended to be conveyed, rather than to the substitution of an entirely different parcel. In the instant case the intention of the grantor was plain, the error was due to an incorrect description furnished her by others, and the omitted parts were included within the bounds of the property actually conveyed, being merely narrow strips which were obviously an integral part of the property being conveyed.

The joint tenancy here was broken; the plaintiff had received his half and his right thereto was protected by the judgment in this action; the wife by her will, had prevented the plaintiff from inheriting her property; and he was no longer an heir. The plaintiff had remarried, and it is only equitable that the children should receive the share the mother intended to give them. While it was held on the former appeal that the plaintiff had alleged a cause of action, he was unable to prove the issue he raised. The mother having terminated the joint tenancy by her free and voluntary act and deed, she had a right to give all of her interest to her children, and this she attempted to do. In equity and good conscience the plaintiff should not be permitted to prevent this, or to profit from this incidental error in description. To permit this to be done would result in tying up the title to a part of the property in a fantastic manner.

[4] Under the unusual facts of this case we think the equities of the parties are not equal, and that the strict rule of the *Enos* case is not applicable here, the reasons for the rule being absent. In our opinion equity requires that the general rules for reformation of instruments, for the purpose of carrying out the clear intention of the parties, should be here applied.

That portion of the judgment which denied relief to the cross-complainants upon their first cause of action is reversed, with directions to the trial court to amend its conclusions of law and the judgment in accordance with the views herein expressed. In all other respects the judgment is affirmed. The cross-complainants to recover costs on appeal.

GRIFFIN and MUSSELL, JJ., concur.

TOMLINSON v. NOBILE et al.

Civ. 4094.

District Court of Appeal, Fourth District,
California.

April 3, 1951.

Hearing Denied May 28, 1951.

Marion Tomblinson brought action against John Nobile and another to recover for injuries sustained by plaintiff when struck with a blackjack by the named defendant. The Superior Court of Fresno County, Strother P. Walton, J., rendered a judgment for the plaintiff, and the defendants appealed. The District Court of Appeal, Mussell, J., held that evidence sustained verdict for plaintiff.

Judgment affirmed.

1. Appeal and error ⇨930(1), 989

On appeal, evidence must be construed most strongly against party against whom judgment was rendered, every favorable inference which may be fairly deduced from the evidence should be resolved in favor of prevailing party, and prevailing party's evidence must be accepted as true and evidence contradicting it must be disregarded.

2. Assault and battery ⇨35

In action against private detective employed to keep order at combination restaurant, bar, and dance hall, and against his employer to recover for injuries sustained by plaintiff when struck in the eye by the detective with a blackjack, evidence sustained verdict for plaintiff.

3. Assault and battery ⇨10

Private detective employed to keep order at combination restaurant, bar, and dance hall, had right to eject trespassers from the premises, if circumstances warranted such action, but he had authority only to use such force as was reasonably necessary and was not justified in brutal use of blackjack.

4. Assault and battery ⇨43(2)

In action against private detective employed to keep order at combination restaurant, bar, and dance hall, and against his employer to recover for injuries sustained by plaintiff when struck in the eye by the detective with a blackjack, instruction that detective was not a peace officer but was a

private detective operating under Business and Professions Code and that he had the same authority and no more authority to make arrests and preserve the peace than any other private citizen, was not erroneous on ground that it erroneously limited detective's authority.

5. Assault and battery ⇨43(2)

In action against private detective employed to keep order at combination restaurant, bar, and dance hall, and against his employer to recover for injuries sustained by plaintiff when struck in the eye by the detective with a blackjack, instruction that mere words, however threatening or profane, will not amount to an assault, was not erroneous, where detective himself testified that he struck plaintiff to prevent a further assault on himself by plaintiff.

6. Trial ⇨108½

In action for injuries incurred in alleged assault, the asking of some of the prospective jurors on voir dire whether they or their friends had any interest in any insurance company, was not error where there was no showing of bad faith.

7. Trial ⇨108½

Prospective jurors may be asked if they are interested in a specified casualty company or generally in any insurance company, if the question be propounded in good faith.

Crossland & Crossland, Ray W. Hays and James N. Hays, all of Fresno, for appellants.

Nicholas H. Dubsick and Marvin E. Helon, Fresno, for respondent.

MUSSELL, Justice.

Action for damages for personal injuries.

Plaintiff received serious injury to his right eye from a blow struck by defendant John Nobile with a "blackjack" (a leather bag full of shot). He recovered damages therefor against defendant Nobile and his employer Frank Stielow, individually and doing business as "Frank's Detective Service". These defendants appeal from the judgment and submit as reasons for re-

versal that (1) The evidence does not support the verdict and judgment; (2) The jury was erroneously instructed; and (3) Plaintiff committed prejudicial error in the voir dire examination of jurors.

[1] The evidence is here briefly summarized and stated in accordance with the rules that it must be construed most strongly against the party against whom the judgment is rendered; that every favorable inference which may fairly be deduced from the evidence should be resolved in favor of the prevailing party and that the prevailing party's evidence must ordinarily be accepted as true and the evidence which contradicts it must be disregarded. *Roy v. Mission Taxi Co.*, — Cal.App.2d —, 219 P.2d 840.

Evidence

Plaintiff and two male companions, during the evening of February 5, 1949, visited "Johnny's Place", a combination restaurant, bar and dance hall in Fresno. They secured a table near the dance floor and while plaintiff was sitting at the table drinking beer, Robert Welch (one of his companions) became somewhat hilarious and noisy. Defendant Nobile, who was employed by Frank's Detective Service and instructed to watch plaintiff's table by one of the proprietors of the cafe, approached Welch, told him he was creating too much disturbance and that he would have to leave. Nobile accompanied Welch to the door. Plaintiff got up from the table and followed. When he was outside, he asked Nobile why they were throwing Welch out. Nobile replied that Welch was making too much noise and he had to leave. Plaintiff then stated that he was going back inside and see "Cecil" (one of the proprietors of the cafe) and see if he could get Welch back in, if he would be quiet. As plaintiff started through the door, Nobile "grabbed him by the hair" and pulled him back.

One witness, Eugene O'Neal testified as follows: "He pulled Marion (plaintiff) back, threw him off balance, and I don't know whether he swung a blow or not, but it looked like it to me. The cop swung a blow and Marion came up fighting. He hit the cop and backed away. He hit him and knocked the cop down and Marion com-

menced to backing up, and both cops started circling him." In this connection plaintiff testified that after stating that he was going back inside to see "Cecil", he "turned around, went back toward the crowd, which had already gathered there, started in the door, and somebody grabbed me and pulled me; they had ahold of my hair and ahold of my shoulder. I don't know who it was. I just turned around and more or less shook or hit whoever it was to keep them off of me * * *." He further testified as follows: "After I hit the officer, I hit him in the face some place, I don't know where, I backed into the crowd. When I did that somebody grabbed me ahold of my arms and I was trying to get loose from who had ahold of me. I don't know who it was and as I was shaking my head and wiggling by body * * *. I saw a fist and a club or blackjack coming down, and it hit me in the face. I fell to the ground—rolled over on my face—and somebody either kicked me or stepped on me, on my back, and the officers picked me up."

Another witness, Joyce O'Neal, testified that she accompanied her husband to the door and heard the "officer" call the plaintiff a vile name and saw the "officer" pull plaintiff back and hit him in the face.

According to the testimony of defendant Nobile, plaintiff, in the presence of the crowd which had gathered in the door of the cafe, used profane language and was told that he was under arrest; that he then took "ahold" of plaintiff's left arm and he jerked it away; that he "grabbed" plaintiff the second time and told him he was under arrest and that then the plaintiff struck him with his right hand, knocking him back against the car, where he went down; that as he was coming up off the ground, he swung his blackjack and struck plaintiff, who then fell to the ground; that he placed plaintiff under arrest because of the language he was using; that he struck the plaintiff because he (Nobile) thought he was about to be assaulted again.

[2] There was a sharp conflict in the evidence as to whether plaintiff did use profane language and as to whether the defendant Nobile informed plaintiff that he was under arrest. The foregoing evidence

is ample to support the verdict and judgment.

The contention that the court erroneously instructed the jury is without merit. At the request of the plaintiff, the jury was instructed in the following language: "You are instructed that the defendant John Nobile is not a peace officer but is a private detective operating under the provisions of Division 3, Chapter 11 of the Business and Professions Code, and that said John Nobile has the same authority and no more authority to make arrests and preserve the peace than any other private citizen." And a further instruction, as follows: "Mere words however threatening or profane will not amount to an assault."

[3] It is defendant's contention that by the first of these instructions the court erroneously limited Nobile's authority to that of a private citizen. However, as stated in the instruction, Nobile was not a peace officer as defined by Penal Code section 817 and the definition of a peace officer under that section was given in the instruction immediately preceding the one complained of and at the request of the defendants. The jury was instructed as follows: "You are instructed that any person, be he a police officer or private citizen, may arrest another for the commission of a misdemeanor in his presence. In this connection, if you find that the plaintiff, Marion Tomblinson, committed either a felony or a misdemeanor in the presence of the defendant, John Nobile, that the defendant, John Nobile, had the right to arrest the plaintiff, Marion Tomblinson, for the commission of such felony or misdemeanor." The jury was further instructed fully as to the rights of defendant Nobile to repel force by force in the defense of his person under the circumstances here shown. It is true that Nobile had the right to eject trespassers from the premises involved, if the circumstances warranted such action. However, he had authority to use only such force as was

reasonably necessary and the brutal use of a "blackjack" was clearly without justification. *Haworth v. Elliott*, 67 Cal.App.2d 77, 82, 153 P.2d 804.

[4, 5] The instructions properly covered the authority of the defendant John Nobile in making an arrest, whether he was a peace officer or not. The second instruction is a correct statement of the law and while its application to the facts presented may be somewhat obscure, no prejudicial error was occasioned by it or by the first instruction. Especially is this true when defendant Nobile himself testified that he struck the plaintiff to prevent a further assault upon himself and the apparent fact that the injury to plaintiff was not incurred while he was being ejected from the premises.

[6] Finally, it is argued that prejudicial error was committed in the voir dire examination in the asking of some of the prospective jurors whether or not they or their friends had any interest in any insurance company. The question was proper if asked in good faith. *Kroplin v. Huston*, 79 Cal.App.2d 332, 336, 179 P.2d 575.

[7] As was said in *Levens v. Stocco*, 5 Cal.App.2d 693, 695, 43 P.2d 357, 358: "It is the rule that prospective jurors may be asked if they are interested in a specified casualty company or generally in any insurance company, if the question be propounded in good faith."

Under the circumstances here presented, we conclude that there was no showing of bad faith and that the questions asked the prospective jurors were not prejudicially erroneous, where, as here, there was no contention that the judgment awarded was excessive and the liability was established by abundant evidence.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.

103 Cal.App.2d 97

**SHIRK et al. v. SOUTHERN
PAC. CO. et al.
Civ. 7798.**

District Court of Appeal, Third District,
California.

March 27, 1951.

Action by Fannie Shirk, and another, against the Southern Pacific Company, a corporation, and another, to recover damages for the accidental death of husband which resulted when train struck bulldozer which decedent was driving across railroad tracks. The Superior Court, Sacramento County, Malcolm C. Glenn, J., rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Adams, P. J., held that decedent's own negligence in driving bulldozer across railroad tracks without flagman's protection proximately contributed to his injuries and death, and therefore plaintiffs were not entitled to recover.

Judgment affirmed.

1. Railroads ⇐396(2)

Where employee of independent contractor, while plowing fire guards, was instructed to stay within certain area and not to cross railroad tracks without flagman's protection, and while driving bulldozer across railroad tracks without flagman's protection train struck bulldozer and employee sustained injuries which caused his death, presumptions that employee obeyed the law, took ordinary care of his own concerns and was innocent of wrong were dispelled by the evidence. Code Civ. Proc. § 1963, subs. 1, 4, 33.

2. Railroads ⇐398(4)

In action by widow against railroad for accidental death of husband, evidence established that decedent's negligence in driving bulldozer across railroad tracks without flagman's protection proximately contributed to his injuries and death.

Hildebrand, Bills, & McLeod, Russell & Federspiel, Oakland, Hoge, Pelton & Gunther, San Francisco (Leo V. Killion, Reginald M. Watt, San Francisco, of counsel), for appellants.

Devlin, Devlin & Diepenbrock and Horace B. Wulff, Sacramento, for respondents.

ADAMS, Presiding Justice.

Fannie Shirk and Maxine G. Hamilton, surviving widow and daughter, respectively, of Darrell Leroy Shirk, deceased, brought this action against the Southern Pacific Company, as owner and operator of a certain train, and William M. Packard as engineer of the locomotive, to recover damages alleged to have been suffered as the result of the accidental death of Shirk, charging negligence on the part of defendants.

A jury was impaneled to try the case. Defendants made motions for a nonsuit and for a directed verdict which were denied. The jury disagreed and was discharged. Thereafter defendants made a motion for judgment pursuant to section 630 of the Code of Civil Procedure which was granted. Judgment was entered in favor of defendants and plaintiffs took this appeal.

The answer of defendants admits that Southern Pacific Company owned and operated a branch line railroad between Sacramento and Placerville at the time of the accident, and that Packard was the engineer of the locomotive; that the company entered into an agreement with one Leo G. Lentz, as an independent contractor, to plow fire guards along the company's right-of-way, and that Shirk, the deceased, was employed by Lentz. Plaintiffs alleged that on August 31, 1943 Shirk, as a servant, agent and employee of Lentz, was operating a bulldozer on the right-of-way about a mile or mile and a half west of Placerville and while he was driving the bulldozer across the tracks at about 1:30 o'clock p. m. of that day, respondents so negligently and carelessly operated a locomotive with cars attached that the locomotive was caused to and did strike and collide with the bulldozer with great force and violence; and that as a direct and proximate result thereof Shirk sustained injuries from which he died on the same day.

The only witnesses called by plaintiffs were as follows: William Nixon, the con-

ductor of the train, testified regarding the conditions existing in the vicinity of the accident, and certain rules of the Southern Pacific Company regarding speed of trains there. Defendant William Packard, called under section 2055 of the Code of Civil Procedure, testified as to the method of operating trains over that stretch of road; that he was proceeding at a speed of between 10 and 15 miles per hour; that he saw the tractor when about 250 feet distant; that it appeared to be crossing the track, as the blade in front was over the rail; that he saw Shirk on the tractor in the driver's seat; that he applied the emergency brakes on the train and blew the whistle, but was unable to stop in time to avoid the collision; that the train struck the blade of the tractor at a speed of about 10 miles per hour; that he had received no order to beware of the possibility of a man's working with a tractor and did not anticipate his presence. The two plaintiffs were called but their testimony had no bearing upon the cause of the accident. Vernon E. Pearson, roadmaster of the railroad company, was then called by appellants as their own witness, and not under section 2055 of the Code of Civil Procedure. He testified that the right-of-way where the accident occurred was about 100 feet wide; that there was a fence on either side of the right-of-way about 50 feet from the single track; that the bulldozer had a blade 10 or 12 feet wide; that there was a cleared area of about $6\frac{3}{4}$ feet along the track which was maintained by section gangs; that he had a conversation with Shirk about three days after the work was begun, and then instructed Shirk that he was to follow along the fence line, plow a fire guard the width of the blade, and not to foul the track or cross it without getting proper flag protection; that he told him the section foreman passed there every day and would ask him if he needed anything, and if he did the flagman would give him protection if he required it; that he told Shirk to confine his work to the space along the fence, and whenever he was going to cross or foul the track he should get protection from the foreman; that the section gang

took care of the right-of-way near the track and Shirk was not to work there; that if any occasion arose that would bring him near the track he was to stop work and get flag protection; that Shirk told him he understood and that he had obtained flag protection several times when he had to foul the track.

The foregoing is all the evidence put in by appellants of events preceding and at the time of the accident.

It is appellants' contention that the motion for a directed verdict was not proper; that they were entitled to the benefit of the presumptions of section 1963, subdivisions 1, 4 and 33, of the Code of Civil Procedure that every person obeys the law, takes ordinary care of his own concerns and is innocent of crime or wrong, and that such presumptions were not dispelled by the testimony produced by appellants. We do not agree with the latter contention.

In *Anthony v. Hobbie*, 25 Cal.2d 814, 820, 155 P.2d 826, 830, the court said that the rule stated in *Westberg v. Willde*, 14 Cal.2d 360, 94 P.2d 590, quoting from *Mar Shee v. Maryland Assur. Corp.*, 190 Cal. 1, 210 P. 269, is that " * * * 'a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case.' "

Appellants rely upon *Smellie v. Southern Pacific Company*, 212 Cal. 540, 299 P. 529, but in that case it was held, only, that the presumption continued in plaintiffs' favor as against the testimony of a witness called by them under section 2055. Mr. Justice Richards in his concurring and dissenting opinion in the *Smellie* case stated, 212 Cal. at page 565, 299 P. at page 539, what seems to be the true rule when he said: "It seems to me indisputable as a matter of law, supported by innumerable authorities, that, if the witness Ireland had been

called by the plaintiffs on their own account and as their own witness, and not under the provisions of section 2055 of the Code of Civil Procedure, and if as such witness he had given the testimony which he did give with respect to the words and acts of the deceased immediately prior to the casualty in which he lost his life, the presumption above referred to would have disappeared from the case." Also see majority opinion, 212 Cal. at page 553, 299 P. at page 529.

In *Engstrom v. Auburn Auto. Sales Corp.*, 11 Cal.2d 64, 70, 77 P.2d 1059, 1063, the rule was stated to be that: "Generally speaking, however, it may be said that a *presumption* is dispelled when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on it or of such party's own witness, when such testimony was not the product of mistake or inadvertence. *Smellie v. So[uthern] Pac. Co.*, supra [212 Cal. 540, 299 P. 529]; *Mar Shee v. Maryland Assur. Corp.*, 190 Cal. 1, 8, 210 P. 269; *Pitt v. So[uthern] Pac. Co.*, 121 Cal. App. 228, 232-235, 9 P.2d 273; *Peters v. Cal[ifornia] Bldg.-Loan Ass'n*, 116 Cal. App. 143, 154, 2 P.2d 439; *Fortier v. Hogan*, 115 Cal.App. 50, 56, 57, 1 P.2d 23."

In *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 38, 297 P. 884, 886, the court said: "If the evidence on his [plaintiff's] part showed that he was negligent, then it cannot be said that the jury, notwithstanding this evidence, might presume that he was not negligent, or that he took ordinary care of his own concerns, which amounts to the same thing."

This court in *Friddle v. Southern Pacific Company*, 126 Cal.App. 388, 396, 14 P.2d 568, 572, hearing in Supreme Court denied, reviewed the *Smellie* and *Mar Shee* cases and concluded the rule to be: "Thus we find one thing definitely decided beyond argument, and that is that the presumption falls in the face of evidence produced by the party relying thereon which is inconsistent therewith."

Concerning the duty of one approaching a railroad track, the court in *Heintz v. Southern Pacific Company*, 63 Cal.App.2d

699, 704, 147 P.2d 621, 624, hearing in Supreme Court denied, relying on *Koster v. Southern Pacific Co.*, 207 Cal. 753, 279 P. 788, said: "* * * a special duty of care rested upon him [decedent] in approaching and crossing these railroad tracks, which were in themselves a warning of danger, and with the presence and location of which he was thoroughly familiar."

In *Dull v. Atchison, T. & S. F. Ry. Co.*, 27 Cal.App.2d 473, 478, 81 P.2d 158, 161, the court said, quoting from *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 P. 651: "And, when injury results which might have been avoided by the use of proper care, the plaintiff cannot recover, although the defendant has also been guilty of negligence."

In *Anderson v. Western Pacific R. R. Co.*, 17 Cal.App.2d 244, 250, 61 P.2d 1209, 1213, hearing in Supreme Court denied, it is said: "Furthermore, it is a well-settled rule that one who places himself in the way of an obvious and well-understood peril is guilty of contributory negligence which bars recovery of damages for injuries resulting therefrom (*Andrews v. Valley Ice Co.*, 167 Cal. 11, 138 P. 699)".

[1] In view of the foregoing authorities and the testimony of Pearson as appellants' own witness, the presumptions relied upon were dispelled. When Shirk was killed he was obviously where he had been forbidden to go without first securing the protection of a flagman.

As was said in *Mundy v. Marshall*, 8 Cal.2d 294, 296, 65 P.2d 65, 66, "There is only one reasonable conclusion to be drawn from the facts established by the testimony of the plaintiff's own witness. A pedestrian who crosses a well-lighted thoroughfare other than on a crosswalk, in a diagonal line and with his back partly turned to approaching traffic and is struck by a car approaching from the quarter from which traffic was to be expected is obviously not exercising the vigilance the law requires of him. *Sheldon v. James*, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493; *Atkins v. Bouchet*, 65 Cal. App. 94, 223 P. 87; *Moss v. [H. R.] Boynton Co.*, 44

Cal.App. 474, 186 P. 631; Thompson v. White, 56 Cal.App. 173, 204 P. 561. The manner in which the decedent was crossing the street having been covered by the plaintiff's own evidence, there is no room for the operation of the presumption that he was exercising due care (Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709, and it cannot be relied upon to establish a conflict in the evidence."

[2] Here not only have plaintiffs failed to show negligence on the part of defendants, but have, we believe, shown that decedent's own negligence proximately contributed to his injuries and death.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.



103 Cal.App.2d 143

HARPKE v. LANKERSHIM ESTATES.

Civ. 17860.

District Court of Appeal, Second District,
Division 3, California.

March 28, 1951.

Action by Elsie Harpke against Lankershim Estates, a California corporation, for damages for personal injuries sustained in fall down a stairway in office building. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that evidence was insufficient to establish that the stairway where plaintiff fell was in fact unsafe or in unsafe condition and that plaintiff fell because of that condition.

Judgment affirmed.

1. Negligence ⇨121(1)

Negligence is never presumed.

2. Negligence ⇨121(1), 134(2)

In action by invitee against owner of office building for injuries sustained in fall

down a stairway, the invitee had burden of proving that negligence existed, and such proof could be direct or by facts and circumstances from which negligence could have been inferred.

3. Negligence ⇨121(3)

No inference of negligence arises from the mere proof of a fall upon stairway.

4. Negligence ⇨48

In action by invitee against owner of office building for injuries sustained in fall down a stairway, to impose liability on owner it must have been shown that a dangerous condition existed, and that owner knew or should have known of it.

5. Negligence ⇨121(1)

While under some circumstances negligence may be inferred from the existence of dangerous condition, burden rests on plaintiff to show the existence of a dangerous condition, and that the defendant knew or should have known of it.

6. Negligence ⇨121(3)

In action by invitee against owner of office building for injuries sustained in fall down a stairway, no inference of negligence would arise merely from proof that floor was "slippery", in the absence of proof of some foreign substance upon the floor, or proof of a dangerous condition created by, or known to, the owner.

7. Negligence ⇨121(1, 5)

While a duty is imposed upon the owner of a building to police and inspect a stairway which it invites others to use, the minimum duty of a plaintiff is to show that stairway was in fact unsafe and that she fell because of that condition.

8. Negligence ⇨134(5, 11)

In action by invitee against owner of office building for injuries sustained in fall down a stairway, where invitee's evidence indicated that she slipped, lost her balance, and fell, did not see anything on the stairway which caused her to slip and fall, and did not know what caused her to slip, evidence was insufficient to show that stairway was in fact unsafe or in unsafe condition and that invitee fell because of that condition.

William S. Palmese, Jesse A. Levinson, Los Angeles, for appellant.

Tripp & Callaway and Hulen C. Callaway, all of Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of nonsuit in an action for damages for personal injuries sustained by her when she slipped and fell down a marble stairway in an office building operated by defendant.

Plaintiff alleged negligence generally and that without fault or negligence on her part she "tripped by reason of the defective, unsafe, dangerous and unsound condition of the stairway, and was precipitated and fell down the stairway," sustaining the injuries for which she seeks recovery. A jury was impaneled and at the close of plaintiff's case the court granted defendant's motion for nonsuit.

It is conceded that plaintiff was an invitee of the defendant corporation and that it was under a duty to exercise ordinary care to maintain the stairway in a reasonably safe condition or to give warning of a latent or concealed peril, if such existed. Plaintiff was the only witness who testified concerning her fall and the condition of the stairway at the time of the accident.

Plaintiff testified she had worked in defendant's building for four or five years prior to March 17, 1947, the date of the accident, and had used the stairway on numerous occasions; that as "I was leaving work approximately 4:30 in the afternoon and I used the stairs, I walked down from the third to the second, and I left the second floor to go down to the first, and I started down the stairs, and there is a platform outside at this flight, and there were some girls there, I walked around them * * * and started down again, and I got about half way between this landing and the front, and I slipped and fell and didn't gain my balance, and I went down through the plate glass door, my arm extended, I think, and I cut my hand." With respect to the condition of the stairway she testified "the stairs are worn, they are rounded edged, they are sort of grooved on the two sides, on the right and left, and they were

slippery." On cross-examination she stated that she noticed no difference in the condition of the stairway from that on any previous day. She further testified:

"Q. Now, it is true, is it not, as you passed those three girls that were descending or going in the same direction you were going you lost your balance, isn't that right? A. After I had passed them?

"Q. Yes, and you stumbled head-first, then, the remaining stairs, is that correct? A. Yes.

"Q. And that happened about halfway from the bottom of the steps to the top of the landing? A. The landing, yes.

"Q. And you don't know what caused you to stumble, do you? A. No.

"Q. And I take it that as you walked down the stairs you were looking in the direction in which you were walking? A. Yes.

"Q. And these stairs over which it was necessary for you to traverse were within the range of your vision? A. Yes.

"Q. And you did not see anything on the stairs that caused you to fall? A. No.

"Q. And you don't know what caused you to slip? * * * A. No, I don't."

[1-8] The foregoing evidence constituted plaintiff's case. All that it showed was that she slipped and fell; that she lost her balance, she did not see anything on the stairway that caused her to slip and fall, and she did not know what caused her to slip. Negligence is never presumed. The burden of proof was upon plaintiff to prove its existence either directly or by facts and circumstances from which negligence may be inferred. No inference of negligence arises from the mere proof of a fall upon the stairway. "In order to impose liability on the owner it must be shown that a dangerous condition existed, and that the defendant knew or should have known of it. While under some circumstances, negligence may be inferred from the existence of a dangerous condition, the burden rests upon the plaintiff to show the existence of a dangerous condition, and that the defendant knew or should have known of it." *Vaughn v*

Montgomery Ward & Co., 95 Cal.App.2d 553, 556, 213 P.2d 417, 419, and cases there cited. No inference of negligence arises merely from proof that the floor was "slippery" in the absence of proof of some foreign substance upon the floor, or proof of a dangerous condition created by, or known to, the owner. While a duty is imposed upon the owner of a building to police and inspect a stairway it invites others to use, the minimum duty of a plaintiff is to show that the stairway was in fact unsafe and that she fell because of that condition. Here the plaintiff failed to sustain her burden of proof and the nonsuit was properly granted.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



103 Cal.App.2d 153

PEOPLE v. GOMPERTZ et al.

Cr. 748.

District Court of Appeal, Fourth District,
California.

March 28, 1951.

Rehearing Denied April 6, 1951.

Hearing Denied April 26, 1951.

Laurence K. Gompertz and Leonard Brophy were convicted in the Superior Court of San Diego County, John A. Hewicker, J., for the occupation of premises with books, papers, or paraphernalia for the purpose of recording or registering bets upon the results of horse races and defendant appealed from the order denying a new trial. The District Court of Appeal, Griffin, J., held that the evidence was sufficient to sustain the conviction and the order overruling motion for a new trial.

Affirmed.

I. Gaming $\S$ 98(5)

In prosecution for occupation of premises with books, papers, or other paraphernalia for the purpose of recording or registering bets upon the results of horse races, some causal connection must be shown between the paraphernalia found on

the premises and the defendant before conviction can be sustained, and such causal connection must be established as would reasonably justify an inference that defendant occupied and kept a place where such devices were utilized for the purpose of recording or registering bets. Pen.Code, $\S$ 337a, subd. 2.

2. Gaming $\S$ 96, 98(5)

In prosecution for keeping premises for the purpose of recording or registering bets upon the results of race horses, the prosecution is not required to show that a race was actually run, or that any bet was actually made, and the purpose for which the place or room was being used or occupied need not be established by direct evidence, but may be gathered from all the surrounding circumstances shown by the evidence. Pen.Code, $\S$ 337a, subd. 2.

3. Criminal law $\S$ 1144(13)

On appeal by defendant from a judgment of conviction the evidence is to be viewed in the light most favorable to the prosecution.

4. Gaming $\S$ 98(5)

Evidence sustained conviction of occupying premises with books, papers, or paraphernalia for the purpose of recording or registering bets on the results of horse races. Pen.Code, $\S$ 337a, subd. 2.

5. Criminal law $\S$ 1166½(12)

In prosecution for occupying premises with books, papers, or paraphernalia for purpose of recording or registering bets upon the results of horse races, where there was no evidence or contention that defendants operated as bookmakers simply by the use of a telephone and relying on their memory as a means of recording bets, no prejudicial error resulted from remark by trial judge that the human brain could very well be called paraphernalia, especially since judge qualified remark by stating that he did not mean paraphernalia within meaning of statute under which prosecution was being had. Pen.Code, $\S$ 337a, subd. 2.

6. Criminal law $\S$ 824(1), 829(3)

In prosecution for occupying premises with books, papers, or paraphernalia for purpose of recording or registering bets

upon the results of horse races, where defendants offered no specific instruction as to the cause or connection required between the defendants and certain exhibits, and the question of cause or connection was adequately covered by other general instructions given, no prejudicial error resulted from not instructing the jury on its own motion to the effect that, since there was no causal connection established between either defendant and particular exhibit found on premises, no crime was committed by them. Pen.Code, § 337a, subd. 2.

7. Criminal law ⇨822(1)

A single instruction or a portion of other given instruction cannot be singled out and considered separately from the entire charge.

8. Criminal law ⇨1186(4)

In prosecution for occupying premises with books, papers, or paraphernalia for purpose of recording or registering bets upon the results of horse races, where the instructions considered as a whole stated that the charge was the occupation of premises for the purpose of registering or recording bets, fact that some of the instructions used the phrase "for the purpose of taking bets" was not prejudicial error. Pen.Code, § 337a, subd. 2; Const. art. 6, § 4½.

9. Criminal law ⇨1156(3)

Usually, the question of due diligence and the propriety of granting a new trial on grounds of newly discovered evidence are factual questions for trial court, and unless a clear abuse of discretion is shown, an appellate tribunal will not interfere.

10. Criminal law ⇨939(2)

In prosecution for occupying premises with books, papers, or paraphernalia for purpose of recording or registering bets upon the results of horse races, where a person who was on premises at time officers made arrest, made an affidavit after trial that he was the one who deposited incriminating evidence in waste basket and that he could not in good conscience stand by and see defendants convicted on false premises, trial court did not abuse its dis-

cretion in refusing to grant a new trial, since trial court properly held that due diligence had not been shown to secure witness' presence during trial and that upon a new trial the witness could refuse to testify to the facts set forth on the ground that they might incriminate. Pen.Code, § 337a, subd. 2.

Edgar B. Hervey, San Diego, Henry F. Walker, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Donald D. Stoker, Deputy Atty. Gen., James Don Keller, Dist. Atty., John Robert Sorbo, Deputy Dist. Atty., San Diego, for respondent.

GRIFFIN, Justice.

Defendants Laurence K. Gompertz and Leonard Brophy were convicted of the crime denounced by section 337a, subd. 2, Penal Code. No judgment was pronounced nor sentence imposed. They were granted conditional probation and now appeal from the order denying a new trial. Defendants' main contention is that the evidence produced was insufficient to establish that they occupied the place with books, papers, or paraphernalia *for the purpose of recording or registering bets* upon the results of horse races.

The arresting officers testified generally that they went to a store building located at 2975 National Avenue; that one small room therein was occupied by these defendants; that an adjoining storeroom was occupied by the "Circus Cafe". Defendants did not testify at the trial. The evidence shows that they occupied the room at the time, but they urge that it was used merely for the purpose of engaging in the making and distribution of mimeographed "run-down" or "scratch" sheets, a legal business enterprise.

Brophy first rented the room in July, 1949. A mail box was placed at the office door (the only entrance to the room) giving the address as 2977 and the name "J. Saunders Products", "Donovan Elec. Supply". In August, 1949, application was made under the name "James Donovan" for a phone. It was listed as "Donovan

Electrical Appliance" at 2977 National Avenue. There were no signs on or at the store building indicating that defendants were engaged in the electrical business. The only window in the room was obscured by a covering.

An investigator testified that he made diligent inquiry in regard to the "Donovan Electrical Supply Co." but was unable to find any record or information as to its actual existence or operation. No search was made as to the "J. Saunders Products Co." When the officers raided the place on July 21, 1950, about 8:20 a. m. defendants Brophy and Gompertz were standing directly opposite the mimeograph machine and were operating it. Three other persons were in the room, including one *Gene* Baehr. Two tables were found. One held the mimeograph machine. One desk carried a radio set capable of receiving short wave broadcasts. There was an electric clock, and a connected telephone on the desk which bore the number FR 9-3968. A printed and published "Daily Racing Form" for July 21, showing the several entries for races to be run on that day, past performance of the horses, names of owners, trainers, jockeys, and other such information was found near the table. On the table were stacks of papers. Some were mimeographed and were described as "run-down sheets" or "scratch sheets". Found in a near-by cardboard box (also described as a "trash box" or "paper basket") were similar "sheets" showing the index number and names of the horses at the several tracks, the jockeys, their weight, probable odds, and other such information. Found with them, folded in a rubber band, were numerous smaller sheets, described by the officer as "registration of bets on horse races made for the previous day", on which were written the names of individuals and certain numbers. As a sample, one of them contained the name "Chet Keller-954-968", followed by the figure (1) in the first column, nothing in the second column, and the figure (1) appearing again in the third column. Opposite it was the figure 1595. Opposite the figure 969 appeared the figure (1) in all three columns, followed by the figure

920. Opposite the figure 155-17 appeared the figure (1) in the first and third columns, followed by the figure 385, totaling 2900. Then follows what appears to be a summarization: "P-2900 T-700". Underneath a subtraction line appears the figure "-2200". The officer explained that the first numbers indicated the index number of the horses, that the bettor bet the amount indicated in the first column to win, next to place, and the next to show, and the other figures indicated whether the bettor won or lost and the amount.

Chet Keller was called as a witness for the people. He stated he knew a man named Baehr; that he had indirectly placed bets with him by telephone; that Baehr had given him certain telephone numbers to call if he desired to place a bet; that he just called one of the numbers and made a bet and if the phone was busy he would call another; that he did not at that time remember the telephone numbers given him by Baehr because he destroyed the sheet on which he kept those numbers after identifying the number which the investigator had with him when they called on him about making bets at this address on National Avenue; that he never made bets with Baehr personally but it was true some unidentified person was reached by calling a number given by Baehr; that sometimes he won and others he lost; that Baehr or some person other than defendants would call at Keller's place of business and pay him or collect, as the case might be; that the parties who called would have a columnar sheet which looked similar in form to the small sheets attached to People's Exhibit 17, which the officer testified were a recordation of bets.

The men who were taken to the police station were searched. Defendants had small sums of money on their persons. Baehr had \$1938 in currency. There was also removed from his pocket small columnar sheets and adding machine tape contained in an envelope marked "*Gene* and *Jimmie*", and appeared to be an accounting of Baehr's business in respect to certain named persons and as to whether they had won or lost. Many of these names also appeared on People's Exhibit 17, found by

the officers on National Avenue. One of the arrested persons, other than defendants, had some columnar or collection sheets on his person, similar to those mentioned. He tried to hide them by putting them in his shoes and also by hiding them behind the jail door. Another had "Pay-out sheets" which he threw beside the store building while in custody of the officer. He had several hundred dollars on him when he was searched.

Sergeant Whitney, in charge of the vice squad, who qualified as an expert investigator on the subject of bookmaking, testified that accurate time clocks are used by bookmakers in determining the post time of a race; that some bookmakers use a short-wave radio set in obtaining racing information; that the other exhibits found in the room, excepting the mimeograph machine, were a type of paraphernalia ordinarily used by bookmakers and that some of the exhibits were "bet registrations or other notations commonly made by bookmakers".

Statements were taken of all parties arrested that morning. Brophy stated generally that he rented the room in question the year before; that the equipment was his; that the telephone was not in his name; that he had one employee (defendant Gompertz); that his occupation was that of operating a news service and that he distributed mimeograph sheets to his customers.

Defendant Gompertz stated that he was employed by Brophy; that he obtained the information from the "green sheets" and typed the stencils from it; that some man whom he did not know, phoned the price to be put on it; that the radio was used on the ordinary band to receive results on the races which were broadcast from one of the regular stations in Los Angeles; that he wrote these results down and that occasionally, whenever persons called in to ascertain the results of a race, he furnished that information; that the names, numbers, etc. appearing on Exhibit 17 were "something made up by somebody outside of me. It is not in my right"; that the men arrested at the place of business with

him were unknown to him. The officers testified they were all bookmakers.

Defendants offered in evidence the statement of Baehr, in which he stated that he was a "cleaning operator"; that he just happened to be at that address that morning as a visitor; that he worked for himself and that he did not know what the envelope on him marked "Gene and Jimmie" was and did not recall who gave it to him; that he did not know what the names, initials and markings on the slip meant but that they concerned his collections for his cleaning business; that some of the markings were in his handwriting. He then stated that he had been arrested in 1950 for suspicion of bookmaking.

As heretofore stated, it is defendants' claim that the papers which indicated a registration of bets found in the cardboard box must have belonged to Baehr, if anyone; that he must have thrown them there because the defendants in this action were too far from the box at the time of the raid and that no one saw them throw them there. This, no doubt, was the argument made to the jury, which argument was rejected by it.

[1,2] It is true, as stated in *People v. Simon*, 66 Cal.App.2d 860, 153 P.2d 420, that in a prosecution under this section and subdivision, some causal connection must be shown between the paraphernalia found on the premises and the defendant before a conviction can be sustained. Such causal connection must be established as would reasonably justify an inference that the defendant occupied and kept a place where such devices were utilized for the purpose of recording or registering bets. *People v. O'Brien*, 37 Cal.App.2d 708, 712, 100 P.2d 367; *People v. Fisk*, 32 Cal.App.2d 26, 89 P.2d 142; *People v. Rabalete*, 28 Cal.App.2d 480, 82 P.2d 707. However, the prosecution is not required to show that a race was actually run or that any bet was actually made. *People v. Warnick*, 86 Cal.App.2d 900, 195 P.2d 552. The purpose for which the place or room was being used or occupied need not be established by direct evidence, but may be gathered from all the

surrounding circumstances shown by the evidence. *People v. Newland*, 15 Cal.2d 678, 683, 104 P.2d 778; *People v. Barnhart*, 66 Cal.App.2d 714, 721, 153 P.2d 214. There is no contention that defendants were not in possession of the premises.

It is clearly shown that the business of "electrical appliances" was not being conducted at this establishment and defendants made no indication to the public that they were in that purported legal enterprise. They made efforts to conceal their activities, as indicated by the telephone registration, the mail box, the house number, and the obscurity of the window. All of these circumstances were unexplained by defendants. The jury was entitled to conclude that the occupancy of the room was for illegal purposes. *People v. Walker*, 99 Cal.App.2d 238, 221 P.2d 287. Most of the equipment in the room was shown to be types of paraphernalia used by bookmakers. The officers did testify to the effect that each of the items could have a legal use and that the possession of any one of the items would not necessarily give rise to an inference that the person was a bookmaker. It is defendants' contention that the evidence in this respect was "without contradiction" and that none of the items found in the room bore or gave any indication of having been used or designed for the purpose of recording or registering any bets except the possible exception of People's Exhibit 17. In view of all the evidence the jury was entitled to infer that the paraphernalia was used to facilitate the recordation of bets, and not merely for use in the mimeographing of "run-down" sheets. The evidence shows that at least one known bookmaker and a number of other persons possessing bet recordations were on the premises at the time. The finding of People's Exhibit 17 on those premises, which was unexplained by either defendant, together with the testimony of the witness Keller, might well have supported the jury's conclusion that the defendants occupied the place and kept the paraphernalia found there for the purpose of recording bets. It was explained to the jury that a bookmaker often has a clerk or clerks in a room

with a telephone and they record bets from the bookmaker's agents who take bets while walking around the streets or in bars.

The statement of defendant Gompertz indicates that after running the stencils on the mimeograph machine he would then stay at the office the rest of the day "in case the phone should ring". It is true that the testimony of the officers on cross-examination did tend to show that defendants might not have had an opportunity to throw the papers into the basket while the officers were approaching or while they were in the room and that Baehr might have had such an opportunity. It is to be noted that neither of the defendants took the witness stand to deny knowledge of the pack of papers found in the file basket or to explain what the file baskets were used for, or to otherwise explain how the papers happened to be found where they were. The jury might have inferred that the other bettors, whose names were in common on two sets of papers, also placed bets with persons other than Baehr, or that defendants were Baehr's agents in receiving and recording bets for him. The inference, from all the facts established, is that defendants, operating as they were with a false front, were linked with Baehr in his bookmaking activities and that the papers were, at the time of discovery, prepared for delivery to Baehr. *People v. Rumley*, 100 Cal.App.2d 6, 222 P.2d 913; *People v. Kulwin*, 102 Cal.App.2d 104, 226 P.2d 672; *People v. Gory*, 28 Cal.2d 450, 170 P.2d 433.

[3,4] On appeal by defendant from a judgment of conviction the evidence is to be viewed in the light most favorable to the prosecution. *People v. Cayer*, 102 Cal.App.2d 643, 228 P.2d 70. We conclude that the circumstances shown by the evidence reasonably justify the finding of guilt by the jury and, accordingly, a reviewing court is not warranted in disturbing the finding. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778; *People v. Barnhart*, *supra*.

The trial judge, in a dialogue between himself and defendants' counsel, unnecessarily made the statement that the human

mind was a paraphernalia within the meaning of the Penal Code section here involved. Defendants assigned such statement as prejudicial error. An expert witness testified that bookmakers usually used some means of recording bets which are readily disposable, such as match boxes or slips of paper, and that sometimes they are written on the cuff of a shirt. The question was then propounded of the witness: " * * * isn't it also a fact that many bookmakers use no records of bets at all? Relying simply upon their memory?" Objection was made to the question and the court remarked: "You can register it in your mind.

"Mr. Hervey: I don't think you can record it and register it in your mind. Especially I don't think the human brain can very well be called paraphernalia.

"The Court: I think it would be. Overruled.

"Mr. Hervey: You think the brain would be paraphernalia?

"The Court: Best paraphernalia I know".

After assigning the court's statement as prejudicial misconduct, the court said: "Well, the reason I made the remark was some people have very, very brilliant minds and they are very, very active.

"Mr. Hervey: * * * if Your Honor please, * * * the jury might get from Your Honor's remark the idea that when a person is charged with occupying a room with the device and books and papers for the purpose of recording bets that the law contemplates the paraphernalia to be their human brain, which I submit is not true.

"The Court: That wasn't the purpose of my remark.

"Mr. Hervey: I am sure it isn't."

Then followed some further colloquy and thereafter the witness was permitted to answer the question whether or not in his opinion "would it be possible, then, for a bookmaker to occupy a room with no more equipment than a telephone? * * * Relying * * * on memory as a means of recording bets?" The answer was: "It is possible, but not very probable."

[5] There was no evidence or contention that defendants so operated. The court's remarks might well have been left unsaid. However, they were clarified by the dialogue that followed. This clarification was accepted by counsel. The answer to the question could not be said to be prejudicial to defendants' rights. No prejudicial error resulted.

[6] Next it is contended that, although defendants offered no instructions, the court erred in not instructing the jury on its own motion to the effect that since there was no causal connection established between either defendant and Exhibit 17, no crime was committed by them, and that such causal connection forms an essential part of the crime here charged, citing *People v. Putnam*, 20 Cal.2d 885, 890, 129 P.2d 367; and *People v. Sanchez*, 35 Cal. 2d 522, 528, 219 P.2d 9. Section 337a, subd. 2 of the Penal Code was read to the jury, and other pertinent instructions bearing on the proof required were given. Since the defendants offered no specific instruction on that subject and since the question was adequately covered by other general instructions given, no prejudicial error resulted. *People v. Klor*, 32 Cal.2d 658, 662, 197 P.2d 705; *People v. Carothers*, 77 Cal.App.2d 252, 255, 175 P.2d 30; *People v. Bender*, 27 Cal.2d 164, 163 P.2d 8.

[7, 8] It is also argued that in some of the instructions the court used the term "occupied the premises for the purpose of taking bets" when the statute requires that it be for the purpose of "registering or recording" bets. It is true that the charge made and denounced by the section under discussion is "registering or recording" and not the "taking" of bets. The first instruction was given in the language of the statute. Other instructions contained a proper charge to the jury. A single instruction or a portion of other given instructions cannot be singled out and considered separately from the entire charge. *People v. Frazier*, 88 Cal.App.2d 99, 105, 198 P.2d 325; *People v. Newland*, 15 Cal. 2d 678, 684, 104 P.2d 778. It might be fairly said that more evidence would be

required to prove that the room was used for the purpose of *taking* bets than for the purpose of *registering* or *recording* bets. It is difficult to see how the defendants were in any way prejudiced by the claimed error. When the instructions are considered as a whole they were not misleading nor did they result in a miscarriage of justice. Art. VI, sec. 4½ Constitution; *People v. Warren*, 16 Cal.2d 103, 114, 104 P.2d 1024.

Lastly, defendants charge that the court erred in not granting them a new trial upon the showing made. They presented affidavits indicating that prior to trial they endeavored to subpoena Baehr as a witness; that what he would testify to was unknown to them; that they were unable to locate him; that after the trial he was located and that he did, on October 26, 1950, make an affidavit and present it to defendants' counsel, which affidavit was to the effect that he had deposited Exhibit 17 in the basket that morning without defendants' knowledge and that he could not "in good conscience stand by and see defendants convicted on false evidence". The court denied the motion stating that it felt that (1) due diligence had not been shown; and (2) that upon a new trial Mr. Baehr, if called as a witness, could refuse to testify to the facts set forth in his affidavit on the ground that his answers might tend to incriminate him and that therefore the evidence would not in such event be permitted to be introduced on any new trial. Defendants claim error in this ruling and cite such cases as *People v. Goodwin*, 202 Cal. 527, 261 P. 1009; and *People v. Lewis*, 64 Cal. 401, 1 P. 490.

[9] Usually, the question of due diligence and the propriety of granting a new trial on the grounds of newly discovered evidence are factual questions for the trial court. Unless a clear abuse of discretion is shown, an appellate tribunal will not interfere. *People v. Addington*, 43 Cal.App.2d 591, 111 P.2d 356; *People v. Goodale*, 33 Cal.App.2d 80, 91 P.2d 163. Due diligence in searching for a witness is discussed in *People v. Kuranoff*, 100 Cal. App.2d 673, 224 P.2d 402.

[10] In the absence of the witness Baehr, the affidavit could not be used on a new trial. The trial court was within its right in taking the position that Baehr might not be available at a new trial and that if available he might choose to stand on his constitutional rights and refuse to testify. He did not aver in his affidavit that he would be willing to testify to the facts contained in his affidavit at a new trial, nor that he would be present and available as a witness. He did not admit that Exhibit 17 was a recordation of bets on horse races. He may have still contended at a new trial that they involved transactions connected with his "cleaning business". It is not uncommon, after trial, for one not charged with a crime to attempt to absolve his fellow confederate who has been convicted. *People v. Morton*, 32 Cal.App.2d 662, 90 P.2d 845. The trial court was not bound to accept the statement of Baehr as true. *People v. Kirk*, 98 Cal.App.2d 687, 220 P.2d 976. It was entitled to regard it with distrust and disfavor. *People v. Fong Shee Shung*, 42 Cal.App.2d 721, 109 P.2d 974; *People v. Weber*, 149 Cal. 325, 350; *People v. English*, 68 Cal.App.2d 670, 673, 157 P.2d 429.

Before denying the motion herein, the trial court heard the comprehensive argument of attorney for appellants on the law and the evidence but refused to set aside the jury's verdict. It was fully argued by him to the jury that the recordations of bets found in the basket were not placed there by the defendants but were placed there by Baehr. At the trial defendants relied upon Baehr's statement made to the police after his arrest, which defendants placed in evidence. Notwithstanding this evidence and the argument made by counsel, the court rejected the theory that Baehr alone was responsible. It does not appear that the court, in denying the motion for new trial, abused the discretion which is given to it.

Order denying new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER, J., dissenting.

103 Cal.App.2d 245

PEOPLE v. CONNOLLY et al.

Cr. 4602.

District Court of Appeal, Second District,
Division 3, California.

April 2, 1951.

Robert Irvin Connolly and Lloyd Allan Phillips were charged by amended information with two counts of armed robbery. The Superior Court, Los Angeles County, Harry J. Borde, J., entered a judgment of conviction upon a verdict of a jury and denied probation, and defendant Lloyd Allan Phillips appealed. The District Court of Appeal, Shinn, P. J., held that the granting or withholding of probation is discretionary with trial court and the exercise of that discretion will not be interfered with upon appeal in absence of a clear showing of an abuse thereof.

Affirmed.

1. Criminal law ⇨982

The granting or withholding of probation is discretionary with trial court and exercise of that discretion will not be interfered with on appeal in absence of a clear showing of an abuse thereof.

2. Criminal law ⇨1144(17)

Appellate court could not presume that trial court, when considering defendant's application for probation, accepted the finding of jury that defendant was armed with a deadly weapon rather than with a dangerous one within meaning of statute making one guilty of robbery while armed with a deadly weapon ineligible for probation where denial of probation was made without comment. Pen.Code, § 1203.

3. Criminal law ⇨1177

In prosecution for armed robbery under Penal Code, § 211a, failure of court to give jury opportunity to find that defendant may have been armed with a dangerous weapon rather than with a deadly weapon did not require reversal on theory that under Penal Code, § 1203, making a robber armed with a deadly weapon ineligible to parole, defendant was deprived of having his application for parole heard on merits, in view of fact that application was de-

nied without comment and could have been denied in discretion of court without reference to type of weapon. Pen.Code, §§ 211a, 1203.

4. Criminal law ⇨1141(1)

Under rule that all intendments and presumptions must be resolved in favor of judgment and orders, error on part of trial court may not be presumed.

5. Courts ⇨50

The Superior Court in a particular county is a single entity and its division into departments is simply for convenience and expedition of business.

6. Criminal law ⇨1177

The fact that the same judge who presided at trial did not hear defendant's application for probation is not ground for reversal.

7. Criminal law ⇨1144(17)

Although judge who presided at trial and judge who heard defendant's application for probation were different, appellate court would not presume that judge who heard probation application was unfamiliar with record when passing on application.

William W. Larsen and Max Tendler,
Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendants, Robert Irvin Connolly and Lloyd Allan Phillips were charged by amended information with two counts of robbery while armed with deadly weapons, to which they pleaded not guilty. (Defendant Connolly was charged with and admitted a prior conviction of a felony, a violation of section 503, Vehicle Code.) After trial by jury, Count I was dismissed as to defendant Phillips and defendant Connolly found not guilty. Both defendants were found guilty as to Count II and the jury further found specially that both were armed with deadly weapons at the time

of the robbery. Both defendants filed application for probation and it was denied without comment in each instance. Defendant Phillips alone appeals.

Defendant Phillips contends that the trial court did not properly instruct the jury and that he was thereby deprived of his right to have his application for probation considered on the merits. He also contends that he was prejudiced in that the same judge who presided at the trial did not consider his application for probation.

At about one o'clock on the morning of May 16th, 1950, the defendants entered the liquor store of one Max Weiss. Mr. Weiss testified that he saw two blue-barrelled—rather heavy guns “on” both defendants; that one of them searched him and after removing the contents of his pockets forced him to open the cash register; that he was then told to lie face down on the floor. He stated that approximately \$224 was taken by the defendants from the register and from his person. When the defendants were apprehended on the afternoon of May 16th, by police officers who pursued them for about thirty-five miles, two loaded revolvers were found in their car.

Defendant maintains that there was no evidence to show that the guns were loaded at the time of the robbery or that they were pointed at Mr. Weiss or used in any manner, and that the jury should have been instructed concerning “dangerous” as distinguished from “deadly” weapons inasmuch as one who has been found guilty of robbery while armed with a “deadly” weapon is ineligible for probation under the provisions of section 1203 of the Penal Code.

The court defined robbery and instructed as to what constitutes robbery of the first degree. Section 211a of the Penal Code provides that robbery is of the first degree when it is perpetrated by a person who is armed with a “dangerous or deadly” weapon and no distinction is made for the purpose of fixing the degree of the crime. The court further instructed the jury as follows: “It is charged in each count of the information that at the time of the commission of the offense therein described, the defendant[s] was armed with a deadly

weapon, to wit: pistols. If you find the defendants guilty of the crime thus charged, it then will become your duty to determine whether or not he was armed with a deadly weapon at the time of the commission of the offense, as alleged in the information, and you will include a finding on that question in your verdict, using a form that will be supplied for that purpose.”

“The term ‘deadly weapon’, as used in the instruction just given, includes a pistol, or revolver or any other firearm. A person is ‘armed with’ a weapon when he carries such weapon as a means of offense or defense.”

The jury found that defendant was armed as “charged in the amended information.” Defendant contends that if the jury had been properly instructed it could have found that he was armed with a dangerous weapon, rather than with a deadly one, thereby rendering him eligible for probation. In support of his theory he relies on the case of *People v. Raner*, 86 Cal.App.2d 107, 194 P.2d 37, wherein this court held that the defendants there had been prejudiced and denied a substantial right conferred by statute to have their application for probation considered because the court erred in finding that they were armed with a “deadly” weapon rather than a “dangerous” one. In the *Raner* case it was pointed out that the minutes of the court showed affirmatively that probation was denied because the court considered the unloaded .22 rifle which had been pointed at the victim to be a “deadly” weapon and for that reason refused to pass on the merits of the application. The *Raner* case discussed the distinction between deadly and dangerous weapons and it would serve no useful purpose to repeat that discussion here. In the present case no reason was given for the denial of probation.

[1-4] The granting or withholding of probation is discretionary with the trial court and the exercise of that discretion will not be interfered with on appeal in the absence of a clear showing of an abuse thereof. *People v. Martino*, 113 Cal.App. 661, 299 P. 86; *People v. Wiley*, 33 Cal. App.2d 424, 91 P.2d 907; *People v. Jackson*, 89 Cal.App.2d 181, 200 P.2d 204. This

court may not presume that the trial court accepted the finding of the jury that the defendant was armed with a "deadly" weapon rather than with a "dangerous" one when considering the application for probation. The jury's finding was directed toward fixing the degree of the offense and was not binding upon the court when the question arose later as to whether the guns may have been only dangerous weapons. Inasmuch as other factors may have entered into the court's determination to deny probation to defendant, we may not presume that the denial was based solely on an erroneous characterization of the weapon with which the defendant was admittedly armed. To do so would be to presume error on the part of the trial court and this we may not do since all intendments and presumptions must be resolved in favor of the judgment and orders. *People v. Alexander*, 41 Cal.App.2d 275, 106 P.2d 450, 916. It is therefore unnecessary to discuss the sufficiency of the evidence to support the finding of the jury that the pistol was a deadly weapon.

[5-7] There is no merit in defendant's contention that he was prejudiced because the same judge did not hear his application for probation. It has long been held that the superior court in a particular county is a single entity and its division into departments is simply for the convenience and expedition of business. Precisely the same point was raised by the defendant in *People v. Martino*, 113 Cal.App. 661, 663, 299 P. 86, and there decided adversely to him. See, also, *Garris v. Mitchell*, 7 Cal. App.2d 430, 436, 46 P.2d 225. This court will not presume that the trial court was not familiar with the record when passing on defendant's application for probation. The rule is the same here as when a motion is made for a new trial and a judge, other than the one who presided at the trial, passes thereon; a reviewing court will not interfere with the exercise of his discretion when no abuse thereof appears. *Commander Oil Co., Ltd. v. Bardeen*, 48 Cal. App.2d 345, 119 P.2d 969.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

JOHNSON et al. v. CENTRAL AVIATION CORP. et al.

Civ. 7831.

District Court of Appeal, Third District,
California.

March 27, 1951.

Rehearing Denied April 26, 1951.

Stanley Johnson and Horace B. Baird, a co-partnership, doing business under the name and style of Executive Air Services, brought action against Central Aviation Corporation, a corporation, and Bruce Gross to recover for damages to plaintiffs' airplane which was struck by an airplane which was owned by the Central Aviation Corporation, and which was being taxied across airfield by Bruce Gross, a student at flying school of Central Aviation Corporation. The Superior Court of San Joaquin County, Thomas B. Quinn, J., rendered a judgment for the plaintiffs against both defendants for an allegedly inadequate amount, and plaintiffs and the Central Aviation Corporation appealed. The District Court of Appeals, Van Dyke, J., held that Central Aviation Corporation was not liable under the doctrine of respondeat superior for damage negligently caused by Bruce Gross.

Judgment reversed.

1. Pleading *Code Civ. Proc.* § 362(3), 364(2, 3)

In action to recover for damage to airplane in collision, court erred in striking out as sham or irrelevant or redundant allegations that plaintiffs had purchased the airplane for \$20,000 and that they had entered into an agreement to sell the airplane for \$27,500, and that they lost profit of \$7,500 which they were entitled to recover, in addition to cost of repair and loss of use of airplane. *Code Civ. Proc.* § 453.

2. Damages *Code Civ. Proc.* § 40(1)

In actions of tort there may be, where the circumstances justify it, a recovery for loss of profits resulting from the tort.

3. Damages *Code Civ. Proc.* § 40(1)

There may be recovery for loss of profits, consequent on torts if loss of profits are such as may naturally be expected to follow from the tort, and if they are certain, but recovery is denied where profits are uncertain, speculative, or remote.

4. Pleading ⇨207

Even if loss of profits for which plaintiffs sought recovery in tort action, were defectively pleaded, remedy was not by motion to strike but by special demurrer.

5. Damages ⇨39, 40(1)

There was nothing necessarily inconsistent with claim for damages for loss of use of airplane as result of collision and loss of profits on sale which might have been made, since both elements of damage might, in a proper case, if proof warranted, be allowable.

6. Damages ⇨139

In action for damage to airplane in collision, evidence sustained trial court's finding that reasonable cost of repairs of airplane amounted to only \$2,950 rather than \$3,671.89 as contended by plaintiffs.

7. Damages ⇨39, 62(3)

Where an airplane is damaged by the wrongful act of another, owner is entitled to recover for damage to airplane and for loss sustained by being deprived of its use, but owner is bound to exercise reasonable care and diligence to avoid loss or minimize resulting damages and cannot recover for losses, which might have been prevented by reasonable efforts and expenditures on his part.

8. Damages ⇨106

An owner's recovery for being deprived of the use of a damaged airplane is generally to be determined with reference to the period of time reasonably required for the making of repairs.

9. Damages ⇨188(1)

In action for damage to airplane in collision, evidence established that plaintiffs were entitled to recover in some amount for loss of use of airplane during repair.

10. Schools and school districts ⇨5

Corporation conducting flying school was not liable under doctrine of respondeat superior, for damages caused by one of its students when student negligently collided with airplane of plaintiffs while student was taxiing corporation's airplane up to offices of corporation in order to be checked out for solo flight, though on six or seven

previous occasions student had taxied airplane up to check-out point and such conduct had at least been known to corporation.

11. Negligence ⇨22

An airplane, properly handled by a competent pilot, is not an inherently "dangerous instrument".

See publication Words and Phrases, for other judicial constructions and definitions of "Dangerous Instrument".

12. Negligence ⇨27

One permitting another the use of an airplane may, under general rules of law applicable to suppliers of chattels, become liable for his own negligence in knowingly permitting use of the airplane by one incompetent to do so.

Honey & Mayall, and Ralph E. Kingston, Stockton, for appellants.

Neumiller, Ditz, Beardslee & Sheppard, Stockton, for respondent.

VAN DYKE, Justice.

Appellants and cross-respondents Stanley Johnson and Horace B. Baird, a co-partnership, brought this action to recover damages from Central Aviation Corporation, a corporation, respondent and cross-appellant, and one Bruce Gross, respondent. Briefly stated, the complaint alleged that the partnership was the owner of an airplane known as a DC-3, and that Central Aviation Corporation owned a Luscombe airplane; that Bruce Gross was the agent, servant and employee of the corporation and that on October 1, 1947, he and the corporation so negligently and carelessly operated the Luscombe plane that it collided with the DC-3 and damaged the same; that the direct damage to the DC-3 amounted to \$4,000, as being the reasonable cost of repairing the same; that the partnership lost the use of the DC-3 for a stated period of time, being further damaged thereby and that before the collision the partnership had entered into an agreement for the sale of the DC-3, but that by reason of the collision and consequent damage to the plane they were unable to consummate the sale to

their further damage, consisting of the loss of profits they would have made through the contemplated sale. The corporation and Gross demurred to the complaint and their demurrers were overruled. They also moved to strike out the allegations concerning loss of profits through contemplated sale; they further asked, if that be denied, that there be stricken the allegations concerning damage through loss of use. The trial court, responsive to the motions, struck out the allegations concerning loss of profits and the trial proceeded upon the complaint as deleted.

Trial was by the court without a jury and the court found to be true the allegations concerning ownership of the planes, the agency of Gross and the negligence averred; further that by the collision the DC-3 was damaged in the sum of \$2,950, representing the reasonable value of the necessary repairs. The court concluded that the partnership was entitled to judgment against each of the defendants in that sum and judgment was accordingly entered. No award was made for loss of use.

The partnership appealed from the judgment upon the issue of damages and the corporation appealed from the entire judgment against it. Gross did not appeal.

Since the partnership owning the DC-3 has appealed and the corporation owning the Luscombe has likewise appealed, we shall for convenience hereafter refer to them as the appellants and cross-appellant, bearing in mind, of course, that as to the partnership's appeal the corporation is respondent and as to the corporation's appeal the partnership occupies that status.

In support of their appeal, appellants, who were plaintiffs in the court below, present three contentions which may be stated as follows: 1. The court erred in striking from their complaint the allegations concerning damages through loss of profits from the sale of their plane; 2. The court erred in finding that the reasonable cost of repairing their plane was \$2,950, the amount for which judgment was rendered, instead of \$3,671.89, which they claim was proved, without contradiction, to be such reasonable cost of repair; 3. The court

erred in refusing to allow any damages based upon loss of use of their plane. They request this court, pursuant to Rule 23a of the Rules on Appeal, to make new findings of fact awarding them \$3,671.89 for cost of repairs and \$19,500 for loss of use.

By the cross appeal taken by the corporation the following contentions are advanced: 1. That the court erred in finding that Gross was an agent, servant or employee of the corporation or acting as such within the scope of any employment at the time of the accident and that therefore the judgment against the cross-appellant should be reversed.

We will first consider appellants' contention that the court erred in striking from the complaint the allegations referring to damages for loss of profits through sale of the plane. This motion addressed to the pleading was made upon the ground that these allegations were sham, immaterial, surplusage, irrelevant, incompetent and constituted conclusions of law. The allegations stricken are: "That prior to the collision plaintiffs had entered into an agreement for the sale of said DC-3 airplane for the sum of \$27,500.00; that the cost of said airplane to said plaintiffs was the sum of \$20,000.00 and that by virtue of said agreement of sale, plaintiffs would have made \$7,500.00 profit; that by reason of said collision and the negligence of said defendants, and each of them, as aforesaid, plaintiffs were unable to consummate said sale to their further damage in the sum of \$7,500.00."

[1-3] We think this matter should not have been stricken from the complaint. Section 453 of the Code of Civil Procedure provides: "Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out". We do not think the matter stricken could be termed sham or irrelevant or redundant. In actions of tort there may be, where the circumstances justify it, a recovery for loss of profits resulting from the tort. The rule is stated in 25 Corpus Juris Secundum, Damages, p. 523, § 44 [headnote], as follows: "There may be a recovery for loss of profits consequent upon torts if such

as may naturally be expected to follow from the wrongful act and if they are certain; but recovery is denied where the profits are uncertain, speculative, or remote."

[4,5] This rule is followed in California. *Hollander v. Wilson Estate Co.*, 214 Cal. 582, 586, 7 P.2d 177; *Martin v. Deetz*, 102 Cal. 55, 68, 36 P. 368; *Hoffmann v. Lane*, 11 Cal.App.2d 655, 659, 54 P.2d 477; *Continental Car-Na-Var Corp. v. Moseley*, 24 Cal.2d 104, 113, 148 P.2d 9; *Razzano v. Kent*, 78 Cal.App.2d 254, 261, 177 P.2d 612; 8 Cal.Jur. 773. Even if it be claimed that loss of profits here was defectively pleaded, still the remedy was not by a motion to strike but by special demurrer. *Swain v. Burnette*, 76 Cal. 299, 18 P. 394. See, also, *Barnes v. Berendes*, 139 Cal. 32, 69 P. 491, 72 P. 406, where the trial court was upheld in its refusal to strike from the complaint on motion items of damage which plaintiff was entitled to recover. In this case a single tort was pleaded, and based upon that tort appellants were entitled to recover compensation for all the detriment proximately caused thereby whether it could have been anticipated or not. Sec. 3333, Civil Code. It is true that damages claimed through loss of profits may, upon the trial, be shown to be so speculative and remote that recovery cannot be allowed, but we are concerned here with a question of pleading. There is nothing necessarily inconsistent with a claim for damages for loss of use of the plane and a claim for loss of profits upon sale, since both elements of damage might, in a proper case, if the proof warranted, be allowable. Thus, the time for delivery of the plane under the sale might be far enough in the future to enable the owner to use the plane for his own purposes for a period of time before being obligated to deliver it to the buyer in accordance with his selling agreement. We think it could not be said that the allegations concerning loss of profits were sham, irrelevant or redundant. And whether plaintiffs were entitled to recover for both loss of profits and loss of use was matter which they should have been permitted to prove, if they could.

[6] Appellants next contend that the evidence does not support the court's finding that the reasonable cost of the repairs amounted to \$2,950, but on the contrary amounted to a greater sum. Stanley Johnson, one of the appellants, testified that \$3,671.89 was the expense incurred in repairing the airplane, excluding any repairs that had been contemplated before the injury to the plane, in order to put it in air-worthy condition. It appeared that the plane had been purchased in Florida from the War Assets Administration and had been flown to Stockton, California, where appellants conducted their business, by means of a ferry permit from the Civil Aeronautics Administration. This permit enabled appellants to fly the plane out to California, but they could not license it for use until certain repairs had been made. But Johnson's testimony as to cost of repairs excluded all repairs except those made necessary by the collision. Upon this issue of the actual reasonable cost of repairs so made necessary there was conflict in the testimony. One Macedo, who said he was a project engineer for Transocean Airlines and familiar with the cost of repairing planes, had inspected the damaged plane and made an estimate of the cost of repair which he testified was reasonable. He testified that 650 man hours of labor at \$3.50 per hour was reasonably necessary for the repair of the plane. Johnson testified, on the contrary, that 1,100 man hours had been necessarily used for that purpose. Allowing the full sum claimed by appellants for cost of repair parts, it is apparent that the trial court disallowed in part the claim that 1,100 man hours were necessary. There was a clear issue of fact. The trial court was acting within its discretion in fixing the sum which it did fix as the necessary cost of repairs. We find no error in the trial court's conclusion in this regard.

[7,8] Appellants contend, finally, that the trial court erred in refusing to allow as damages any sum for loss of use of the plane. Appellants had claimed that this loss of use extended from October 1, 1947, the date of the collision, to April 15, 1948, the date of completion of repairs. As has

been said, the plane was not licensed to fly when it arrived in California and could not be licensed until certain repairs had been made and inspection for airworthiness completed by the proper authorities. Appellants were engaged in making these repairs when the collision occurred. It does appear that the repairs necessary to obtain a flying license for the plane could have been accomplished in a fairly short period of time, but it also appears that nothing substantial had been done to the plane after it arrived in July and until the collision occurred. Johnson, in part, explained this by testifying that there was little point in securing a license in advance of either a sale of the plane or contracts for renting the same, since the license, when given, goes for a year and if obtained prior to their needing it the time would in part have expired before either use or sale was consummated. After the collision on October 1, 1947, little was done by appellants in the way of repair until mid-December. This delay in starting the repair work was claimed by appellants in part to have occurred because there was uncertainty as to whether or not an insurance carrier was liable for such repairs. In part, there was testimony that obtaining the necessary parts was a difficult matter. From the whole of the testimony the court could have concluded that there was no legitimate reason for delaying the start of repairs until the middle of December and also that much less time was reasonably required to complete the repairs than was actually expended. But all of these matters, while they might justify a reduction in the period of time for which loss of use was claimed, would not be sufficient to eliminate the claim entirely, as was done. We have examined the memorandum opinion filed by the trial judge for such light as it may throw upon the reasoning by which it was determined that no award for loss of use was justified and it appears that after considering that loss of use could not be allowed for the full period claimed and intimating that eight weeks would have been sufficient time to repair the plane and that loss of use could not exceed that period, it was then reasoned that the evidence disclosed a used plane not air-

worthy had been purchased by professional repairers for reconditioning and resale; that the plane was never used but was apparently resold, and that therefore any award for loss of use would be of necessity conjectural and speculative. The rules governing damages for loss of use are clearly laid down in *Valencia v. Shell Oil Co.*, 23 Cal.2d 840, 844, 147 P.2d 558, 560, as follows: "Where a vehicle is damaged by the wrongful act of another, the owner is entitled to recover for the damage done to the vehicle and for the loss sustained by being deprived of its use. * * * A person injured by the wrongful act of another is bound, however, to exercise reasonable care and diligence to avoid loss or minimize the resulting damages and cannot recover for losses which might have been prevented by reasonable efforts and expenditures on his part. * * * Accordingly, an owner's recovery for being deprived of the use of a damaged vehicle is generally to be determined with reference to the period of time reasonably required for the making of repairs. * * *"

In *Malinson v. Black*, 83 Cal.App.2d 375, 381, 188 P.2d 788, 791, it was declared to be the general rule "that even though a car be used only for pleasure, the owner is entitled to damages for loss of use, despite failure of the owner to hire another car to take the place of the injured vehicle. *Pittari v. Madison Ave. Coach Co., Inc.*, 1947, 188 Misc. 614, 68 N.Y.S.2d 741."

[9] It thus appears that no reason existed for the denial of all damages for loss of use in this case unless it can be said that appellants never intended to make any use of their plane. That appears to have been the inference drawn from the testimony by the trial judge. In short, the inference is drawn that because "a used plane not air-worthy had been purchased by professional repairers for reconditioning and resale" its injury while in their hands, which, from all the testimony, necessitated its being held considerably longer than would otherwise have been the case, did not, in fact, damage them in any amount whatever. But we think the evidence does not support such a view. There was definite testimony concerning the rental value of such a plane

and the court had evidence before it which clearly required it to hold that necessary repairs to make the plane usable would require a considerable lapse of time, which time the court could fix from the evidence before it within the maximum and minimum limits shown by the evidence. The court's implied finding, therefore, that appellants had been in no wise damaged by loss of use finds no support in the record.

Appellants request this court to make findings of fact concerning the damage suffered through injury to the plane by the collision, but what we have already said upholding the factual determination of the trial court upon this matter is sufficient for denial of such a request. It is for trial courts to resolve conflicts of evidence. The same answer must be made to the request that this court find as a fact that appellants suffered damages in the sum of \$19,500 for loss of use. This sum is arrived at by allowing such loss of use at a rate testified to by appellant Johnson for the entire period from the date of the collision until the completion of repairs and the discussion heretofore has pointed out there is much conflict as to what loss of use could reasonably be allowed.

[10] Cross-appellant, Central Aviation Corporation, contends in support of its appeal, that the evidence does not support the award made against it because there is not evidence sufficient to justify the court's finding that Gross, at the time of the collision, was acting as its agent. It appears from the evidence that Gross was a student pilot who had contracted for a course of instruction in the theory and practice of airplane flight, from cross-appellant who was conducting what is termed a school of aviation. He had received considerable theoretical training and had arrived at the point in practice flying where he was permitted to make solo flights. He was working, and in order to get in his flying hours he was accustomed to go to the airfield where cross-appellant conducted its school and kept its planes, generally arriving early in the morning so that he might put in some hours before he had to go to his employment for the day. He went to where the Luscombe plane was sitting on the field,

and proceeded to taxi it up to the offices of the cross-appellant, where in the normal course he would be checked out for his solo flight. There was testimony that he had theretofore on six or seven occasions taxied a plane up to the check-out point just as he did on the morning when the accident occurred and that this conduct had at least been known to cross-appellant. While he was so taxiing the plane he ran it into the DC-3, causing the damages herein sought to be recovered and there appears to be no issue upon the proposition that he was negligent in so doing. The question here is whether or not from the evidence the court could justly find that his relationship to cross-appellant was such as to make it liable for that neglect under the doctrine of respondeat superior. No claim is made to a right to recover upon any other theory and from the pleadings we think it clear that no other theory of recovery has ever been relied upon since this action was begun. The allegations of the complaint are that at the time of the collision Gross was "the agent, servant, or employee of defendant Central Aviation Corporation * * * and was acting within the course and scope of his employment as such. * * * That on or about October 1, 1947, defendants so negligently and carelessly operated their Luscombe airplane * * * as to cause the same to collide with the DC-3 airplane owned by plaintiffs." The court finds these allegations to have been true and makes no finding that any other negligence occurred save that of Gross in driving the Luscombe plane into the DC-3. Cross-appellant contends that the doctrine of respondeat superior is not applicable under the facts of this case and that, on the contrary, Gross was at all times, while in charge of the plane, nothing more than a bailee or licensee for whose negligent handling of the plane it was not responsible.

The legal relationship between Gross and cross-appellant was clearly shown without conflict to have been one where by the contract between them he was to receive from them instruction in flying, which included, of course, ground handling of a plane. It included, too, the furnishing to him by the cross-appellant of a plane for his

use during the course of instruction. Both parties were engaged in performing that contract when this accident occurred. We see no reason to hold that, because to the knowledge of cross-appellant he had on several occasions, just as he did on the morning of the accident, taxied the plane intended for his use from its parking place up to the offices of cross-appellant preparatory to being checked out for his solo flight, the regular and contractual relationship between them was somehow changed into one of employer and employee or principal and agent. As a student taking instruction he was neither the servant nor the agent of the flying school while doing those things properly within his course of instruction. By what occurred we hold he did not change that status so as to make the school liable for his acts on the basis of respondeat superior.

[11] Generally speaking, there is nothing about airplanes which takes them out of the category of chattels which may be bailed to another for his use, or which another may be permitted by the owner to use, without imposing upon the owner liability for such bailee's or permittee's negligent operation. It is true that the law formerly looked upon aviation as an ultra-hazardous activity and the Uniform Aeronautics Act which was once adopted in many states did impose absolute liability on the owner as well as the operator or lessee of every aircraft for any damage to person or property caused by its operation unless there was contributory negligence on the part of the injured person. However, this view has come to be modified and now it is considered that properly handled by a competent pilot an airplane is not an inherently dangerous instrument. Our Legislature has adopted this more modern view and has declared that as to passengers the liability of the owner or pilot of an aircraft shall be determined by the rules of law applicable to torts on the lands or waters of this State arising out of similar relationships, and has further declared that "the liability of the owner of one aircraft to the owner of

another aircraft, or to operators or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by" the same rules. State Aeronautics Commission Act, Sec. 2, subdivisions (f) and (g), 1949 Pocket Supp., 1 Deering's Gen.Laws, Act 151a. We have no statute respecting airplanes, fixing liability upon owners for permitted use such as we have with respect to automobiles.

[12] It is, of course, true that one permitting to another the use of an airplane may, under general rules of law applicable to suppliers of chattels, become liable for his own negligence in knowingly permitting such use by one incompetent to exercise the same. It would serve no purpose, however, to state the conditions and the limitations of the rules governing such liability, for no such negligence was pleaded or in any wise relied upon in this action. Under the contract between them for the use by Gross of the airplane furnished him under the provisions of the existing agreement between himself and the cross-appellant he was neither the employee nor the agent of the cross-appellant and they were not, therefore, liable for his negligence under the doctrine of respondeat superior.

With respect to respondent Gross and responsive to the appeal of appellants, the owners of the DC-3, the judgment is affirmed as to the award of damages for the reasonable cost of necessary repairs; the judgment is reversed as to respondent Gross for the error of the trial court in striking out the allegations for damage from loss of profits and for error in the trial court's findings that no damage was suffered from loss of use. Responsive to the cross-appeal of Central Aviation Corporation, the judgment against it is reversed. Appellants are to recover costs on appeal from respondent Gross; cross-appellant Central Aviation Corporation is to recover costs on appeal from appellants Johnson and Baird.

ADAMS, P. J., and PEEK, J., concur.

103 Cal.App.2d 164

JENSEN v. UNION PAVING CO. et al.

Civ. 14482.

District Court of Appeal, First District,
Division 1, California.

March 29, 1951.

Action by L. C. Jensen against Union Paving Co., a corporation, and another, for balance alleged to be due plaintiff under contract with named defendant for certain construction work. The Superior Court in and for the county of San Mateo, Edmund Scott, J., rendered judgment for plaintiff and defendants appealed. The District Court of Appeal, Peters, P. J., held that some of the findings were unsupported, and others were inconsistent with each other and as trial court recognized errors had been committed in findings and tried to correct those errors but acted too late it was abuse of discretion to deny motion for new trial by operation of law.

Judgment reversed.

1. New trial ☞155

Where defendant's motion for new trial was not acted on by trial court within 60 days from service of notice of entry of judgment, motion was denied by operation of law and trial court's order entered thereafter vacating and setting aside findings and judgment and reopening case for further proceedings was void.

2. New trial ☞155

In action by subcontractor against contractor and contractor's surety to recover balance allegedly due subcontractor for work or labor performed under contract, where trial court's findings were inconsistent and some of them were unsupported by evidence and trial court recognized errors had been committed in findings and tried to correct those errors but acted too late, it was an abuse of discretion to deny motion for new trial by operation of law.

3. Trial ☞398

While findings must be given a liberal construction to end of supporting rather than defeating a judgment, that rule cannot be used to uphold findings that are unsupported or inconsistent with each other.

Henry F. Wrigley, San Francisco, for appellants.

Mathew Weber, San Francisco, for respondent.

PETERS, Presiding Justice.

This is a case where the evidence, the findings and portions of the judgment are most confusing, ambiguous, and in some respects, inconsistent. The facts are as follows:

Plaintiff L. C. Jensen and defendant Union Paving Co. are duly licensed contractors. Union, on August 10, 1946, entered into a contract with South San Francisco to construct certain improvements for the city in accordance with certain plans and specifications. The defendant United Pacific Insurance Company executed a bond as surety for Union to guarantee payment by Union for materials, work or labor performed under the contract. The bond also provided for a reasonable attorney's fee. On August 24, 1946, Jensen, as a subcontractor, entered into a contract with Union to install the portion of the main improvement consisting of certain sewers and storm drains for a total contract price of \$41,325.80. This contract is in the form of a letter signed by Jensen and accepted by C. L. Corson for Union. It reads as follows:

"Dear Sir:

"I agree to install sewers and storm drains in Brentwood, South San Francisco, for the following prices. [Here are set forth in detail the work and unit prices totalling \$41,325.80.]

"These prices include furnishing all labor, materials and equipment necessary to install the work according to plans and specifications.

"Monthly progress payments in the amount of 90% of the work completed are to be made and final payment is to be made 30 days after the acceptance of the work by the engineer in charge.

"Yours very truly,

"L. C. Jensen"

The complaint alleges that Union failed to make the contract payments; that the

reasonable value of the work done by Jensen, with extras, is \$53,269.14; that \$26,449.54 has been paid; that a balance of \$26,819.60 is due and owing, plus a reasonable attorney's fee. The second amended answer of the two defendants denies that Union failed to perform its part of the contract and alleges that Jensen performed only a part of his contract; that the reasonable value of the work performed by Jensen does not exceed \$32,276.44, and that \$30,661.19 has been paid to Jensen. The answer then, by way of "setoff and counterclaim" alleges that, in certain respects, Jensen breached his contract by refusing to perform and complete the work called for by the contract, and that defendants were required to correct these defects to their damage in the amount of \$6,308. The specific items, nine in number, are set forth in the pleading. Because some of these items will be referred to later in this opinion, they should here be summarized. They are:

1. Masonry work on all manholes and catchbasins were installed below the required elevation and had to be corrected at a cost of \$350.

2. Raising manholes at a cost of \$783.83.

3. Cost of supplying missing manhole frames and covers —\$127.12.

4. A trench over the 48-inch storm sewer was not backfilled in accordance with plans and specifications, and that portion which was on Hazelwood Drive and Maywood Way easterly settled. Jensen refused to remedy this, and Union removed the defective filling, re-backfilled and repaved at a cost of \$2,448.35.

5. Jensen failed and refused to remove surplus material after backfilling the 48-inch sewer, and Union did so at a cost of \$967.20.

6. Stakes were damaged by reason of the re-excavating of the 48-inch sewer, and had to be replaced at a cost of \$36.

7. Catchbasins on two corners of Maywood Way and Wildwood Drive were not constructed to conform with the lines and grades as shown on the plans. Jensen refused to correct this, and Union rebuilt

them to conform to the plans at a cost of \$112.10.

8. Jensen damaged certain sidewalks, which had to be corrected at a cost of \$85.

9. The backfilling in connection with the trench over the 48-inch sewer, at the extreme northwest portion of Wildwood Drive at the parking lot near Hazelwood Drive settled due to improper compaction, which Union had to remedy at a cost of \$1,398.40.

On these pleadings the cause proceeded to trial. At the commencement of the trial the parties stipulated that there was a duly executed contract between the city and Union, a copy of which was admitted into evidence; that the defendant insurance company executed a material and labor bond which provides for a reasonable attorney's fee; that all work performed and here involved was performed pursuant to the Improvement Act of 1911, Streets and Highways Code, § 5000 et seq.; and that plaintiff had filed a verified claim with the city. At the trial the main issues revolved around the precise amount already paid to Jensen, the necessity for and the value of certain work performed by Union in correcting what it claimed were defects in Jensen's work, and the value of the work performed by Jensen. The evidence on these issues was most confusing. The trial judge ordered the plaintiff to prepare proposed findings, and then filed a memorandum opinion in which he stated, in part:

"* * * The Court feels that the only reason Union Paving Co. did not make payments to Plaintiff is because of Plaintiff's failure to complete the work; and, in the opinion of the Court, the amount due Plaintiff could not be determined until a trial had been had. However, the Court feels that Plaintiff is entitled to the fair value of the work done by him after deducting credits to which Defendant is entitled which net sum is the amount of \$10,069.05.

"Therefore, the Court will enter judgment for Plaintiff for \$10,069.05 plus an attorney fee in the sum of \$1,000.00, costs and interest from the date of entry of judgment."

Findings were prepared and signed and judgment entered in favor of plaintiff on July 27, 1949, for \$10,069.05 plus the \$1,000 attorney's fee. Notice of entry of judgment was mailed to defendants July 29, 1949. On August 8, 1949, defendants moved for a new trial on the grounds of insufficiency of the evidence, that the decision is against the law, errors in law, and newly-discovered evidence. The motion was supported by affidavit, and plaintiff filed a counter-affidavit. The court failed to pass on this motion for a new trial within 60 days from the service of notice of the entry of judgment as required by section 660 of the Code of Civil Procedure. After the 60-day period had expired the trial court attempted to reopen the case by a minute order dated October 3, 1949. That order reads as follows:

"(Motion for a New Trial heretofore submitted).

"In lieu of granting a new trial, the court vacates and sets aside the findings and judgment and reopens the case for further proceedings and the introduction of additional evidence on (1) the sewer repair bill in the sum of \$1398.40, (2) the payments received by check by plaintiff and (3) the reasonable costs of remedying the other items of work referred to in Par. VIII (8) of defendants' 2nd amended answer. Deft. are granted leave to further amend said answer by pleading said items and the alleged reasonable costs of remedying same."

[1] This order was ineffective. The motion for a new trial, not having been acted upon within 60 days from service of notice of the entry of judgment, was denied by operation of law, and the order of October 3, 1949, made after that date was void. *Kraft v. Lampton*, 13 Cal.App. 2d 596, 57 P.2d 171.

The findings of fact entered at the conclusion of the trial purport to dispose of the basic issues involved. Finding VIII sets forth that from October 18, 1946, to June 2, 1947, plaintiff supplied work, labor and materials under the contracts. The court then finds that it is untrue that the reasonable value of this work, labor and

materials was \$53,269.14 as alleged in the complaint, and that it is untrue that Union breached its contract with Jensen in failing to pay him. This last finding was apparently predicated on the thought of the trial judge that a reasonable dispute existed between the parties and a law suit was necessary to ascertain the precise amount due. The court then finds (finding XI) that the *agreed value* of the work to be performed by Jensen was \$41,102.90, and that there has been paid to Jensen (finding XII) or to his account the sum of \$27,541.87; that plaintiff became indebted to defendants for the use of equipment in the sum of \$96.68, for which defendants are entitled to credit, but Union is not entitled to certain other designated credits. In finding XIII it is found that plaintiff did not perform and complete the work in conformity to the plans and specifications, and Union had to remedy these defects to their damage in the sum of \$3,395.30. This is the total of items 2, 3, 4 and 6 set forth in defendants' answer and itemized earlier in this opinion. The court then finds (finding XIV) as untrue certain allegations of the second amended answer which refer to items 1, 5, 7, 8 and 9 there set forth and itemized earlier in this opinion. In finding XV the court finds that the balance due from defendants to plaintiff is \$10,069.05, plus a reasonable attorney's fee, fixed (in finding XVII) at \$1,000. Judgment was entered accordingly, and defendants appeal.

It is extremely difficult to ascertain just how the court arrived at some of the figures contained in the findings, and the briefs do little to clarify the situation. Each one of the basic findings is unsupported or inconsistent with other findings.

In finding XI the court fixes the "agreed value" of respondent's work at \$41,102.90. The contract price was \$41,325.80. Respondent states (Res. Br. p. 3) that the finding is based on the agreed contract price. This is obviously not so. There are other figures in the record. Jensen's last bill sent to Union is dated June 3, 1947, and it fixes the figure at \$41,220.80. Deutsch, an engineer working under Estes, the city works engineer, itemized the total cost of the job and fixed the figure of

Jensen's work at \$41,468.15. Exhibit 5 is an itemized summary of Jensen's testimony and shows that on the trial Jensen testified that the total value of his work was \$41,266.94. But this included \$146.14 for extras. If this be deducted from the \$41,266.94, the result is \$41,120.80, which is within \$17.90 of the amount fixed in the finding as the "agreed" price. The precise finding of the court is unsupported.

The trial court, in finding XII, fixes the amount paid to Jensen by Union at \$27,541.87. There must be an error in this figure. Union introduced bills by it totalling \$22,381.36. Some of the items contained in this bill were challenged by Jensen. Dowling, the president of Union, testified that \$24,419.97 plus \$5,744.30 had been paid to respondent. Jensen testified to having received four payments from Union totaling \$5,000, and stated that Union paid bills of \$22,449.54. He was positive that the total amount paid to him was \$27,449.54. (Rep. Tr. 21.) But later in the trial the court and counsel got considerably confused over the amount of these payments to Jensen. This confusion was caused by the fact that Jensen was doing other work for Union and sometimes payments on several jobs were included in one check. Thus, defendants' exhibit 23 is a check to Jensen for \$9,031.84, which admittedly covered several jobs. Dowling testified that \$5,744.30 of this check was meant to apply to the job here involved. Starting at page 195 of the reporter's transcript appears evidence from which it is apparent that the trial court and counsel confused this \$5,744.30 with the \$5,000 previously testified to by Jensen. The two are clearly separate transactions. Jensen testified that no part of the \$9,031.84 was applied by him to this job. Thus, the evidence would sustain a finding that \$5,744.30 of this check was applied to this job or nothing at all. But the trial court admittedly allowed a credit to Union of \$2,942.90 as being applied from this check on the job here involved. This was apparently based on a misunderstanding of Jensen's testimony. He first testified that he applied \$2,942.90 of the check to this job (R.T. 195, L. 16), but a few lines later in the

record (R.T. 195, L. 22) he corrected this testimony and stated that not one cent from the check had been applied on this job.

In addition, in arriving at the figure of \$27,541.87 the trial court apparently disregarded Jensen's admission that he had received four checks from Union totalling \$5,000. The court recognized that it had committed an error in this finding in fixing the sum of \$27,541.87 as the amount paid by Union, because one ground of its abortive order of October 3, 1949, was that additional evidence should be taken on the issue of "the payments received by check by plaintiff." This finding is unsupported by the evidence.

This is equally true of a series of other findings. In finding XII the court allowed a credit to Union of \$96.68 for the rental of equipment, and then specifically denied a credit for a discount to Gladding McBean Company of \$60.33; the so-called De Velbiss deduction of \$65.61; investigation costs of \$83.54; and a payment to Estes Engineering Company of \$48.00. Then in finding XIII the court found that Union was required to remedy certain defects in respondent's work as follows: Cost of raising certain manholes, \$783.83; cost of supplying manhole covers, \$127.12; cost of repairing trench over 48-inch sewer, \$2,448.35, and cost of replacing survey stakes, \$36. Thus, in this finding, the court found that Union was entitled to a credit of \$3,395.30. Then in finding XIV the court found certain allegations of the answer to be untrue. These were the allegations claiming credits for items 1, 5, 7, 8 and 9 alleged in the answer and set forth earlier in this opinion. Union admits that there was a conflict in the evidence as to items 1 and 5, but claims that it was error to deny to it credits on items 7, 8 and 9. Item 7 relates to two catchbasins which Union claims it had to rebuild because of Jensen's failure to construct them according to the plans. The evidence on the necessity of rebuilding these catchbasins was conflicting. Jensen testified that he built these catchbasins according to stakes set out by the engineers, and that the error was that of the engineers and not his mistake. There-

fore, the disallowance of this item is supported. A different situation exists as to items 8 and 9.

Item 8 refers to certain sidewalks that were damaged by Jensen and repaired by Union at a cost of \$85. As we read the record the evidence was uncontradicted that Jensen's equipment caused this damage. (R.T. 124, L. 26, to p. 125, L. 8.) We have not been referred to any conflicting testimony, nor have we found any in the record. This being so, this item should have been allowed as a credit.

Item 9 is even more important. It refers to the refilling of a portion of a certain trench in which a 48-inch pipe was laid at a cost to Union of \$1,398.40. The court disallowed this item, but, strangely enough, allowed item 4, which is for backfilling another portion of the same ditch, and repaving a portion of the overlying road. There was much conflicting testimony over this ditch. Jensen, who was required under his contract to refill the ditch, did so by pushing on the dirt with a bulldozer. There was a great deal of evidence that this method was improper because it did not pack in the dirt tight enough to prevent settling. Jensen and several of his witnesses testified that his method of refilling the ditch was correct, and that the settling was caused by factors over which he had no control. Union, at the request of the city, enlarged the ditch and flooded it to settle the fill. Some of the new pavement over the ditch settled and Union repaved. Union, in items 4 and 9 set forth in its answer claimed an offset for this repacking and repaving of the trench. Item 4 is for removing the defective filling, repacking and repaving that portion of the trench on Hazelwood Drive and Maywood Way. The trial court allowed this as an

offset in the amount of \$2,448.35. Item 9 is for the cost of repacking the portion of the trench at the extreme northwest portion of Wildwood Drive. This cost Union \$1,398.40. This item was disallowed by the trial court. These findings are inconsistent. There was no difference between the two sections of the trench. Both sections admittedly settled. Both sections were admittedly repacked by Union. Either the settling was or was not caused by the methods employed by Jensen in refilling. If such methods were faulty, Union was entitled to offset both items 4 and 9; if the settling was caused by factors not related to Jensen's methods of repacking, neither item should have been allowed. The trial court in its ineffectual order of October 3, 1949, recognized that there was something wrong with its findings on this issue because the court ordered additional evidence taken on "the sewer repair bill in the sum of \$1398.40."

[2, 3] From what has been said it is obvious that the judgment must be reversed. While findings must be given a liberal construction to the end of supporting rather than defeating a judgment, *Davis v. Stulman*, 72 Cal.App.2d 255, 164 P.2d 787, that rule cannot be used to uphold findings that are unsupported or inconsistent with each other. The trial court recognized that errors had been committed in the findings and tried to correct these errors, but it acted too late. Under the circumstances it must be held that it was an abuse of discretion to deny the motion for a new trial by operation of law.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

103 Cal.App.2d 208

NIERI v. NIERI.

Civ. 14409.

District Court of Appeal, First District,
Division 2, California.

April 2, 1951.

Rehearing Denied May 2, 1951.

Hearing Denied May 28, 1951.

Suit for divorce by Ellen Nieri against Silvio Nieri, wherein defendant filed a cross-complaint for divorce. The Superior Court in and for the County of San Mateo, A. R. Cotton, J., entered judgment granting plaintiff a divorce and providing for division of the community property and both plaintiff and defendant appealed. The District Court of Appeal, Nourse, P. J., held that there was sufficient fully corroborated evidence to support a finding that defendant had caused plaintiff great mental suffering justifying a divorce on ground of cruelty.

Judgment affirmed.

1. Divorce ⇨130

Evidence corroborated by several witnesses was sufficient to support a finding that husband by his conduct had caused wife great mental suffering justifying a divorce on ground of cruelty.

2. Divorce ⇨186

Where trial court's finding of cruelty based on physical violence was attacked on ground of lack of corroboration but fully corroborated evidence was sufficient to support a finding as to mental suffering justifying a divorce on ground of cruelty, appellate court would append to trial court's finding a finding as to such mental suffering constituting cruelty. Code Civ.Proc. § 956a.

3. Divorce ⇨130

Evidence that husband and wife by mutual choice engaged in frequent quarrels and intermarital warfare to the satisfaction of both parties warranted conclusion that neither party suffered actionable cruelty justifying a divorce by reason of such conduct.

4. Divorce ⇨286

Provision in divorce judgment for division of community property would not be disturbed on appeal where neither party

showed by undisputed evidence that trial court's estimates of value were wrong or that wife did or did not receive a substantially greater share than was awarded to husband.

5. Divorce ⇨238

Where evidence was such that wife might well have been found guilty of cruelty and therefore denied a divorce on ground of husband's cruelty, denial of wife's request for alimony was not abuse of discretion.

6. Divorce ⇨225

Where divorce judgment directed husband to pay wife \$25,000 in cash as her share of the community property, which appeared to be far in excess of the available cash on hand, trial court was justified in denying costs and counsel fees to wife.

Belli, Ashe & Pinney, and Melvin M. Belli, all of San Francisco, for plaintiff-appellant.

J. W. Coleberd, of South San Francisco, R. A. Rapsey, of San Bruno, and Richard P. Lyons, of South San Francisco, for defendant-appellant.

NOURSE, Presiding Justice.

Plaintiff sued for separate maintenance, later amending her complaint and praying for a divorce. Defendant answered and cross-complained praying for a divorce. Both parties charged cruelty and plaintiff separately charged adultery. Judgment was entered in favor of plaintiff on the ground of cruelty. A finding was made that the charge of adultery was not proved. On the issue of cruelty the court found that it consisted of frequent slappings and beatings. In the adjustment of the community property the court awarded the plaintiff \$25,000 in cash, a Packard automobile and all the household furniture. To the defendant was awarded \$25,000 in cash and real property valued at \$8000. Both parties appealed, the plaintiff attacking the finding against the charge of adultery and the award of property interests, the defendant attacking the finding of cruelty as

not corroborated, the finding that the plaintiff herself was not guilty of cruelty, and the finding as to the value and proper division of the community property. Because of the cross appeals we will refer to the parties as plaintiff and defendant as they originally appeared in the trial court.

We have reached the conclusion that the judgment should be affirmed on both appeals and will not give a detailed statement of facts as it would serve no good purpose to do so.

The real serious contention by the appellant-defendant is that there was no corroboration for the court's finding of cruelty. Finding No. 11 reads: "That, on numerous occasions, defendant Silvio Nieri violently struck, beat, grabbed and shook plaintiff and called plaintiff vile, profane and abusive names." There was ample evidence given by plaintiff herself to support this finding of fact, and defendant does not contend to the contrary. However, we are satisfied that there was sufficient evidence of other acts of cruelty, which evidence was fully corroborated by numerous witnesses and which would fully support a finding of cruelty sufficient to support a divorce on that ground.

These facts are undisputed: Plaintiff and defendant maintained two homes or apartments. One of these apartments consisted of two bedrooms and bath on the second floor of the mortuary which the parties were operating in San Bruno. On the night of February 20, 1948, defendant and correspondent mentioned in the adultery count entered these apartments at about 10:30 P.M. At about that time the plaintiff accompanied by two investigators and a photographer drove up and parked opposite the mortuary. These witnesses testified that they at that time witnessed defendant and correspondent in the front bedroom practically naked and that they waited until approximately three hours later when they rang the doorbell and were admitted to the apartment. They then saw the correspondent in Mrs. Nieri's bed and the "battle" followed. Both the defendant and the correspondent admitted these facts, though strenuously denying all acts of

adultery which is not the issue at this point.

Bearing in mind that the undisputed evidence also showed that Mrs. Nieri disliked the correspondent almost to the point of hatred and that she became fighting mad when she observed this woman occupying her own bed, it can not be gainsaid that her reaction did not cause some mental suffering amounting to cruelty.

We have said that this evidence is undisputed. Four witnesses called by the plaintiff testified to these facts. The denials of defendant and the correspondent corroborated these witnesses in all material details. The answer of the defendant is that the woman was a cousin, a grandmother with an eight year old grandchild, and that she herself was fifty-four years of age. Assuming these facts to be true we can not draw any untoward assumptions either from the relationship of the parties or from the age of the correspondent.

[1,2] This evidence is sufficient to support a finding that the acts of the defendant on that occasion caused the plaintiff mental suffering justifying a divorce on that ground. *Van Camp v. Van Camp*, 53 Cal.App. 17, 22, 199 P. 885. Conformably to the provisions of 956a, Code of Civil Procedure, we therefore append to finding No. 12 the following: "That on the night of February 20, 1948, the defendant entertained the correspondent named in the pleading at his apartment at San Bruno from the hour of 10:30 P.M. until the following morning, during a part of which time the correspondent occupied the bed of this plaintiff and the defendant slept in the same bedroom, and that the parties were thus seen by the plaintiff and three others, all of which greatly disturbed this plaintiff and caused her great mental suffering and mental cruelty."

[3] The defendant also complains of the finding against his charge of cruelty on the part of plaintiff. The evidence on this issue disclosed a sordid picture of excessive drinking at home and at public bars, with frequent quarrels and intermari-

tal warfare carried on with whatever weapons were available at the moment, such conduct having been apparently the mutual choice and to the satisfaction of both parties. If that was the mode of living the parties chose, the trial court could not have found plaintiff alone guilty of cruelty and absolved the defendant from all blame, but might well have concluded that neither party suffered actionable cruelty from those instances.

[4] The issue of the division of the community property is not a fair issue for decision. The question as to what part of defendant's business should be treated as separate property and what part community was decided on evidence covering a wide range relating to the value of defendant's partnership interest in the business at the time of his marriage, the value of his services in building it up, the value of the plaintiff's services, and the value of the good will and assets at the time of the trial. The evidence of the value of the automobile and household furniture was far from satisfactory. The trial court patiently heard all the evidence and made what it deemed a proper division. We cannot conceive how either party would gain by a re-trial of these issues. Suffice it to say that neither party has shown by undisputed evidence that the court's estimates of value were wrong nor that the plaintiff did or did not receive a substantially greater share than that awarded her husband.

[5] In a case such as this where the plaintiff might well have been found guilty of cruelty, and denied a divorce on that ground, it was no breach of discretion, on this record, to deny her request for alimony.

[6] Finally the plaintiff argues that it was error to deny her counsel fees and costs. We find no motion made for that purpose and no order denying it. But if the record is incomplete in this respect it is sufficient to say that the trial court was justified in denying costs and counsel fees to plaintiff after having directed defendant to pay her \$25,000 in cash which appears

to have been far in excess of the available cash on hand.

The judgment is affirmed. Each party to bear his own costs—the cost of the clerk's and reporter's transcripts to be equally divided.

DOOLING, J., and SCHOTTKY, Justice pro tem., concur.

Hearing denied; SCHAUER, J., dissenting.



102 Cal.App.2d 861

LOGAN v. CITY OF GLENDALE et al.

Civ. 17666.

District Court of Appeal, Second District,
Division 1, California.

March 19, 1951.

Rehearing Denied April 5, 1951.

Oliver C. Logan brought suit against City of Glendale, and others, to restrain the city and its officers from levying assessment or paying out any of city's general funds in connection with installation of ornamental street lights and related equipment on one of the main business streets undertaken by special assessment proceedings, and for declaratory relief. A judgment of dismissal following sustaining of demurrers to plaintiff's fourth amended complaint without leave to further amend was entered by the Superior Court of Los Angeles County, Kurtz Kauffman, J., and the plaintiff appealed. The District Court of Appeal, White, P. J., held that plaintiff's fourth amended complaint failed to state a cause of action for either injunction or declaratory relief.

Judgment affirmed.

I. Municipal corporations 419

Where special assessment proceedings by chartered city to provide for installation of ornamental street lights and related equipment on one of business streets complied with constitutional provision relating to improvement proceedings by chartered city, the limitations set forth in the Street and Highway Code were inapplicable.

Streets and Highways Code, §§ 2800-3212, Code, §§ 5003, 5369; Const. art. 13, § 2804, 5000-6794; Const. art. 13, § 17.

2. Municipal corporations ⇨484(1), 491

Where complaint of one protesting against special assessment proceedings by chartered city to provide for installation of ornamental street lights and related equipment on one of business streets failed to allege that city council did not find and determine in accordance with constitutional provision relating to improvement proceedings by chartered city that public convenience and necessity required such improvement, it would be assumed that such a finding was made by council, and consequently, the debt limitation and majority protest provisions of the Special Assessment Investigation, Limitation and Majority Protest Act of 1931 were not applicable. Streets and Highways Code, §§ 2800-3012, 2804, 5000-6794; Const. art. 13, § 17.

3. Municipal corporations ⇨484(1)

The determination of a legislative body as to relative benefits conferred upon property by an improvement is conclusive in absence of fact showing fraud or denial of constitutional right to property owner.

4. Municipal corporations ⇨425(3)

Assessing the right of way of railroad at but a nominal amount by city council of chartered city in special assessment proceeding to provide for installation of ornamental street lights and related equipment on one of business streets would not be set aside as an abuse of discretion in violation of statute, in absence of fact showing fraud or a denial of constitutional rights to property owners. Streets and Highways Code, § 5300; Const. art. 13, § 17.

5. Municipal corporations ⇨484(1)

Where complaint attacking special assessment proceedings by chartered city to provide for installation of ornamental street lights and related equipment on one of business streets failed to plead that due publication of resolution of intention was not made, court must presume that such official duty was performed by city officials in due course. Streets and Highways

6. Constitutional law ⇨193

Curative provisions cannot be successfully invoked against a party who shows that he has been deprived of property without due process of law.

7. Municipal corporations ⇨515(1)

Property owner who was objecting to special assessment proceedings by chartered city to provide for installation of ornamental street lights and related equipment on one of business streets was barred by operation of curative provisions of improvement act of 1911, where property owner failed to plead facts showing deprivation of property without due process of law. Streets and Highways Code, §§ 5003, 5369; Const. art. 13, § 17.

8. Fraud ⇨41

Pleading ⇨8(15)

Fraud must be pleaded in specific language descriptive of acts which are relied upon to constitute fraud, and it is not sufficient to allege it in general terms, or in terms which amount to mere conclusions.

9. Municipal corporations ⇨419

Special assessment proceedings by a chartered city to provide for installation of ornamental street lights and related equipment on one of business streets was not objectionable because of inclusion of assessment for cost of certain transformers and control equipment and the installation of poles and painting of existing poles on ground that they constituted equipment and functions of the public service department of the city, a municipally owned public utility. Streets and Highways Code, §§ 2800-3012, 5000-6794; Const. art. 13, § 17.

Paul S. Crouch, Jackson T. Carle, Los Angeles, for appellant.

Henry McClernan, City Atty., John H. Lauten, Asst. City Atty., Joseph R. Roark, Deputy City Atty., all of Glendale, for respondents City of Glendale and its officers.

Aubrey N. Irwin, Henry Melby, Glendale, for respondent Newbery Electric Corp.

WHITE, Presiding Justice.

Appeal from a judgment of dismissal following the sustaining of demurrers to plaintiff's fourth amended complaint without leave to further amend.

The City Council of Glendale undertook by a special assessment proceeding to provide for installation of ornamental street lights and related equipment on Brand Boulevard, one of the main business streets of Glendale. Plaintiff and others, owners of property on Brand Boulevard, filed protests which were overruled. Thereupon plaintiff brought the present proceeding to restrain the city and its officers from levying assessments or paying out any of the city's general funds in connection with the improvement, and for declaratory relief.

The fourth amended complaint alleged that on January 7, 1947, pursuant to sections 2851 and 2852 of the Special Assessment Investigation, Limitation and Majority Protest Act of 1931 (Streets and Highways Code, Div. 4), the City Council caused a notice of hearing on the proposed improvement to be issued and set February 13, 1947, as the time for hearing protests; that plaintiff filed his written grounds of protest and orally presented the same, said grounds being as follows:

(1) That the proceedings were partial, biased and an abuse of discretion, in that the Council "permitted and encouraged the withdrawal of protests and objections to said improvement, after and subsequent to the time fixed by said Council limiting the filing of protests."

(2) That the Council, although permitting the withdrawal of protests, denied plaintiff and other property owners the right to file protests subsequent to the dead-line.

(3) That the purported improvement was a replacement of the existing street lighting system and not the installation of a new system as contemplated under the Improvement Act of 1911.

(4) That the improvement would not result in local benefit to the property proposed to be assessed.

(5) That a portion of the equipment and installations were not proper items to be paid for by assessment and were of no benefit to the property assessed.

(6) That the proposed improvement was not permanent in character and therefore not a proper improvement to be financed by assessment, since it was to replace a former similar improvement, and would in turn be replaced in the future.

(7) That under the Charter of the City of Glendale, certain transformers and control equipment, estimated to cost \$20,000.00 out of the \$100,000.00 estimated cost, could be paid for only with funds of the Public Service Department of the city.

(8) That the proposed system, if beneficial at all, would benefit the entire city, and was not local in nature.

(9) That a portion of the estimated cost, to-wit, the painting of poles, was an ordinary maintenance operation required to be performed by the Public Service Department.

It was then alleged that the Council continued the hearing on the protests to February 20, 1947, and again to February 27, 1947, the plaintiff each time renewing his objections, and that on February 27 plaintiff specifically objected to acceptance by the Council of withdrawals of protests filed subsequent to February 13, 1947, "and a report filed with said City Council on the 27th day of February, 1947 by Defendant John C. Albers, City Engineer, in which, as a consequence of acceptance by the City Council of said withdrawals, said City Engineer found that less than a majority of the area of the district proposed to be assessed to pay a portion of the cost of said purported public improvement, was represented in protests filed by owners thereof."

Next, it was alleged that on October 16, 1947, the Council, claiming to act pursuant to Section 17 of Article XIII of the Constitution of California, adopted Resolution No. 7861, calling a hearing for October 30,

1947, for the purpose of determining whether the public convenience and necessity required construction of the improvement; that prior to the hearing plaintiff and other property owners filed protests upon the following grounds, among others:

- (1) All the grounds hereinabove stated.
- (2) That the proposed assessment was not impartial, fair nor general.
- (3) That the cost of supplying poles for a portion of the improvement was to be spread over the entire district assessed, while said poles were useful and beneficial only in a limited area.
- (4) That the assessment on individual parcels had no relation to value of property assessed or benefits to be derived.
- (5) That the Council had no right to proceed under the aforesaid section 17 of Article XIII of the Constitution.

It was further alleged that on October 30, 1947, the council adopted Resolution of Intention No. 7877, calling a hearing for November 28, 1947, on which last mentioned date the plaintiff and others appeared and made objection and protest on the grounds hereinbefore mentioned, which objections were overruled; that about March 30, 1948, within ten days from date of first publication of notice of award of contract (sec. 5258, Improvement Act of 1911), plaintiff sought to file with the clerk of the city council a notice specifying in what respect the proceedings were defective, but that his "protest and objection" was rejected and plaintiff was told by the City Attorney that his protest was improper and not provided for by law under the Improvement Act of 1911 and he could not protest further until assessments were levied, but that said statements and advice by the City Attorney were false, and relying on such statements and advice plaintiff did not file his protest and objections. As a result, it was alleged, a controversy calling for declaratory relief has arisen.

Further allegations of the fourth amended complaint relate to proceedings undertaken by the City Council as far back as 1941, a proposed map of the district prepared in 1948, a charge that between 1941 and 1947 no notice of proposed

changes in the boundary of the assessment district or in the work proposed had been given; that in February, 1947, the Council found that the public interest and necessity required construction of the proposed improvement, and subsequently found that the protests against such improvement were made by owners of less than one-half of the district to be assessed, and therefore overruled all protests; that certain statements by the City Attorney and the City Engineer were false; that plaintiff and others have been deprived of substantial rights under the Special Assessment Investigation, Limitation and Majority Protest Act of 1931 and section 17 of Article XIII of the Constitution of the State of California; that the City Council never abandoned the proposed improvement in accordance with the Act of 1931, but purported to proceed under the aforesaid section 17 of Article XIII of the Constitution in disregard of pertinent provisions of the Act of 1931; that funds of the city allocated to its Chamber of Commerce were used to discourage protests; that the City Attorney and the City Engineer were unlawfully delegated the legislative function of determining the number and character of protests, and the Council acted upon reports of such officials which were false and untrue "because the total area included in the various districts proposed to be assessed varied and differed so that parcels included at one time were excluded at others and said statements represented a false and untrue estimate rather than a factual statement; * * *." Further, it was alleged that the notice of hearing and notice of improvement referred to certain maps and plans for information, which maps and plans, plaintiff was informed, were not in file in the office of the city clerk, whereby plaintiff and others were precluded from exercising their rights of protest and/or of obtaining necessary information. In addition it is contended that the final cost of the improvement exceeded the estimated cost by more than ten per cent.

As a second cause of action it was alleged that the purported improvements, being placed on the main thoroughfare of Glendale, were for the benefit of the

entire city, the entire population, as well as those owning property in the assessed area; that consequently, in setting the boundaries of the assessment district, the City Council abused its discretion. Further, as a third cause of action, it was charged that the improvements are merely replacements of old improvements and should be paid for from the city's general fund. As a fourth cause of action it was charged that the assessment was unfair because the rights of way of Pacific Electric Railway Corporation and Southern Pacific Railway are either not included in the district or are assessed a nominal amount, contrary to section 5300 of the Improvement Act of 1911. By the fifth cause of action it is asserted that the entire cost of the improvement should be paid for by the City of Glendale Public Service Department.

The foregoing statement, lengthy as it is, constitutes a mere summary of the allegations of the fourth amended complaint. Many of the charges therein contained are mere conclusions and consequently subject to demurrer. For the purposes of this decision we will consider the contentions made by appellant in his opening and closing briefs. It is urged that the proceedings of the council were irregular; that the owners of property in the district will be deprived of property without the due process of law; that a chartered city proceeding under the provisions of section 17 of Article XIII of the Constitution must adhere also to the requirements of the Special Assessment Investigation, Limitation and Majority Protest Act of 1931; that a property owner is "denied a hearing" when the council fails to "consider on their merits" protests of a property owner because of erroneous advice of the city attorney that such protests were not "before" the council; that property owners are deprived of property without due process when the council permits withdrawal of protests after the deadline barring additional protests; that due process is denied when a council bases its action overruling protests upon false information supplied by city officers; that the facts set forth in the complaint show fraud, abuse of dis-

cretion; that the council could not commence assessment proceedings under one law and then change to that authorized by another law; that the resolution of intention is uncertain; that under the city charter, custom and practice, a lighting system includes certain transformers and control equipment which must be provided by the city's public utilities system; and that the failure to assess the railroad rights of way comparably to other property constitutes a violation of section 5300 of the Improvement Act of 1911.

[1] It is appellant's position that the Act of 1931, *supra* (Streets & Highways Code, secs. 2800-3012), the Improvement Act of 1911 (Streets & Highways Code, secs. 5000-6794), and section 17 of Article XIII of the California Constitution all were violated by the special assessment proceedings complained of. The contention is made that assessment proceedings were *in invitum* and must be strictly construed. *City of Stockton v. Whitmore*, 50 Cal. 554; *Creighton v. Manson*, 27 Cal. 613; *Barber Asphalt Paving Co. v. Costa*, 171 Cal. 138, 139, 152 P. 296; *City of Gustine v. Silveira*, 67 Cal.App.2d 403, 154 P.2d 474. It appears to be appellant's position, further, that the facts alleged in the fourth amended complaint show a "substantial departure from the requirements of the governing sections of the Streets and Highways Code and the Constitution."

Section 2804 of the Act of 1931 (Streets & Highways Code) expressly provides that the limitations therein set forth shall not apply "* * *" when said improvement proceedings are by a chartered city, and said city has complied with the provisions of Section 17 of Article XIII of the Constitution; "* * *." Section 17 of Article XIII of the Constitution of the State of California provides, so far as here pertinent, that: "All proceedings undertaken by any chartered city * * * for the construction of any public improvement * * * by special assessment * * * shall be undertaken only in accordance with the provisions of law governing: (a) limitations of costs * * * in relation to the value of any property assessed therefor,

(b) determination of a basis for the valuation of any such property, (c) payment of the cost in excess of such limitations, (d) avoidance of such limitations, (e) postponement or abandonment, or both, of such proceedings in whole or in part upon majority protest; and particularly in accordance with such provisions as contained in Sections 10, 11 and 13a of the Special Assessment Investigation, Limitation and Majority Protest Act of 1931 * * *." (See Parts 5, 6 and 7, Div. 4, Streets and Highways Code.)

Section 17 further provides as follows: "Notwithstanding any provisions for debt limitation or majority protest as in this section provided, if, after the giving of such reasonable notice by publication and posting and the holding of such public hearing as the legislative body of any such chartered county, chartered city, or chartered city and county shall have prescribed, such legislative body by no less than a four-fifths vote of all members thereof, finds and determines that the public convenience and necessity require such improvements or acquisitions, such debt limitation and majority protest provisions shall not apply."

[2] It is clear that if respondent city has complied with the provisions of section 17 of Article XIII of the Constitution, then its proceedings are valid. Appellant in his complaint has failed to allege that the city council did not find and determine, in accordance with the provisions of the cited section, that the public convenience and necessity required such improvement. It must be assumed, therefore, that such a finding was made, and consequently, under the provisions of the section, that the "debt limitation and majority protest provisions" of the Act of 1931 are not applicable.

[3, 4] We come now to the argument that assessing the right of way of the Pacific Electric Railway but a nominal amount constituted an abuse of discretion and a violation of section 5300 of the Streets and Highways Code. Section 5300 provides: "Whenever a railroad, street or interurban railroad right of way shall front on or abut or parallel or be included

with or divide longitudinally any street improved under this division or shall be included within any district to be assessed for the cost of any work provided in this division, such railroad right of way (whether it is owned in fee or as an easement) shall be included in the warrant, assessment and diagram and shall be assessed in the same manner and with the same effect as other lots, lands or parcels of land are assessed, * * *."

The answer to appellant's contention in this respect is that the law is well settled that the determination of a legislative body as to the relative *benefits* conferred upon property by an improvement is conclusive in the absence of facts showing fraud or a denial of constitutional rights to property owners. *Hannon v. Madden*, 214 Cal. 251, 5 P.2d 4; *Blake v. City of Eureka*, 201 Cal. 643, 258 P. 945; *Duncan v. Ramish*, 142 Cal. 686, 76 P. 661, 663. As said in the last-cited case: "It is true that local assessments are said to be imposed on the theory that the property adjacent to the improvement receives special benefit therefrom. But this is a matter which is for the determination of the legislative authority of the state, acting through its established agencies for the government of political subdivisions, or directly by the Legislature of the state, as that body may see fit. It is enough for the local property owner that he has a right to be heard before the city council upon the question, by filing a petition of remonstrance in the proceeding prescribed by law, setting forth his reasons why the improvement should not be made. Upon this the council must decide the question, and its decision is final."

As stated in *Bailey v. City of Hermosa Beach*, 183 Cal. 757, 764, 192 P. 712, 715, "All that the statute requires is that such lands be not omitted because they are used for railroad right of way, and that, if benefited, they be assessed like other lands." In *Canby v. Council of City of Los Angeles*, 114 Cal.App. 94, at page 100, 299 P. 732 at page 735, it is said: "* * * it would seem plain that making an assessment according to *benefits* involves an omission from assessment of property not

benefited." (Emphasis added.) Appellant's fourth amended complaint must be held to be insufficient to show that the city council abused its discretion in concluding that the private rights of way of the Southern Pacific Railway or the Pacific Electric street railway system were not benefited substantially by the improvement. Concededly, the question is one upon which there might be some difference of opinion, but the conclusion of the city council is not shown by the pleadings to be an abuse of its discretion. It does not appear from the fourth amended complaint that substantial evidence was presented by appellant to show that the rights of way were benefited. "* * * the Legislature did not intend that the appeal to the council should be prosecuted in a perfunctory manner or should be a mere formality. It devolves upon protestants to show that sufficient evidence was adduced to support the appeal, and, if the council should overrule the appeal because of its misapplication of the law to the facts, it is incumbent upon the party seeking the review to clearly present to that tribunal the questions of law which he claims to have been misconstrued or erroneously applied, and show that they have been presented upon the appeal to the council." *Hannon v. Madden*, supra, 214 Cal. at page 259, 5 P.2d at page 7.

[5] We are further persuaded that appellant's contentions are barred by the operation of the curative provisions of the Improvement Act of 1911 (Streets and Highways Code, secs. 5003, 5369). Section 5003 provides that "This division shall be liberally construed in order to effectuate its purposes. No error, irregularity, informality, and no neglect or omission of any officer, in any proceeding taken under this division, which does not directly affect the jurisdiction of the legislative body to order the work or improvement, shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the legislative body in accordance with the provisions of this division." Section 5369 provides "No assess-

ment, warrant, or diagram, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same, where the resolution of intention of the legislative body to do the work, has been actually published as provided in this division. * * *" The date of publication of the resolution of intention does not appear from the pleading under consideration. As stated in *Garibaldi v. City of Daly City*, 63 Cal.App.2d 480, 484, 147 P.2d 122, 125, "* * * the complaint fails to plead that due publication was not made, and we must presume that this official duty was performed in due course."

[6-8] Concededly, no curative provisions can be successfully invoked against a party who shows that he has been deprived of property without due process of law. But in this respect appellant has failed to plead facts showing such deprivation. "It is a cardinal rule of pleading that fraud must be pleaded in specific language descriptive of the acts which are relied upon to constitute fraud. It is not sufficient to allege it in general terms, or in terms which amount to mere conclusions." *Hannon v. Madden*, supra, 214 Cal. at page 267, 5 P.2d at page 11.

[9] Appellant's contention that certain transformers and control equipment provided for by the assessment, the installation of poles and the painting of existing poles, constitute equipment and functions of the Public Service Department of the City of Glendale, a municipally owned public utility, is answered by the decision and language of *Logan v. City of Glendale*, 132 Cal.App. 169, 22 P.2d 552, 553. In that case appellant contended that an ornamental street lighting system was part of the plant and equipment of a public utility. The court there affirmed a judgment denying appellant an injunction against improvement of Brand Boulevard with an ornamental electric lighting system, and in so doing observed: "Manifestly a private utility which is operated for the purpose of selling electric energy for profit is not interested in the character of poles or ornaments used in connection

with the lighting of the public streets. On the other hand, these poles and ornamental lights are a distinct improvement of the property abutting the public street, and are erected by the city in its governmental capacity as an improvement of the street." We think the foregoing reasoning applies to all of appellant's contentions in this respect. The function of the utility is to furnish the power. If, for instance, special transformers are required, they are normally furnished by the consumer, as in the case of doorbells, or radios. The case relied upon by appellant, *Snell v. Clinton Electric L. H. & Power Co.*, 196 Ill. 626, 63 N.E. 1082, 58 L.R.A. 284, involved the question of discrimination between customers by a public utility.

Further discussion of appellant's contentions would serve no useful purpose. We conclude that the allegations of his fourth amended complaint fail to state a cause of action for the redress sought—that is, for either injunction or declaratory relief.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



103 Cal.App.2d 243

ROBSON v. ROBSON.

Civ. 17855.

District Court of Appeal, Second District,
Division 3, California.

April 2, 1951.

Action by Mabel L. Robson against Donald A. Robson wherein defendant was granted an interlocutory decree of divorce on his cross-complaint. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered an order granting defendant's motion to enter final decree, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that order itself was not appealable.

Appeal dismissed.

Divorce

All claims of error in divorce proceedings which culminated in an order granting defendant's motion for entry of final decree would have been reviewable on an appeal from judgment, but order granting defendant's motion was not appealable and therefore appeal would be dismissed.

Hahn, Ross, Goldstone & Saunders and Nathan Kline, all of Los Angeles, for appellant.

N. E. Youngblood, Los Angeles, William R. Grant, Los Angeles, of counsel, for respondent.

SHINN, Presiding Justice.

Donald A. Robson was granted an interlocutory decree of divorce on his cross-complaint. The decree provided that he pay to plaintiff's attorneys \$950.00 as additional attorneys' fees. As the time approached for entry of a final decree one of plaintiff's attorneys filed an affidavit alleging that \$397.94 of the attorneys' fees remained unpaid. The court made an order that no final decree be entered except upon motion and due notice to the parties. Cross-complainant gave notice and moved the court for entry of a final decree in support of which he filed an affidavit alleging that he was and had been financially unable to pay all or any part of the balance of attorneys' fees. The motion was opposed by plaintiff on the ground that cross-complainant was wilfully in default in the payment of attorneys' fees, but no affidavit was filed or evidence introduced in opposition to the averment in the affidavit of Robson of his inability to pay. After a hearing the court granted the motion and a final decree of divorce was entered. Plaintiff thereupon gave notice of appeal " * * * from the order of court granting defendant and cross complainant his motion to enter final decree in the above entitled action * * *. No other proceedings were had after the judgment was entered. No appeal was taken from the judgment."

All claims of error in the proceedings which culminated in the order granting re-

spondent's motion would have been reviewable on an appeal from the judgment. The order, itself, is not appealable. *Little v. Mountain View Dairies*, 35 Cal.2d 232, 234, 217 P.2d 416; *In re Estate of Alegria*, 87 Cal.App.2d 645, 659, 197 P.2d 571; *Ryan v. Welte*, 87 Cal.App.2d 897, 905, 198 P.2d 357; *Gardenswartz v. Equitable, etc., Soc.*, 23 Cal.App.Supp.2d 745, 754, 68 P.2d 322; *In re Estate of Phillips*, 202 Cal. 490, 499, 261 P. 709; *Spitzer v. Superior Court*, 74 Cal. App. 494, 500, 241 P. 270; *Mather v. Mather*, 22 Cal.2d 713, 720, 140 P.2d 808; *Nicolai v. Nicolai*, 96 Cal.App.2d 951, 954, 216 P.2d 913.

The appeal is dismissed.

WOOD, J., concurs.

VALLÉE, J., being disqualified, did not participate.



103 Cal.App.2d 230

In re CUMMINS' ESTATE.

BOBST v. CUMMINS.

Civ. 18280.

District Court of Appeal, Second District,
Division 2, California.

April 2, 1951.

Proceedings in the matter of the estate of Lillian B. Cummins. J. C. F. Cummins, as executor procured probate of will and Charles Bobst, one of legatees named in will appealed from the order of the Superior Court of Los Angeles County, Orlando H. Rhodes, J., interpreting the will and distributing the estate. The District Court of Appeal, Wilson, J., held that provisions in will attempting to appoint a guardian for person who is not a minor and was not under legal disability was void but that such invalid provision did not modify a plain and unambiguous valid bequest made in another paragraph.

Reversed with directions.

1. Guardian and ward ☞11

Where legatee was neither a minor nor under any legal disability, paragraph of will purporting to appoint a guardian for such legatee was null and void.

2. Wills ☞470

A will must be construed in its entirety.

3. Wills ☞473

Where paragraph of will made absolute bequest to legatee, and there was subsequent paragraph attempting to appoint guardian for legatee which was invalid, such invalid paragraph did not invalidate absolute bequest contained in previous paragraph.

R. R. Sleeper, Jack B. Adams, Los Angeles, for appellant.

Walter W. Rennie, Venice, for respondent.

WILSON, Justice.

Appellant, Charles Bobst, one of the legatees named in the will of decedent, has appealed from the order settling final account, for interpretation of will, and for distribution of estate. Decedent left a holographic will in which she made several cash bequests, the fourth paragraph reading as follows: "I give devise and *bequeath* to my dear brother Charles Bobst (8,000.00) Eight thousand dollars in cash out of my estate"

After making other bequests she appointed her husband as executor of the will and in paragraph ten made the following provision: "I appoint my husband John Charles Freemont Cummins *Guardine* for my brother Charles Bobst estate, I *auherize* him to provide a *sutable* place to live & board, and all the comforts of life, *Guardine* to furnish all clothing as needed to pay laundry and dry cleaning bills, Charlie to get \$(20.00) Twenty dollars a month spending money providing he does not spend it for liquor if he does it is to be reduced to \$(10.00) Ten dollars a month Charles to have a radio *Guardine* to use his judgment as to price In case of my brother Charles death and there is any money left from his estate that is to be *equeally* divide— among all the *airs* mentioned in this my Will"

After paying the debts and expenses of administration there were insufficient funds in the estate to pay the bequests in full, and distribution was made ratably. The court ordered the sum of \$6,459.09, less inheritance tax, distributed to John Charles Fremont Cummins to be held in trust for Charles Bobst under the following terms and conditions: "1. Out of principal, or income, to provide room, board and clothing to Charles Bobst; 2. To pay to Charles Bobst the sum of \$20.00 per month spending money, provided the money is not used to purchase alcoholic beverages, and in the event the Trustee determines that Charles Bobst is using any of the funds to purchase alcoholic beverages, the Trustee shall reduce the amount of spending money to \$10.00; 3. Upon the death of Charles Bobst any principal, and/or income, on hand will be distributed to the legatees named in this Will, if then living, in the same proportion that they take under this Decree of Distribution."

[1] Since Bobst was not a minor and was not under any legal disability, decedent was without power to designate a guardian for him. Hence paragraph ten of the will purporting to appoint a guardian is null and void. The bequest to Bobst in paragraph four was absolute and without limitation, and the court was therefore without power to create a trust for him or to distribute his legacy otherwise than directly to him.

Inasmuch as the executor and legatee are different persons we are not called upon to determine whether any portion of the will is directed to the executor or to the same person as legatee, nor does any question arise whether any part of the will is mandatory or precatory. The will is neither uncertain nor ambiguous though the provision attempting to appoint a guardian for Bobst is void.

[2,3] It is the rule that a will must be construed in its entirety but it is not the rule that an invalid provision will vary or modify a plain, unambiguous and valid bequest.

That part of the order purporting to make distribution to John Charles Fremont Cummins in trust for Charles Bobst is re-

versed and the superior court is directed to distribute unconditionally to Charles Bobst the sum of \$6,459.09 less \$330.77 paid for inheritance tax assessed against said legatee.

MOORE, P. J., and McCOMB, J., concur.



103 Cal.App.2d 80

KUHN et ux. v. GOTTFRIED.

Civ. 17790.

District Court of Appeal, Second District,
Division 1, California.

March 26, 1951.

Action by Orta E. Kuhn and wife against Francis C. Gottfried seeking the cancellation of a note secured by a chattel mortgage, which was given as payment for the purchase price of defendant's medical practice, in which action, defendant cross-complained for foreclosure of the chattel mortgage and reimbursement for expenditures incurred on plaintiff's behalf. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, White, P. J., held that the evidence was sufficient to sustain a judgment awarding cancellation.

Affirmed.

1. Appeal and error ⇨1012(1)

Trial ⇨139(1)

The weight of the evidence is for the jury or court passing upon the facts.

2. Appeal and error ⇨1012(1)

An Appellate Court does not, as a general rule, pass upon the weight or sufficiency of evidence.

3. Appeal and error ⇨994(3)

The credibility of the witnesses is peculiarly within the province of the trial court.

4. Appeal and error ⇨994(3)

Where there are inconsistencies or contradictions in the testimony of wit-

nesses, which statement is to be believed is for the trier of fact, and on appeal, that statement which supports the verdict is to be accepted, not the statement which would tend to defeat the verdict.

5. Chattel mortgages ⌚79

In action seeking cancellation of a note secured by a chattel mortgage, given as payment for purchase price of defendant's medical practice, evidence sustained a conclusion that the parties never arrived at a meeting of the minds.

6. Chattel mortgages ⌚79

In action seeking a cancellation of a note secured by chattel mortgage given as payment for a medical practice, admission of evidence to show that defendant was involved in litigation with another doctor as to a previous sale of defendant's practice, was not error, since knowledge of existence of such litigation was material to plaintiff, who was contemplating the purchase of defendant's practice.

7. Fraud ⌚17

Vendor of medical practice was under duty to disclose to purchaser that vendor was involved in litigation over the previous sale of the practice.

8. Fraud ⌚28

Concealment may constitute actionable fraud where seller knows of facts which materially affect the desirability of the property which he knows are unknown to the buyer.

9. Fraud ⌚27

Where one is under no duty to speak, but yet undertakes to do so, either voluntarily or in response to inquiry, he must make a full and fair disclosure and conceal no facts within his knowledge which materially qualify those stated, including any facts which affect the desirability of the property to be sold.

10. Chattel mortgages ⌚79

In action seeking cancellation of a note secured by a chattel mortgage and given as payment for purchase price of defendant's medical practice, where facts showed that defendant made false representations as to the value of his office equipment, the value of his practice and the nature of the

practice, evidence was sufficient to sustain judgment awarding cancellation.

11. Cancellation of instruments ⌚59

In action seeking cancellation of a note secured by chattel mortgage and given as payment for purchase price of defendant's medical practice, where plaintiff had given defendant notice that he was not going ahead with the practice, and that the office furniture and equipment were being held by the office building management pending the outcome of the suit, evidence supported the conclusion that plaintiff had returned everything of value received by him and that there was nothing more to be restored to defendant.

12. Cancellation of instruments ⌚59

In action seeking cancellation of a promissory note secured by chattel mortgage given as payment for purchase price of defendant's medical practice, evidence supported conclusions that defendant was not entitled to recover expenses alleged to have been made on plaintiff's behalf.

Desmond & Desmond and Walter Desmond, Jr., all of Long Beach, for appellant.

Lloyd S. Nix, Robert F. Tyler, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiffs herein sought the cancellation of a \$5,000.00 promissory note secured by a chattel mortgage given as payment for the purchase price of defendant's medical practice. Defendant cross-complained for collection of the note, foreclosure of the chattel mortgage and for reimbursement for expenditures allegedly made on plaintiffs' behalf. Because Mrs. Kuhn participated in only a minor way in the transaction, reference hereafter to "plaintiff" or "respondent" should be understood to mean plaintiff and respondent Dr. Orta E. Kuhn. The case was tried before the court without a jury, and all material findings were in favor of plaintiff. Defendant has appealed from the ensuing judgment.

Defendant, a practicing physician in Long Beach, advertised his practice for sale in the American Medical Association

Journal. As a result of the advertisement, he entered into a written agreement with a Dr. Jaworski in July, 1948, for the purchase of the practice, good will and equipment for \$15,000.00. After Dr. Jaworski had spent a few days in the office, he abandoned the transaction because he wished to return to Baltimore on account of his father's illness. At that time Dr. Jaworski had paid defendant \$2,000.00 on account of the purchase price. On August 20, 1948, defendant filed suit against Dr. Jaworski in the Superior Court of Los Angeles County to recover the balance allegedly due of \$13,000.00.

Defendant again advertised in the American Medical Association Journal, and on November 18, 1948, plaintiff and defendant had their first conference at defendant's office concerning the proposed sale. On November 23, 1948, a second conference was held. No written agreement was entered into, but a few days later plaintiff commenced practicing in defendant's office, having in the meantime signed a note and chattel mortgage on the furniture and fixtures for \$5,000.00.

The findings of the trial court may be summarized as follows:

That defendant advertised that he would sell a "completely equipped medical office and case records, best remunerative, strictly cash, practice established 18 years; should gross \$2,000.00 monthly; will introduce; 3 approved hospitals, certification not necessary, 208 Heartwell Building, Long Beach 2".

That the defendant represented that he had a completely equipped medical office, with complete case records; that the practice should gross the buyer \$2,000.00 monthly; that his practice was chiefly in the field of pelvic disorders; and that the equipment and furniture in his office was worth at least \$5,000.00. That the defendant fraudulently concealed from plaintiff the fact that he was engaged in litigation with Dr. Jaworski over the sale of the practice; that immediately following his execution of the note and chattel mortgage, plaintiff began an investigation of the representations of defendant.

That the medical records of defendant were partial, unreliable, incomplete and inaccurate; that his equipment and furniture were not worth over \$500.00 and were outmoded and obsolete; that defendant was in fact engaged in litigation with Dr. Jaworski arising out of an alleged contract to sell the practice; that the representations and concealments by Dr. Gottfried were false and fraudulent and known by him to be so; and were made with the intent to induce plaintiff to execute the note and mortgage; that plaintiff relied on said representations and concealments.

The court further found that the parties each understood that a written contract would be entered into between them, the plaintiff desiring a provision in such contract that defendant would not engage in practice in the city of Long Beach; but that no such contract was entered into; no consideration passed to the plaintiff; that there was no "meeting of the minds or mutual understanding" between the parties as to the terms of the proposed contract.

[1-4] Appellant attacks the findings as being unsupported by the evidence, and further assigns as prejudicial error the court's admission of evidence concerning the litigation with Dr. Jaworski. It is contended that appellant was under no duty to disclose the fact of the litigation, because "in the absence of confidential relations mere silence, without fraudulent acts or omissions * * * would not be unconscionable." *Heydenfeldt v. Osmont*, 178 Cal. 768, 773, 175 P. 1, 3. Counsel for appellant have made an earnest and able attempt to show by analysis of the testimony that the findings are not supported by the evidence. The record, however, discloses the familiar situation of conflicts in the testimony of the parties and their witnesses, which conflicts were resolved by the trier of fact in favor of respondent. "No rule of appellate practice is more firmly settled than that the weight of the evidence is for the jury or the court passing on the facts, and that, as a general rule, an appellate court does not pass upon the weight or preponderance of evidence." 2 Cal.Jur.

936. The credibility of the witnesses is a problem peculiarly within the province of the trial court. *Peri v. Los Angeles Junction Ry. Co.*, 22 Cal.2d 111, 137 P.2d 441. If there be any inconsistencies or contradictions in the testimony of a witness, the question of which portion or statement, if any, is to be believed is for the trier of fact. On appeal, that portion or statement which supports the verdict or judgment is to be accepted; not that portion which would defeat or tend to defeat the verdict or judgment. *Bechtold v. Bishop & Co.*, 16 Cal.2d 285, 105 P.2d 984; *Turner v. Whittel*, 2 Cal.App.2d 585, 588, 38 P.2d 835; *Hansen v. Bear Film Co.*, 28 Cal.2d 154, 164, 168 P.2d 946; *Winning v. Board of Dental Examiners*, 114 Cal.App. 658, 667, 670, 300 P. 866. The function of the appellate tribunal begins and ends with a determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings of the trier of fact. Further, in the type of case with which we are here concerned, if there be substantial evidence to support the findings with respect to any one material representation or concealment, or the finding that there was never any "meeting of the minds" upon the terms of a contract, the judgment must be affirmed.

[5] With respect to the "meeting of the minds", respondent testified that he at all times wanted a written contract to be approved by the parties' respective attorneys; that he never saw any bill of sale on the office equipment and furniture, nor any inventory; that the parties discussed the extent of space available and the possibility of obtaining more space; that respondent at different times requested appellant that a written agreement be drawn; that appellant refused to execute a contract; that appellant told respondent in December, 1948, that he thought they could get together on some sort of compromise agreement. This testimony was contradicted by appellant, but the issue was resolved against him by the trier of fact. It would seem that the testimony and actions of the parties would well support the conclusion that they never arrived at even an oral understanding on many material matters, such

as when appellant would leave and respondent take over the practice; whether appellant would agree not to practice in Long Beach for a period of years; and whether the purchase price was to be \$5,000.00 or \$6,500.00.

"When it is part of an understanding between the parties that the terms of a contract are to be reduced to writing and signed by them, assent to its terms must be evidenced in the manner agreed upon else it does not become a binding contract." 6 Cal.Jur. p. 58 et seq.

[6-9] It was not error to admit evidence of the Jaworski litigation. Respondent testified that he asked appellant about the name of Dr. Jaworski appearing on the door, and appellant told him Dr. Jaworski had purchased the practice, but had given it up to return to Baltimore to take care of his father. Respondent further testified that appellant at no time told him of any litigation involving Dr. Jaworski, and that respondent discovered the fact by chance during the month of December, 1948. Appellant admitted that he had never told respondent of the litigation. At the time appellant was asked concerning Dr. Jaworski, he had on file in the superior court his first amended complaint, in which he alleged that he was "holding the said practice and inventory and equipment for and on behalf of the defendant under the terms of the contract." Thereafter, a second amended complaint was filed upon a different theory, but this, in our opinion, does not affect the merits of respondent's position. The existence of this litigation was clearly a most material fact to a party contemplating purchase of the practice. Appellant urges that he was under no obligation to advise respondent of the litigation since it in no way affected the sale of the practice to respondent; that by his third amended complaint he simply sought damages, having retaken possession pursuant to the terms of the contract with Jaworski. Further, as heretofore stated, appellant contends he was under no duty to speak. Appellant's contentions may not be upheld. Respondent testified that he would not have considered buying the property had he known of the litigation.

Whether the litigation affected appellant's right to sell the practice is not the main question; the basic point is that it materially affected the desirability of the property. Concealment may constitute actionable fraud where the seller knows of facts which materially affect the desirability of the property which he knows are unknown to the buyer. *Dyke v. Zaiser*, 80 Cal.App.2d 639, 182 P.2d 344; *Rogers v. Warden*, 20 Cal.2d 286, 125 P.2d 7; *Boas v. Bank of America Nat. Trust & Sav. Ass'n*, 51 Cal.App.2d 592, 125 P.2d 620; *Macco Construction Co. v. Fickert*, 76 Cal.App.2d 295, 172 P.2d 951. The cases cited are also authority for the proposition that where one is under no duty to speak, but yet undertakes to do so, either voluntarily or in response to inquiry, he must make a full and fair disclosure and conceal no facts within his knowledge which materially qualify those stated, including any facts which affect the desirability of the property to be sold.

[10] The conclusions arrived at upon the points so far discussed are sufficient to warrant affirmance of the judgment. However, it may be stated that the evidence upon other points, i. e. (1) the representation that the office was completely equipped and worth \$5,000.00; (2) that the practice

was a "cash" practice grossing \$2,000.00 per month; (3) that the practice was concerned with "pelvic disorders" (whereas respondent testified it was primarily concerned with treatment of venereal diseases), was all of sufficient substantiality to support the findings of the trial court, irrespective of the asserted weakness of such evidence, or the alleged inconsistencies or contradictions contained therein. Under the well-settled rules heretofore stated, the determination of the issues thus raised was the exclusive province of the trier of fact.

[11, 12] The point is made that respondent did not restore or offer to restore everything of value received by him. Appellant admitted receiving a notice from respondent that he was not going ahead with the practice, and appellant's counsel stated that the office furniture and equipment was being held by the office building management pending the outcome of the suit. The evidence supports the conclusion that there was nothing more to be restored to the appellant. The contention that appellant was entitled to recover certain expenses must meet the same answer.

For the reasons stated, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

37 Cal.2d 1

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. MUNDO, Judge.**L. A. 21444.**

Supreme Court of California, in Bank.

April 3, 1951.

Petition for writ of mandate by the Bank of America National Trust and Savings Association, a national banking association, against Arthur L. Mundo, as judge of the Superior Court of the state of California, in and for the county of San Diego. The Supreme Court, Edmonds, J., held that where the bank brought actions to recover taxes paid under protest and by mandate sought to compel production of records of the county assessor to show that in making the assessments the assessor intentionally discriminated against the bank in favor of other property owners but the evidence if obtained would not be relevant to the pending actions in that it did not tend to prove that the board of equalization acted fraudulently or in an arbitrary or malicious abuse of its powers, writ of mandate would be denied.

Alternative writ of mandate discharged and petition for a peremptory writ dismissed.

1. Administrative law and procedure ⇨229
Taxation ⇨451

Generally, taxpayer seeking relief from an erroneous assessment must have exhausted his remedies before the administrative body empowered initially to correct the error except when the attempted assessment is a nullity, but resort to the administrative body is not rendered unnecessary because the error is one in classification of property and tax is assailed as being discriminatory.

2. Administrative law and procedure ⇨229
Taxation ⇨493(2)

Where bank did not make timely application to the board of equalization for relief from assessments complained of, it could not maintain an action for recovery of taxes paid.

3. Administrative law and procedure ⇨229
Taxation ⇨543(2)

Where purpose of bank in seeking to recover taxes paid under protest on ground that the assessors intentionally discriminated against it in favor of other property

owners was to obtain a review of the decision of the board of equalization, an application to the board for correction of the alleged discriminatory assessment, was a prerequisite to the maintenance of the action. 12 U.S.C.A. § 548; Revenue and Taxation Code, §§ 408, 451; Code Civ. Proc. § 1881, subd. 5.

4. Taxation ⇨468, 490

Duty of determining value of property and fairness of assessment is confided to the appropriate county board of equalization and in discharging its duty, the board's determination upon merits is conclusive and taxpayer has no right to trial de novo in superior court to resolve conflicting issues of fact as to the taxable value of his property.

5. Taxation ⇨490, 493(8)

Question presented to the superior court in an action seeking a review of a determination of the county board of equalization is whether there was sufficient evidence of sufficient substantiality before the board to justify the finding and in absence of fraud or malicious or arbitrary use of its powers the board is sole judge of the questions of fact and of the values of property.

6. Taxation ⇨468

Whether assessments alleged to be discriminatory as to bank's personality were made as the bank charges and whether they resulted in unequal taxation were the issues before the board of equalization and it was within the power of the board to correct the alleged discriminatory assessment. 12 U.S.C.A. § 548; Revenue and Taxation Code, §§ 408, 451; Code Civ. Proc. § 1881, subd. 5.

7. Taxation ⇨490

Generally, the decision of the board of equalization upon the evidence adduced cannot be collaterally assailed by new evidence on the point in a different tribunal.

8. Mandamus ⇨82

Where bank brought actions to recover taxes paid under protest and by mandate sought to compel the production

of records of the county assessor to show that in making the assessments the assessor intentionally discriminated against the bank in favor of other property owners but the evidence if obtained would not be relevant to the pending actions in that it did not tend to prove that the board of equalization acted fraudulently or in an arbitrary or malicious abuse of its powers, writ of mandate would be denied.

Holbrook & Tarr, W. Sumner Holbrook, Jr., and Francis H. O'Neill, Los Angeles, for petitioner.

James Don Keller, Dist. Atty., San Diego, and Carroll H. Smith, Chief Trial Deputy Dist. Atty., San Diego, for respondent.

EDMONDS, Justice.

Bank of America National Trust and Savings Association is the plaintiff in eight actions to recover taxes paid under protest. It now asks that, by writ of mandate, the superior court be compelled to order the production of certain records of the county assessor. The asserted purpose of having them before the court is to enable the respondent judge, by an examination of them, to determine whether their contents are confidential and whether public interest would suffer by disclosure of the data.

In the actions brought by the bank it is charged that, in assessing its property during certain years, the assessor discriminated against it and intentionally and systematically favored other property owners. Specifically, the bank alleges that the assessed valuation placed upon its buildings included vault doors and counterlines, classified as improvements, but in all nonbanking institutions, similar articles were classified and assessed as personal property. Such discrimination, the bank concludes, is prohibited by section 5219 of the Revised Statutes of the United States, 12 U.S.C.A. § 548, because the real property of a national bank may be taxed only "to the same extent, according to its value, as other real property is taxed" and also violates constitutional guarantees.

The bank has endeavored to obtain evidence of discriminatory assessments by taking depositions of three deputy county assessors. The witnesses testified that they had assessed or appraised buildings, trade fixtures and machinery in approximately 13 types of industries in the county. They stated the general factors and tests relied upon in making assessments. When asked how they had classified certain items in specific places of business, the witnesses replied that they could answer only after refreshing their memories by reference to the tax records. However, they declined to refer to the records upon the ground that the documents contain matter of prohibition and privilege under sections 408 and 451 of the Revenue and Taxation Code and section 1881, subdivision 5, of the Code of Civil Procedure.

The bank then cited the witnesses to appear before the superior court. It also moved for an order directing each witness to refresh his memory by use of the particular document applicable, and thereafter to answer the questions asked of him.

The superior court issued a *subpoena duces tecum* directing the county assessor to produce the documents. The assessor refused to comply with the subpoena upon the same ground stated by his deputies. The court then refused to order the witnesses to answer the questions and quashed the *subpoena duces tecum*.

The bank's purpose is to secure evidence that, during the tax years in question, the assessor systematically classified and assessed as personal property the counters and other business equipment in nonbanking institutions. Upon establishing that fact, the bank then proposes to show that such items are similar to the vault doors and counterlines in bank buildings which, pursuant to an intentional discrimination against national banks, were classified as improvements.

None of the suits has yet been tried. Demurrers to the complaints have been filed, but the hearings upon them have been deferred pending the taking of the depositions. It does not appear from the

record whether, prior to filing its action, the bank applied to the board of equalization for correction of the assertedly erroneous assessments. However, in one of the briefs, counsel for the bank states, "In certain of the cases appearance was made before the county board of equalization".

[1,2] In those cases where the bank did not make timely application to the board of equalization for relief from the assessment complained of, it cannot maintain the action for the recovery of taxes. "It is the general rule that a taxpayer seeking judicial relief from an erroneous assessment must have exhausted his remedies before the administrative body empowered initially to correct the error. * * An exception is made when the attempted assessment is a nullity because the property is either tax exempt or outside the jurisdiction. * * But resort to the board of equalization is not rendered unnecessary by the fact that, as in the present case, the error is one in the classification of property * * and the tax is assailed as being discriminatory in violation of constitutional mandates * * or section 5219 of the Revised Statutes of the United States". *Security-First Nat. Bk. v. County of Los Angeles*, 35 Cal.2d 319, 320-321, 217 P.2d 946, 947.

In the actions for the recovery of taxes paid after the board of equalization denied relief, the record does not indicate exactly what transpired before the administrative agency. However, it may be inferred that the board of equalization made a determination upon the issue of fact contrary to the claims of the bank.

[3-5] As to such actions, the purpose of the pending litigation is to obtain a review of the decision of the board of equalization. This conclusion logically follows from the fact that application to the board for the correction of an alleged discriminatory assessment is a prerequisite to the maintenance of the action. Compare *Security-First Nat. Bk. v. County of Los Angeles*, supra, with *Hammond L. Co. v. County of Los Angeles*, 104 Cal.App. 235, 241, 285 P. 896. The

duty of determining the value of the property and the fairness of the assessment is confided to the appropriate county board of equalization. Furthermore, in discharging this duty, the board's determination upon the merits of the controversy is conclusive; the taxpayer has no right to a trial de novo in the superior court to resolve conflicting issues of fact as to the taxable value of his property. *Universal Cons. Oil Co. v. Byram*, 25 Cal.2d 353, 153 P.2d 746; *Eastern-Columbia, Inc., v. County of Los Angeles*, 70 Cal.App.2d 497, 500, 161 P.2d 407. The question presented to the superior court in such an action is whether there was sufficient evidence of sufficient substantiality before the board to justify the finding, *Kaiser Co. v. Reid*, 30 Cal.2d 610, 626, 184 P.2d 879, and in the absence of fraud or malicious or arbitrary use of its powers the board is the sole judge of questions of fact and of the values of property. *Los Angeles, etc., Co. v. County of Los Angeles*, 162 Cal. 164, 170, 121 P. 384, 9 A.L.R. 1277.

[6,7] By the present proceeding, the bank desires to obtain, and introduce in its actions for recovery of taxes, evidence of discriminatory practices by the assessor which resulted in overvaluation of its real property and attendant inequality in tax burden. Whether assessments were made as the bank charges and whether they resulted in unequal taxation were the issues before the board of equalization; it was within the power of the board to correct the alleged discriminatory assessment. *Security-First Nat. Bk. v. County of Los Angeles*, supra, 35 Cal.2d at page 322, 217 P.2d 946. Presumably the evidence now sought was not introduced in the proceeding before the board. But it is the general rule that "* * * the decision of the board upon the evidence adduced cannot be collaterally assailed by new evidence on the point in a different tribunal." *Hammond L. Co. v. County of Los Angeles*, supra, 104 Cal.App. at pages 246, 247, 285 P. at page 901.

[8] If the writ sought by the bank were to issue, and evidence of discrimination obtained, it would not be relevant in the

pending actions. Such evidence would not tend to prove that the board of equalization acted fraudulently, or in arbitrary or malicious abuse of its powers. Moreover, the bank has shown no legal ground for augmentation of the record made before the local board.

The alternative writ of mandate is discharged and the petition for a peremptory writ is dismissed.

GIBSON, C. J., SHENK, CARTER, SCHAUER, and SPENCE, JJ., and WILSON, Justice pro tem., concur.



36 Cal.2d 864

STOTT v. JOHNSTON.
S. F. 18222.

Supreme Court of California.
March 30, 1951.

Action by Reo D. Stott, against Thomas Johnston, doing business as Johnston Paint Company to recover damages arising out of use of defective paint allegedly sold to plaintiff by defendant for use in plaintiff's business. The Superior Court, Alameda County, James R. Agee, J., rendered judgment for plaintiff in sum of \$10,000 and defendant appealed. The Supreme Court, Spence, J., held that award of \$10,000 was a reasonable determination of damage sustained by plaintiff, and that any error on part of trial court in restricting assessable items of damage to single issue of loss of good will reacted to defendant's benefit.

Judgment affirmed.

Prior opinion, see 219 P.2d 845.

1. Sales ⇨261(3)

Under statute providing that any affirmation of fact or any promise by seller relating to goods is an express warranty if natural tendency of such affirmation or promise is to induce buyer to purchase goods, and if buyer purchases goods rely-

ing thereon, and that no affirmation of value of goods, nor any statement purporting to be a statement of seller's opinion only shall be construed as a warranty, no particular words are necessary to create a warranty and whether word warranty was used in party's dealings is immaterial. Civ.Code, §§ 1732, 1735.

2. Sales ⇨261(6)

Where paint salesman gave assurances as to high quality of paint and promised that manufacturer would reimburse buyer 100% for labor and materials for any paint that went bad, and promised that if anything went wrong, they would stand behind buyer 100%, and buyer bought on those assurances, statements of salesman amounted to express warranty as to quality. Civ.Code, §§ 1732, 1735.

3. Sales ⇨442(6)

Loss of business good will is a proper element of damage where shown by evidence as flowing from use of unfit material received from one who warranted it to be fit. Civ.Code, §§ 1732, 1735, 1789 (6, 7).

4. Sales ⇨442(6)

Where buyer emphasized to manufacturer's salesman that he had been obtaining satisfactory results with paint that he had been using but agreed to purchase manufacturer's paint pursuant to salesman's assurance that it was as good a paint or better than that which buyer was using and when salesman made statement that company would stand behind buyer 100% if anything went wrong with paint, salesman knew particular purpose for which buyer bought paint and buyer relied on salesman's judgment as to its quality and obtaining satisfactory results, damages for loss of good will was within contemplation of parties as a detriment directly and naturally resulting from breach of warranty. Civ.Code, § 1789(6, 7).

5. Appeal and error ⇨1002

Where evidence is conflicting, jury's rejection of defendant's views and ac-

ceptance of plaintiff's claim are conclusive on appeal to Supreme Court.

6. Sales Ⓒ442(5)

Seller's liability for damages for breach of warranty must be worked out on terms which may reasonably be supposed to have been within contemplation of parties and no such indemnification against loss of good will may ordinarily be deemed an element of recovery where articles are sold as merchandise for general purposes rather than for a particular purpose which is known by seller at time of sale and where it appears that buyer relies on seller's skill or judgment.

7. Damages Ⓒ6

A plaintiff must show with reasonable certainty that he has suffered damages by reason of wrongful act of defendant but once cause and existence of damages have been so established, recovery will not be denied because damages are difficult of ascertainment.

8. Damages Ⓒ6

The law only requires that best evidence be adduced of which nature of case is capable and defendant whose wrongful acts gave rise to injury will not be heard to complain that amount thereof cannot be determined with mathematical precision.

9. Sales Ⓒ441(4)

In buyer's action against paint manufacturer, evidence, including showing by buyer of his records of past earnings in his established business, his sizeable financial outlay for additional equipment in anticipation of increase in his painting work coincident with post war building boom and his expenditure of a considerable sum in promotional activities commensurate with facilities of his theretofore growing business, sustained award of \$10,000 to buyer for loss of good will resulting from sale to him by manufacturer of defective paint. Civ.Code, §§ 1732, 1789(6, 7).

10. Appeal and error Ⓒ878(6)

Where plaintiff did not appeal from judgment, plaintiff's requested modification of judgment would be denied.

Hill, Farrer & Burrill, formerly Hill, Morgan & Farrer, Elliott H. Pentz, and David A. Thomas, all of Los Angeles, for appellant.

Frederick L. Hewitt, Edward E. Heavy, San Francisco, (Robert L. Dreyfus, San Francisco, of counsel), for respondent.

SPENCE, Justice.

Alleging a breach of warranty by reason of the sale of defective paint for use in his business, plaintiff, a painting contractor, recovered judgment upon a verdict against defendant Thomas Johnston, doing business as Johnston Paint Company, in the sum of \$10,000. On appeal, defendant argues: (1) that the evidence was insufficient to establish any liability on the part of defendant; and (2) that the evidence was insufficient to sustain the amount of damages awarded. An examination of the record in the light of applicable principles of law leads to the conclusion that the judgment should be affirmed.

Plaintiff, a painting contractor of some ten years' experience, had been engaged continuously in the business of painting houses in Alameda County since January, 1945. One Jack Hendricks, salesman for defendant, called upon plaintiff in February, 1946, for the purpose of interesting him in the use of Pervo paints. At that time plaintiff told Hendricks that he was using "Rich paint," and Hendricks replied, "We have as good a paint, if not better." Wanting some assurance with respect to the quality of Hendricks' paint, plaintiff testified that he asked Hendricks about the "company policy" in the event of "any paint going bad at any time," and that Hendricks replied, "We would reimburse you a hundred percent for labor and materials for any paint that goes bad"; "If anything went wrong with it, they would stand behind me one hundred percent." Thereupon plaintiff purchased paint from Hendricks and during the following months painted some 50 residences and buildings with Pervo "Fume Proof" paint. Plaintiff prepared and applied the paint as he was instructed by Hendricks. In June, 1946, plaintiff reported to Hendricks that the paint "didn't seem to cover as

well as it should." Hendricks checked one of the jobs that plaintiff had completed and said that the paint used "didn't contain enough pigment." Thereafter the company purportedly improved the quality of the paint by adding more pigment and plaintiff continued to buy it.

In about October, 1946, plaintiff began to receive complaints from customers whose buildings had been painted with the Pervo "Fume Proof" paint. He took Hendricks and Johnston to one of the buildings and after examining the job, Hendricks stated that there was "definitely something wrong with the paint." Johnston also agreed that there was "something wrong with it," and proceeded to explain to plaintiff and the owners of the building that it was not plaintiff's fault that the paint was cracking and peeling off the walls, but that plaintiff had just received "a bum batch of paint." Johnston further stated that his company would "stand behind [the] job," and told plaintiff to "do it over," giving him precise instructions as to how and when it should be done.

With the beginning of the year 1947, plaintiff received more and more complaints. He testified that about March, 1947, he reported to Hendricks that many of his customers were complaining "on this paint peeling" on their jobs, and that Hendricks replied, "I know the paint is no good, but I would appreciate it * * * if you wouldn't go telling it around town that our paint is no good, because it would hurt my sales terrible." About two weeks later, Hendricks told plaintiff that Johnston "just got back from Los Angeles," where he had a "talk with the Pervo Company," and that "they have O.K.'d to go ahead and do these jobs all over as they come in." However, plaintiff was told to get in touch with Hendricks or Johnston before redoing any job, so that they could first "verify each and every job." Hendricks and plaintiff agreed that Johnston would pay plaintiff \$3.50 an hour for the labor to clean and paint the jobs.

About April 5, 1947, plaintiff returned to the Johnston Paint Company all the Pervo paint that he had in stock, some 276 gallons. At about the same time, plaintiff

told Hendricks that he had received complaints on about 20 jobs. Hendricks then said that he did not know "whether the company will stand good for" that many, and told plaintiff that he would have to discuss the matter with Johnston.

Plaintiff testified that in August, 1947, Johnston told him that the company would stand behind him "one hundred percent." In October, 1947, plaintiff telephoned Johnston at his Berkeley store and told him that he [plaintiff] had "a lot more complaints * * * about 40" and he wanted something done about it. Johnston replied that the company "can't stand for that" and declared, "I don't intend to maintain your jobs." Pursuant to their arrangement then made, Johnston went with plaintiff on November 4, 1947, to inspect the jobs. They looked at the first house, Johnston "walked over to a window sill * * * scratched off the paint," and then admitted that it was "definitely over-pigmented." Plaintiff then told Johnston that he had painted a number of houses with that same paint, that "if it is over-pigmented, all these houses will start peeling off like this one" and his business reputation would be ruined. Johnston replied that he would "take care of" the people who sued, and not to worry about the rest, as people forget very easily and plaintiff's reputation would not be damaged in any way. Dissatisfied with Johnston's apparent indifference as to plaintiff's undertaking with his customers, plaintiff threatened to sue Johnston. Then plaintiff suggested that they look at some more of the jobs if Johnston had any doubt as to the importance of plaintiff's having customers satisfied with the work, and the men proceeded on their round of inspection. At the next stop, Johnston again agreed and stated to the owner that the paint was "a poor batch," and that it was "not [plaintiff's] fault." But from then until the tour was completed, Johnston visibly changed his attitude. Upon their inspection of each job thereafter, he told plaintiff that the trouble lay in "surface condition," and that the houses plaintiff was painting were so old that they were not worth painting and "should be burned down."

Plaintiff testified that at the conclusion of their tour of inspection, he told Johnston that he wanted the jobs done over and \$20,000 damages, and that Johnston just laughed and said, "We might give you \$5,000 and pacify these people, but we sure wouldn't give you twenty." Plaintiff then threatened to sue, and Johnston said, "Now, we don't have to go into that. We will call in the license inspector and if the license inspector says we are wrong, we will stand good for the jobs." Plaintiff immediately agreed to the proposal to "leave it up to the license inspector." About two weeks later Johnston told plaintiff over the telephone that the state license inspector had checked several of the jobs and said that the trouble was "surface condition." Upon making inquiry, plaintiff discovered that Johnston had never communicated with the state license board. Plaintiff then asked the board to have the jobs checked. After plaintiff received the board's report, he telephoned Johnston and told him of its finding that he [plaintiff] "wasn't responsible for the paint failures on [the] buildings," and asked Johnston to make good on his promise. Johnston refused, said that he was "not going to do anything" and told plaintiff to "go ahead and sue."

Plaintiff brought this action for breach of warranty, seeking damages upon these three claims: (1) \$5,468.15, representing \$6,185, the amount plaintiff paid for the allegedly defective paint, less a credit of \$716.85 for the return of the paint not used; (2) \$50,000, as the cost necessary to repaint the buildings he had painted with defendant's defective paint; and (3) \$40,000, for the loss of customers and good will. On the trial, at the conclusion of plaintiff's case, counsel and the court, in chambers outside of the presence of the jury, discussed the subject of recoverable damages. The court stated that in its opinion there was no basis for recovery on the first two items. Accordingly, only the third item of loss, the issue of damage to good will, was submitted to the jury, and it returned the verdict of \$10,000 damages against defendant Johnston.

[1,2] In denial of his liability, defendant first contends that the alleged statements of Hendricks and Johnston were not express warranties but only amounted to "puffing talk." To that point he cites *Steen v. Southern California Supply Co.*, 74 Cal.App. 265, 239 P. 1098. That case is clearly distinguishable as it involved only general "puffing" statements concerning quality, unaccompanied by any definite promises. Here, on the contrary, Hendricks not only gave assurance as to the high quality of the paint but promised that defendant would reimburse plaintiff "a hundred per cent for labor and materials for any paint that goes bad" and that "[i]f anything went wrong with it, they would stand behind [plaintiff] one hundred percent." Plaintiff testified that he wanted "an assurance" before changing from the paint which he was using to defendant's paint, and that it was the receipt of this assurance which prompted him to try the Pervo paint. Cf. *Chamberlain Co. v. Allis-Chalmers Mfg. Co.*, 74 Cal.App. 2d 941, 943, 170 P.2d 85.

"Any affirmation of fact or *any promise* by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." Civ.Code, § 1732, part of the Uniform Sales Act, Stats. 1931, pp. 2234, 2238; emphasis added. Under this section no particular words are necessary to create a warranty, and whether the word "warrant" was used in the parties' dealings is immaterial, *Chamberlain Co. v. Allis-Chalmers Co.*, 51 Cal.App. 2d 520, 522, 125 P.2d 113; *El Zarape Tortilla Factory, Inc., v. Plant Food Corp.*, 90 Cal.App.2d 336, 345, 203 P.2d 13; and such was the rule established long before the adoption of the Uniform Sales Act. *Cole v. Weber*, 1924, 69 Cal.App. 394, 397, 231 P. 353. As the record here stands, the conclusion seems inescapable that the statements of defendant and his salesman,

Hendricks, constituted an express warranty; indeed it would be difficult to conceive of a clearer instance of a buyer being induced to buy upon the representations of a seller. See Williston on Sales, Rev. Ed., vol. 1, § 194, p. 498. Accordingly, there is no merit to defendant's attack upon the sufficiency of the evidence as to his liability in this respect.

In view of our conclusion that defendant's liability may be sustained by reason of his breach of an express warranty, it becomes unnecessary to discuss plaintiff's further claim that defendant's liability might likewise be predicated upon the breach of an implied warranty. Civ.Code, § 1735.

There now remains for consideration defendant's contention that the evidence as to damages is insufficient to support the judgment. In testing the propriety of plaintiff's recovery, these provisions of section 1789 of the Civil Code are pertinent: "(6) The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

"(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

[3] Defendant first argues that as a matter of law, there can be no recovery for loss of business good will in that such item is regarded as "too remote, uncertain and speculative." However, there is ample authority sustaining the allowance of such element of damage where shown by the evidence as "flowing from the use of unfit material received from one who warranted it to be fit." *Royal Paper Box Co. v. Munro & Church Co.*, 284 Mass. 446, 188 N.E. 223, 225, and numerous cases there cited; *Cramerton Mills v. Nathan & Cohen Co.*, 231 App.Div. 28, 246 N.Y.S. 259, 267-268, and cases cited, and the applicable provisions of the code above quoted appear to sustain such

recovery if there is evidentiary support therefor. Here, upon submitting the damage issue to the jury, the court defined "good will of a business * * * as the expectation of continued public patronage." See 38 C.J.S., Good Will, § 1, p. 948. It is not open to argument that the sale of defective paint to a successful painting contractor—which results in his painting 50 or more houses and buildings with the paint and it then begins to "peel, crack, discolor, powder and come off" within six months or less—can do serious harm to his reputation as a painting contractor in that particular community.

[4] The record shows that plaintiff was using the "Rich" paint in his painting business and was satisfied with it; that defendant's salesman, Hendricks, told plaintiff that defendant's paint was "the best money [could] buy," that it was "as good * * * or better" than the paint plaintiff was using, and that "if anything went wrong with it, they would stand behind [him] one hundred percent." The record also shows, as above recited, that defendant's paint was admittedly defective. However, despite these factors indicating defendant's liability to plaintiff for breach of warranty in the sale of the paint in question, defendant argues that he is not subject to damages for any loss of good will plaintiff may thereby have sustained because such damages were not contemplated by the parties in their dealings. To this point defendant claims that it was expressly agreed that defendant's liability should extend no further than reimbursement for "labor and materials needed to do over any jobs involving defective paint." As embracing analogous considerations in the measure of recoverable damage for breach of warranty, defendant relies on the general rule that compensation for the detriment occasioned by the loss of future profits may be allowed only where such damages "may fairly be supposed to have entered into the contemplation of the parties when they made the contract". *Grupe v. Glick*, 26 Cal.2d 680, 688, 160 P.2d 832, 838; also, *Morello v. Growers Grape Prod. Ass'n*, 82 Cal.App.2d 365, 375, 186 P.2d

463; Hoag v. Jenan, 86 Cal.App.2d 556, 564, 195 P.2d 451. However, the record here plainly indicates that the parties did in fact contract in contemplation of plaintiff's maintenance of his then existing business good will, coincident with plaintiff's emphasis upon the "satisfactory results" that he had been having with the "Rich" paint but, in view of his need for paint to do the many jobs that he at the time had under contract, agreeing to purchase defendant's paint pursuant to Hendricks' assurance that it was "as good a paint or better" than that which plaintiff was using. Moreover, Hendricks' statement that the company "would stand behind [plaintiff] one hundred percent" if anything went wrong with the paint, indicates that Hendricks fully apprehended that plaintiff's use of a defective paint would entail a loss of business good will. When such statement was made, Hendricks knew the particular purpose for which plaintiff bought the paint and the latter's reliance on his judgment as to its quality in obtaining satisfactory results. In such circumstances, it is reasonable to conclude that damages for the loss of good will was within the contemplation of the parties as a detriment "directly and naturally resulting" from the breach of warranty, and plaintiff's right to an appropriate allowance for such loss is not open to dispute. Cf. Cramerton Mills v. Nathan & Cohen Co., supra, 231 App.Div. 28, 246 N.Y.S. 259, 268.

[5] The question then arises as to the state of the evidence in support of the damage award for plaintiff's loss of good will. Plaintiff's accountant testified that the following figures accurately represented plaintiff's earnings for the years 1946-1948:

Years	Gross Income	Net Profit
1946	\$65,317.83	\$2,865.92
1947	78,514.31	4,428.88
1948	76,258.66	4,920.17

It thus appears that plaintiff's gross income showed a decided increase in 1947—some \$13,000 or approximately twenty per cent—coincident with the postwar building boom, but in 1948 there was a decrease

of more than \$2,000; and that plaintiff's net profits increased in 1947 nearly \$1,600 as contrasted with an increase of but \$500 for the succeeding year, when the repercussions from the many complaints received by plaintiff on his paint jobs began to be felt. These figures assume particular significance in the light of plaintiff's testimony concerning his efforts to expand his business during this critical period: his expenditure in 1946 and 1947 of \$8,000 for advertising, including the distribution of cards in the neighborhood where a particular job was being done, inviting "the people * * * [to] come over and look at [the] work, inspect [the] workmanship"; his purchase of new equipment in the same two years for \$40,000, including three new trucks, compressors and spray outfits, and then his inability to keep even "half of it" in use as "the complaints [kept] coming in on [the] jobs"; his hiring of three additional salesmen in 1947 to solicit business along with himself, and their leaving of his employ as business dwindled. Such evidence shows that despite plaintiff's obviously increased business capacity, efficiency and promotion activities to take advantage of the postwar building and construction boom, his efforts were of no avail: that in 1948, when it would be reasonable to assume that the business earnings would reflect a decidedly favorable return from plaintiff's previous two years' outlay of expense, the gross income, rather than increasing in the same proportion as it did from 1946 to 1947—twenty per cent, which would have brought the gross business for 1948 to some \$90,000—did, in fact, decline some \$2,000 as compared with 1947; and the net profits, instead of advancing in a manner comparable to the \$1,600 gain shown for 1947 over 1946, did, in fact, increase but \$500 over 1947. In discounting this evidence of plaintiff's experience of a decline in his business earnings, defendant argues that plaintiff simply over-expanded his business in the vain hope that it would "skyrocket," and that the failure of the anticipated volume of business to materialize cannot be charged to damage done to plaintiff's reputation as a painting con-

tractor by reason of the use of defendant's paint in the preceding years. Defendant also cites in this regard plaintiff's admission, upon cross-examination, that he had some business losses in 1947 and 1948 because of "trouble * * * with the unions." In explanation of this latter testimony, plaintiff, on re-direct examination, stated that this union trouble was confined to "one instance." These were all simply instances of conflicting evidentiary considerations for the jury to resolve in the determination of plaintiff's right to recover damages for the alleged loss of good will. In such circumstances, there need be no citation of authority for the proposition that the jury's rejection of defendant's views and acceptance of plaintiff's claim are conclusive on this appeal.

[6] However, in a case of this kind there must be recognized the difficulty in the proof of damages put upon the plaintiff, and there seems to be no prescribed pattern of precisely what evidence should be introduced. Aptly illustrative of the problem posed in a case closely parallel in facts affecting the recovery of damages for loss of good will is *Barrett Co. v. Panther Rubber Mfg. Co.*, 1 Cir., Mass., 24 F.2d 329. It there appeared that plaintiff manufactured rubber heels and it purchased from defendant a certain composition or material to be used in its manufacturing business. Defendant, as seller of the raw material, knew that the heels were to be resold in the course of plaintiff's business. In such manufacture and sale over the years, plaintiff "had acquired a valuable business good will, had spent large sums of money in advertising, and had established a valuable reputation for rubber heels under the brand and trade-name of 'Panther'". 24 F.2d at page 331. A latent defect in the material rendered the heels unmarketable. Action was brought for a breach of warranty, and the Circuit Court of Appeals affirmed a judgment in favor of plaintiff, the buyer, which included \$20,000 as damages for loss of good will. In so holding, the court said 24 F.2d at page 337: "It appears that, as the result of defendant's action, the plaintiff put out to the trade about three-quarters

of a million dollars worth of heels which proved unmerchantable. These heels were largely scattered in the trade, to the lasting detriment of the reputation of plaintiff's product. It is not necessary that damages of this kind, in order to be recoverable, shall be capable of calculation with mathematical accuracy; these elements may be determined by approximation. (Citing cases.) After a careful study of the proofs on this subject (plaintiff's records of earnings over the years), we think there was no error in the allowance to the plaintiff of \$20,000 for the loss of good will." See, also, *Cramerton Mills v. Nathan & Cohen Co.*, supra, 231 App.Div. 28, 246 N.Y.S. 259, 268-269.

While a recovery for loss of good will was denied in *Armstrong Rubber Company v. Griffith*, 2 Cir., New York, 43 F.2d 689, with the statement at page 690 that "Knowledge that the goods are to be resold and, if defective, will be the occasion of a loss of profits is not enough to justify an award of special damages", such declaration was made in connection with a claim for damages on a sale of goods "to be used for the general trade" 43 F.2d at page 691 rather than for a particular purpose, the situation in the distinguished *Barrett* case. See *Czarnikow-Rionda Co. v. Federal Sugar Refining Co.*, 255 N.Y. 33, 173 N.E. 913, 88 A.L.R. 1426, and cases collected in 88 A.L.R. 1439; *Architector Co. v. Slomon*, 192 Misc. 319, 80 N.Y.S.2d 590, 594. The *Armstrong* case follows the general principle that the seller's liability for damages must be worked out on terms which may reasonably be supposed to have been within the contemplation of the parties (*Williston on Sales*, Rev. Ed., vol. 3, §§ 614 et seq., pp. 371 et seq.; *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544, 23 S.Ct. 754, 47 L.Ed. 1171; *Moran v. Standard Oil Co.*, 211 N.Y. 187, 105 N.E. 217, 220, and no such indemnification against loss of good will may ordinarily be deemed an element of recovery where articles are sold as merchandise for general purposes rather than "for a particular purpose" which is known by the seller at the time of sale and where "It appears that the buyer relies on the seller's skill or judgment." *Armstrong*

Rubber Company v. Griffith, supra, 43 F.2d at page 691. In the latter situation of sale "for a particular purpose," it would be unrealistic to say that the buyer's dealings with his customers were not in the contemplation of the seller, and accordingly, under such circumstances, the seller's liability for damages shown to have been suffered by the buyer through an injury to his business and good will should be sustained. Cramerton Mills v. Nathan & Cohen Co., supra, 231 App.Div. 28, 246 N.Y.S. 260, 269.

[7] The propriety of the allowance of \$10,000 to plaintiff for the loss of good will must be considered in relation to the nature of the evidence available to plaintiff in proof of this issue. Analogous considerations have arisen in cases where recovery for loss of future profits was sought, and the courts have been reluctant to reverse a reasonable damage award because the precise amount of damage was not definitely ascertainable. In this regard it appears to be the general rule that while a plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult of ascertainment. See annotation 78 A.L.R. 858; 25 C.J.S., Damages, § 28, pp. 493-495. In Grupe v. Glick, supra, 26 Cal.2d 680, it was declared at page 692, 160 P.2d 832, at page 840 upon the citation of numerous authorities that "where the operation of an *established* business is prevented or interrupted, as by a tort or breach of contract or warranty, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales." (Emphasis added.)

[8] Comparable considerations arose in the application of this principle in the case of Hoag v. Jenan, supra, 86 Cal.App.2d 556, 195 P.2d 451, where plaintiff sought

damages for defendant's breach of contract in failing to complete a specified building within the scheduled time, and so prevented the expansion of plaintiff's business as contemplated at the time of their agreement. Plaintiff recovered judgment for \$15,000. In upholding such damage award, the court observed 86 Cal.App.2d at page 564, 195 P.2d at page 456 that plaintiff's business was "in actual operation, its past experience has demonstrated the success of the enterprise, and provides a reasonably certain basis for the ascertainment of the probable loss consequent upon the breach of contract to complete the annex within the time specified." The only additional evidence appearing in that case as compared with the present record is the fact that plaintiff was forced to turn away prospective customers because of defendant's failure "to provide [plaintiff] with the necessary space in which to expand his operations." 86 Cal. App.2d page 560, 195 P.2d at page 453. Here plaintiff has shown his records of past earnings in his established business, his sizable financial outlay for additional equipment in anticipation of an increase in his painting work coincident with the postwar building boom, and his expenditure of a considerable sum in promotional activities commensurate with the facilities of his theretofore growing business. While plaintiff did not introduce any evidence as to loss of specific customers by reason of his use of defendant's defective paint in his business, it is readily arguable that such item of proof may not have been available to plaintiff by reason of the particular nature of his mode of operations as contrasted with another type of business, such as was involved in the Hoag case. Under all the circumstances here, it is difficult to see what additional evidence plaintiff could have introduced on the damage issue. The law only requires that the best evidence be adduced of which the nature of the case is capable, Steelduct Co. v. Henger-Seltzer Co., 26 Cal.2d 634, 651, 160 P.2d 804 and the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision. Hacker Pipe & Supply Co. v. Chapman

Valve Mfg. Co., 17 Cal.App.2d 265, 267, 61 P.2d 944. As the record here stands, defendant's objection to the damage award is without avail.

[9,10] Under all the circumstances showing the extent of plaintiff's injury by reason of defendant's breach of warranty, it is clear that the award of \$10,000 is a reasonable determination of the damage sustained by plaintiff, and that any error on the part of the trial court in restricting the assessable items to the single issue of loss of good will, as above noted, reacted to defendant's benefit. In this regard, plaintiff now urges that the judgment in his favor be increased by the amount of \$5,468.15, being the sum paid for the defective paint used, a matter of loss "clearly proven with certainty" and "tacitly admitted by defendant." However, since plaintiff did not appeal from the judgment, the requested modification must be denied. 2 Cal.Jur. § 492, p. 839; Richardson v. Suiter, 74 Cal.App.2d 682, 688, 169 P.2d 252; Hill v. Hill, 82 Cal.App.2d 682, 702, 187 P.2d 28; Noble v. Noble, 83 Cal.App.2d 775, 778, 189 P.2d 502.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.



76 Cal.2d 877

JOHN BREUNER CO. v. BRYANT.
S. F. 18285-18300.

Supreme Court of California, in Bank.
March 30, 1951.

The John Breuner Company brought a proceeding against James G. Bryant, Director of the Department of Employment, for contempt in failing to comply with a judgment directing him to cancel certain charges and remove them from plaintiff's reserve account maintained by defendant under the Unemployment Insurance Act. From a judgment of the Superior Court, San Fran-

cisco County, Edward P. Murphy, J., discharging defendant, plaintiff appealed. On defendant's motion to dismiss the appeal. The Supreme Court, Gibson, C. J., held that the judgment was not appealable.

Motion granted and appeal dismissed.

1. Contempt $\S$ 66(2)

A judgment discharging defendant in proceeding against state employment director for contempt in failing to comply with judgment directing him to cancel certain charges and remove them from plaintiff's reserve account, maintained by defendant under Unemployment Insurance Act, was not appealable. Code Civ.Proc. § 1222; Gen.Laws, Act 8780d, § 1 et seq.

2. Contempt $\S$ 66(2)

Orders and judgments in contempt cases are not appealable whether trial court imposed punishment for contempt or discharged alleged contemner. Code Civ. Proc. § 1222.

3. Contempt $\S$ 67

Habeas corpus $\S$ 22(2)

An order or judgment in contempt case may be reviewed by certiorari and, where appropriate, by habeas corpus.

Fabian D. Brown, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Edmund G. Brown, Atty. Gen., Charles W. Johnson, William L. Shaw, Deputy Attys. Gen., for respondent.

GIBSON, Chief Justice.

[1] Plaintiff obtained a judgment directing defendant to cancel certain charges and remove them from plaintiff's reserve account which was maintained by defendant under the Unemployment Insurance Act. (Stats.1935, p. 1226, Gen. Laws, Act 8780d, § 1 et seq.) After affirmance of the judgment on appeal, John Breuner Co. v. Bryant, 35 Cal.2d 897, 218 P.2d 4, plaintiff filed an affidavit seeking to have defendant punished for contempt for alleged failure to comply with the mandatory provisions of the judgment. The trial court discharged defendant, finding that he had complied with the judgment

and was not guilty of contempt. Plaintiff then appealed, and defendant has moved to dismiss the appeal, claiming that the contempt judgment is not appealable. This contention must be sustained.

[2, 3] It is well settled that orders and judgments made in cases of contempt are not appealable, and this rule has been held applicable both where the trial court imposed punishment for contempt and where the alleged contemner was discharged. Code Civ.Proc. § 1222; *Tripp v. Tripp*, 190 Cal. 201, 202, 211 P. 225; *Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 50-53, 145 P. 532; *Moon v. Moon*, 62 Cal. App.2d 189, 191, 144 P.2d 599; *Thomas v. Thomas*, 4 Cal.App.2d 317, 318, 40 P.2d 581; *Abbott v. Abbott*, 24 Cal.App. 475, 477, 141 P. 939. An order or judgment in a contempt matter may, however, be reviewed by certiorari, *Wilson v. Superior Court*, 31 Cal.2d 458, 459, 189 P.2d 266; *Gue v. Dennis*, 28 Cal.2d 616, 170 P.2d 887; *Weber v. Superior Court*, 26 Cal.2d 144, 148, 156 P.2d 923; *Phillips v. Superior Court*, 22 Cal.2d 256, 257, 137 P.2d 838; *Taylor v. Superior Court*, 20 Cal.2d 244, 246, 125 P.2d 1, and, where appropriate, by habeas corpus, *In re De Silva*, 33 Cal. 2d 76, 79, 199 P.2d 6; *Kreling v. Superior Court*, 18 Cal.2d 884, 887, 118 P.2d 470.

The motion is granted, and the appeal is dismissed.

SHENK, EDMONDS, CARTER,
TRAYNOR, SCHAUER, and SPENCE,
JJ., concur.



36 Cal.2d 880

OWL DRUG CO. v. BRYANT.

S. F. 18286.

Supreme Court of California, in Bank.

March 30, 1951.

The Owl Drug Company brought a proceeding against James G. Bryant, Director of the Department of Employment, for contempt in failing to comply with a judgment directing

him to cancel certain charges and remove them from plaintiff's reserve account maintained by defendant under the Unemployment Insurance Act. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., discharging defendant, plaintiff appealed. On defendant's motion to dismiss the appeal. The Supreme Court, by the Court, held that the judgment was not appealable.

Motion granted and appeal dismissed.

Contempt — 66(2)

A contempt judgment is not appealable.



Fabian D. Brown, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Edmund G. Brown, Atty. Gen., Charles W. Johnson, William L. Shaw, Deputy Attys. Gen., for respondent.

PER CURIAM.

This appeal from a contempt judgment presents the same question as that involved in *John Breuner Co. v. Bryant*, Cal.Sup., 229 P.2d 356, and on the authority of that case it must be held that the judgment is not appealable.

The motion to dismiss is granted, and the appeal is dismissed.



36 Cal.2d 881

C. L. TILDEN & CO. v. BRYANT.

S. F. 18287.

Supreme Court of California, in Bank.

March 30, 1951.

C. L. Tilden & Company brought a proceeding against James G. Bryant, Director of the Department of Employment, for contempt in failing to comply with a judgment directing him to cancel certain charges and remove them from plaintiff's reserve account maintained by defendant under the Unemployment Insurance Act. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., discharging defendant, plaintiff appealed. On defendant's

motion to dismiss the appeal. The Supreme Court, by the Court, held that the judgment was not appealable.

Motion granted and appeal dismissed.

Contempt Ⓒ66(2)

A contempt judgment is not appealable.

Fabian D. Brown, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Edmund G. Brown, Atty. Gen., Charles W. Johnson, William L. Shaw, Deputy Attys. Gen., for respondent.

PER CURIAM.

This appeal from a contempt judgment presents the same question as that involved in *John Breuner Co. v. Bryant*, Cal.Sup., 229 P.2d 356, and on the authority of that case it must be held that the judgment is not appealable.

The motion to dismiss is granted, and the appeal is dismissed.

Court, held that the judgment was not appealable.

Motion granted and appeal dismissed.

Contempt Ⓒ66(2)

A contempt judgment is not appealable.

Fabian D. Brown, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Edmund G. Brown, Atty. Gen., Charles W. Johnson, William L. Shaw, Deputy Attys. Gen., for respondent.

PER CURIAM.

This appeal from a contempt judgment presents the same custom as that involved in *John Breuner Co. v. Bryant*, Cal.Sup., 229 P.2d 356, and on the authority of that case it must be held that the judgment is not appealable.

The motion to dismiss is granted, and the appeal is dismissed.



36 Cal.2d 881

**WALKUP DRAYAGE & WAREHOUSE
CO. v. BRYANT.**

S. F. 18288.

Supreme Court of California, in Bank.

March 30, 1951.

The Walkup Drayage & Warehouse Company brought a proceeding against James G. Bryant, Director of the Department of Employment, for contempt in failing to comply with a judgment directing him to cancel certain charges and remove them from plaintiff's reserve account maintained by defendant under the Unemployment Insurance Act. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., discharging defendant, plaintiff appealed. On defendant's motion to dismiss the appeal. The Supreme Court, by the

36 Cal.2d 882

**MERCHANTS EXPRESS CORP. v.
BRYANT.**

S. F. 18289.

Supreme Court of California, in Bank.

March 30, 1951.

The Merchants Express Corporation brought a proceeding against James G. Bryant, Director of the Department of Employment, for contempt in failing to comply with a judgment directing him to cancel certain charges and remove them from plaintiff's reserve account maintained by defendant under the Unemployment Insurance Act. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., discharging defendant, plaintiff appealed. On defendant's motion to dismiss the appeal. The Supreme Court, by the Court, held that the judgment was not appealable.

Motion granted and appeal dismissed.

Contempt ⚡66(2)

A contempt judgment is not appealable.

Fabian D. Brown, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Edmund G. Brown, Atty. Gen., Charles W. Johnson, William L. Shaw, Deputy Attys. Gen., for respondent.

Fabian D. Brown, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Edmund G. Brown, Atty. Gen., Charles W. Johnson, William L. Shaw, Deputy Attys. Gen., for respondent.

PER CURIAM.

This appeal from a contempt judgment presents the same question as that involved in John Breuner Co. v. Bryant, Cal.Sup., 229 P.2d 356, and on the authority of that case it must be held that the judgment is not appealable.

The motion to dismiss is granted, and the appeal is dismissed.

PER CURIAM.

This appeal from a contempt judgment presents the same question as that involved in John Breuner Co. v. Bryant, Cal.Sup., 229 P.2d 356, and on the authority of that case it must be held that the judgment is not appealable.

The motion to dismiss is granted, and the appeal is dismissed.



36 Cal.2d 883

**HAGSTROM'S FOOD STORES, Inc.,
v. BRYANT.
S. F. 18290.**

Supreme Court of California, in Bank.
March 30, 1951.

Hagstrom's Food Stores, Inc., brought a proceeding against James G. Bryant, Director of the Department of Employment, for contempt in failing to comply with a judgment directing him to cancel certain charges and remove them from plaintiff's reserve account maintained by defendant under the Unemployment Insurance Act. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., discharging defendant, plaintiff appealed. On defendant's motion to dismiss the appeal. The Supreme Court, by the Court, held that the judgment was not appealable.

Motion granted and appeal dismissed.

Contempt ⚡66(2)

A contempt judgment is not appealable.

36 Cal.2d 883

**HASLETT WAREHOUSE CO. v. BRYANT.
S. F. 18291.**

Supreme Court of California, in Bank.
March 30, 1951.

The Haslett Warehouse Company brought a proceeding against James G. Bryant, Director of the Department of Employment, for contempt in failing to comply with a judgment directing him to cancel certain charges and remove them from plaintiff's reserve account maintained by defendant under the Unemployment Insurance Act. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., discharging defendant, plaintiff appealed. On defendant's motion to dismiss the appeal. The Supreme Court, by the Court, held that the judgment was not appealable.

Motion granted and appeal dismissed.

Contempt ⚡66(2)

A contempt judgment is not appealable.

Fabian D. Brown, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Edmund G. Brown, Atty. Gen., Charles W. Johnson, William L. Shaw, Deputy Attys. Gen., for respondent.

PER CURIAM.

This appeal from a contempt judgment presents the same question as that involved in *John Breuner Co. v. Bryant*, Cal.Sup., 229 P.2d 356, and on the authority of that case it must be held that the judgment is not appealable.

The motion to dismiss is granted, and the appeal is dismissed.

William L. Shaw, Deputy Attys. Gen., for respondent.

PER CURIAM.

This appeal from a contempt judgment presents the same question as that involved in *John Breuner Co. v. Bryant*, Cal.Sup., 229 P.2d 356, and on the authority of that case it must be held that the judgment is not appealable.

The motion to dismiss is granted, and the appeal is dismissed.



36 Cal.2d 884

MANNING'S, Inc. v. BRYANT.

S. F. 18292.

Supreme Court of California, in Bank.

March 30, 1951.

Manning's, Inc., brought a proceeding against James G. Bryant, Director of the Department of Employment, for contempt in failing to comply with a judgment directing him to cancel certain charges and remove them from plaintiff's reserve account maintained by defendant under the Unemployment Insurance Act. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., discharging defendant, plaintiff appealed. On defendant's motion to dismiss the appeal. The Supreme Court, by the Court, held that the judgment was not appealable.

Motion granted and appeal dismissed.

Contempt $\hookrightarrow$ 66(2)

A contempt judgment is not appealable.

Fabian D. Brown, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Edmund G. Brown, Atty. Gen., Charles W. Johnson,

36 Cal.2d 885

**J. A. CLARK DRAYING CO., Limited,
v. BRYANT.**

S. F. 18293.

Supreme Court of California, in Bank.

March 30, 1951.

The J. A. Clark Draying Co., Ltd., brought a proceeding against James G. Bryant, Director of the Department of Employment, for contempt in failing to comply with a judgment directing him to cancel certain charges and remove them from plaintiff's reserve account maintained by defendant under the Unemployment Insurance Act. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., discharging defendant, plaintiff appealed. On defendant's motion to dismiss the appeal. The Supreme Court, by the Court, held that the judgment was not appealable.

Motion granted and appeal dismissed.

Contempt $\hookrightarrow$ 66(2)

A contempt judgment is not appealable.

Fabian D. Brown, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Edmund G. Brown, Atty. Gen., Charles W. Johnson, William L. Shaw, Deputy Attys. Gen., for respondent.

PER CURIAM.

This appeal from a contempt judgment presents the same question as that involved in *John Breuner Co. v. Bryant*, Cal.Sup., 229 P.2d 356, and on the authority of that case it must be held that the judgment is not appealable.

The motion to dismiss is granted, and the appeal is dismissed.

in *John Breuner Co. v. Bryant*, Cal.Sup., 229 P.2d 356, and on the authority of that case it must be held that the judgment is not appealable.

The motion to dismiss is granted, and the appeal is dismissed.



36 Cal.2d 885

**HIGHWAY TRANSPORT, Inc. v.
BRYANT.**

S. F. 18294.

Supreme Court of California, in Bank.
March 30, 1951.

Highway Transport, Inc., brought a proceeding against James G. Bryant, Director of the Department of Employment, for contempt in failing to comply with a judgment directing him to cancel certain charges and remove them from plaintiff's reserve account maintained by defendant under the Unemployment Insurance Act. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., discharging defendant, plaintiff appealed. On defendant's motion to dismiss the appeal. The Supreme Court, by the Court, held that the judgment was not appealable.

Motion granted and appeal dismissed.

Contempt ⚡66(2)

A contempt judgment is not appealable.

Fabian D. Brown, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Edmund G. Brown, Atty. Gen., Charles W. Johnson, William L. Shaw, Deputy Attys. Gen., for respondent.

PER CURIAM.

This appeal from a contempt judgment presents the same question as that involved

229 P.2d—23½

36 Cal.2d 886

**ROBERTSON DRAYAGE CO., Inc. v.
BRYANT.**

S. F. 18295.

Supreme Court of California, in Bank.
March 30, 1951.

The Robertson Drayage Co., Inc., brought a proceeding against James G. Bryant, Director of the Department of Employment, for contempt in failing to comply with a judgment directing him to cancel certain charges and remove them from plaintiff's reserve account maintained by defendant under the Unemployment Insurance Act. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., discharging defendant, plaintiff appealed. On defendant's motion to dismiss the appeal. The Supreme Court, by the Court, held that the judgment was not appealable.

Motion granted and appeal dismissed.

Contempt ⚡66(2)

A contempt judgment is not appealable.

Fabian D. Brown, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Edmund G. Brown, Atty. Gen., Charles W. Johnson, William L. Shaw, Deputy Attys. Gen., for respondent.

PER CURIAM.

This appeal from a contempt judgment presents the same question as that involved

in *John Breuner Co. v. Bryant*, Cal.Sup., 229 P.2d 356, and on the authority of that case it must be held that the judgment is not appealable.

The motion to dismiss is granted, and the appeal is dismissed.



36 Cal.2d 886

**FOSTERS LUNCH SYSTEM, Limited,
v. BRYANT.
S. F. 18296.**

Supreme Court of California, in Bank.
March 30, 1951.

Fosters Lunch System, Ltd., brought a proceeding against James G. Bryant, Director of the Department of Employment, for contempt in failing to comply with a judgment directing him to cancel certain charges and remove them from plaintiff's reserve account maintained by defendant under the Unemployment Insurance Act. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., discharging defendant, plaintiff appealed. On defendant's motion to dismiss the appeal. The Supreme Court, by the Court, held that the judgment was not appealable.

Motion granted and appeal dismissed.

Contempt ⚡66(2)

A contempt judgment is not appealable.

Fabian D. Brown, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Edmund G. Brown, Atty. Gen., Charles W. Johnson, William L. Shaw, Deputy Attys. Gen., for respondent.

PER CURIAM.

This appeal from a contempt judgment presents the same question as that involved

in *John Breuner Co. v. Bryant*, Cal.Sup., 229 P.2d 356, and on the authority of that case it must be held that the judgment is not appealable.

The motion to dismiss is granted, and the appeal is dismissed.



36 Cal.2d 887

**GENE COMPTON'S CORP. v. BRYANT.
S. F. 18297.**

Supreme Court of California, in Bank.
March 30, 1951.

Gene Compton's Corporation brought a proceeding against James G. Bryant, Director of the Department of Employment, for contempt in failing to comply with a judgment directing him to cancel certain charges and remove them from plaintiff's reserve account maintained by defendant under the Unemployment Insurance Act. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., discharging defendant, plaintiff appealed. On defendant's motion to dismiss the appeal. The Supreme Court, by the Court, held that the judgment was not appealable.

Motion granted and appeal dismissed.

Contempt ⚡66(2)

A contempt judgment is not appealable.

Fabian D. Brown, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Edmund G. Brown, Atty. Gen., Charles W. Johnson, William L. Shaw, Deputy Attys. Gen., for respondent.

PER CURIAM.

This appeal from a contempt judgment presents the same question as that involved

in John Breuner Co. v. Bryant, Cal.Sup., 229 P.2d 356, and on the authority of that case it must be held that the judgment is not appealable.

The motion to dismiss is granted, and the appeal is dismissed.



36 Cal.2d 888

**UNION ICE & STORAGE CO. v.
BRYANT.
S. F. 18298.**

Supreme Court of California, in Bank.
March 30, 1951.

The Union Ice & Storage Company brought a proceeding against James G. Bryant, Director of the Department of Employment, for contempt in failing to comply with a judgment directing him to cancel certain charges and remove them from plaintiff's reserve account maintained by defendant under the Unemployment Insurance Act. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., discharging defendant, plaintiff appealed. On defendant's motion to dismiss the appeal. The Supreme Court, by the Court, held that the judgment was not appealable.

Motion granted and appeal dismissed.

Contempt §66(2)

A contempt judgment is not appealable.

Fabian D. Brown, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Edmund G. Brown, Atty. Gen., Charles W. Johnson, William L. Shaw, Deputy Attys. Gen., for respondent.

PER CURIAM.

This appeal from a contempt judgment presents the same question as that involved

Cal.Rep. 229-230 P.2d—11

in John Breuner Co. v. Bryant, Cal.Sup., 229 P.2d 356, and on the authority of that case it must be held that the judgment is not appealable.

The motion to dismiss is granted, and the appeal is dismissed.



36 Cal.2d 888

**UNION ICE CO. v. BRYANT.
S. F. 18299.**

Supreme Court of California, in Bank.
March 30, 1951.

The Union Ice Company brought a proceeding against James G. Bryant, Director of the Department of Employment, for contempt in failing to comply with a judgment directing him to cancel certain charges and remove them from plaintiff's reserve account maintained by defendant under the Unemployment Insurance Act. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., discharging defendant, plaintiff appealed. On defendant's motion to dismiss the appeal. The Supreme Court, by the Court, held that the judgment was not appealable.

Motion granted and appeal dismissed.

Contempt §66(2)

A contempt judgment is not appealable.

Fabian D. Brown, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Edmund G. Brown, Atty. Gen., Charles W. Johnson, William L. Shaw, Deputy Attys. Gen., for respondent.

PER CURIAM.

This appeal from a contempt judgment presents the same question as that involved in John Breuner Co. v. Bryant, Cal. Sup., 229 P.2d 356, and on the authority

of that case it must be held that the judgment is not appealable.

The motion to dismiss is granted, and the appeal is dismissed.



36 Cal.2d 889

PENINSULA ICE CO. v. BRYANT.

S. F. 18300.

Supreme Court of California, in Bank.

March 30, 1951.

The Peninsula Ice Company brought a proceeding against James G. Bryant, Director of the Department of Employment, for contempt in failing to comply with a judgment directing him to cancel certain charges and remove them from plaintiff's reserve account maintained by defendant under the Unemployment Insurance Act. From a judgment of the Superior Court, San Francisco County, Edward P. Murphy, J., discharging defendant, plaintiff appealed. On defendant's motion to dismiss the appeal. The Supreme Court, by the Court, held that the judgment was not appealable.

Motion granted and appeal dismissed.

Contempt ⚡66(2)

A contempt judgment is not appealable.

Fabian D. Brown, San Francisco, for appellant.

Fred N. Howser, Atty. Gen., Edmund G. Brown, Atty. Gen., Charles W. Johnson, William L. Shaw, Deputy Attys. Gen., for respondent.

PER CURIAM.

This appeal from a contempt judgment presents the same question as that involved in *John Breuner Co. v. Bryant*, Cal.Sup., 229 P.2d 356, and on the authority of that case it must be held that the judgment is not appealable.

The motion to dismiss is granted, and the appeal is dismissed.

TYLER v. LARSON.

Civ. 17869.

District Court of Appeal, Second District,
Division 3, California.

April 10, 1951.

Rehearing Granted May 4, 1951.*

Action by James A. Tyler, as administrator of the estate of Jennie Pover, deceased, against Ellen R. Larson to reform a deed from one creating joint tenancy to one creating tenancy in common. The Superior Court of Los Angeles County, Frederick F. Houser, J., entered judgment reforming the deed to one making grantees tenants in common, and defendant appealed. The District Court of Appeal, Vallée, J., held that the absence of a finding that defendant knew or suspected at the time the deed was executed that it was intended to create a tenancy in common and not a joint tenancy was fatal to action to reform the deed.

Reversed.

1. Appeal and error ⚡837(4)

Where matters alleged in complaint for reformation of deed were admitted by the answer they would, on appeal, be taken as true and as having been found by the trial court. Code Civ.Proc. § 462.

2. Appeal and error ⚡907(3)

On judgment roll appeal, facts admitted by the pleadings and found by the court will be taken as true.

3. Reformation of Instruments ⚡19(2)

Where grantor voluntarily conveyed property to herself and her daughter as joint tenants and she had intended to create only tenancy in common, in absence of finding that daughter had knowledge of mistaken belief of grantor there was no mutual mistake of parties as to effect of conveyance, but merely mistake of one of the parties which was insufficient ground for reformation of deed. Civ. Code, § 3399.

4. Reformation of Instruments ⚡43

There is a presumption that a written instrument expresses the true intent and meaning of the parties and such presumption is particularly strong where one of the parties is dead and recollection of

* Subsequent opinion 235 P.2d 39.

declarations of such deceased person are relied upon to establish such person's state of mind.

5. Estoppel ¶95

Where grantor voluntarily conveyed property to herself and her daughter as joint tenants and it was contended in suit to reform deed that grantor had intended to create tenancy in common unless daughter knew or had reason to suspect that there had been mistake in making deed, there was no duty on daughter to speak and she could not be estopped by silence.

6. Reformation of Instruments ¶19(1)

Under statute providing for revision of written instrument on application of party aggrieved when instrument does not express the intention of parties because of fraud or mutual mistake or mistake of one of the parties which the other party suspected, deed voluntarily executed and conveying joint tenancy instead of tenancy in common as a result of mistake on part of grantor alone, could not be reformed in absence of finding of knowledge or suspicion on part of grantee that grantor had in fact made such mistake. Civ.Code, § 3399.

Robert M. Wiley, Hemet, for appellant.
Hobart & Hobart and Holmes E. Hobart, all of Los Angeles, for respondent.

VALLÉE, Justice.

Appeal on the judgment roll from a judgment which reforms a deed from one in joint tenancy to one as tenants in common.

[1] The complaint alleged, and the answer admitted, that on November 30, 1945, decedent Jennie Pover was the sole owner of a parcel of realty and the furnishings therein, that she had a substantial bank account, and was the recipient of an old age pension. These allegations must be taken as true and as having been found by the trial court. Code Civ.Proc. § 462; In re Estate of Cover, 188 Cal. 133, 147, 204 P. 583.

Ellen R. Larson, appellant, is the youngest daughter of Jennie Pover. On November 30, 1945, Jennie executed a deed conveying the parcel of realty to herself and Ellen as joint tenants. The deed was recorded the same day. From November 1, 1945, or prior thereto, until the death of Jennie, a confidential relation existed between Jennie and Ellen. Jennie was competent and of sound mind at the time she executed the deed. There was no fraud, misrepresentation, duress, or undue influence in connection with the execution of the deed. Ellen did not give Jennie any consideration for the deed. Jennie died on February 1, 1947.

The court found that at the time Jennie executed the deed she believed and understood that it would have the effect of giving Ellen only a half interest in the property, and that she would retain a half interest, and that her intent was to make Ellen a tenant in common and not a joint tenant. The court further found "that after the execution of said deed on November 30, 1945, that the decedent on several occasions in the presence of the defendant, Ellen R. Larson, referred to her property and expressed her desire and intention to make a will disposing of her estate; that the said Ellen R. Larson at no time asserted or claimed in the presence of said decedent and that decedent had disposed of all her real property and had no real property to dispose of by will, if she did not survive Ellen R. Larson; that the only real property owned by the decedent during all of this period of time was the real property herein described." The judgment strikes the words "as joint tenants" from the deed and substitutes the words "as tenants in common." Ellen appeals.

[2, 3] The assignment of error is that the findings do not support the judgment. As this is an appeal on the judgment roll, we must take as true the facts admitted by the pleadings and those found. The only conclusion that can be drawn from the findings is that the deed, made freely and voluntarily, was, by mistake on the part of Jennie alone, made to herself and Ellen "as

joint tenants." Although an amendment to the complaint filed during the trial alleged that Ellen "knew that the decedent at the time of the execution of said deed did not intend to have said deed convey other than an undivided one-half interest in the property," the court did not so find. There is no finding that Ellen had knowledge of any facts that would have led her to believe or suspect that her mother was laboring under a mistake. There is no finding from which it can be implied that Ellen knew or suspected anything other than that her mother intended to convey the property in joint tenancy. In sum, there is no finding that Ellen knew of or suspected her mother's mistake at the time of the execution of the deed.

[4] Civil Code section 3399 provides: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other *at the time* knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention". (Italics added.) A mistake of one of the parties alone is not sufficient ground for reformation. *Baines v. Zuieback*, 84 Cal.App.2d 483, 489, 191 P.2d 67; cf. *Socol v. King*, 36 Cal.2d 342, 223 P.2d 627. Every presumption favors the view that a written instrument expresses the true intent and meaning of the parties. *Moore v. Vandermast, Inc.*, 19 Cal.2d 94, 98, 119 P.2d 129; *Oakdale Mercantile Co. v. Baer*, 128 Cal.App. 350, 354, 17 P.2d 779; *California Trust Co. v. Cohn*, 9 Cal.App.2d 33, 40, 48 P.2d 744. This is particularly true where, as here, one of the parties is dead and the plaintiff necessarily must rely on the weakest and most unsatisfactory class of evidence—recollection of declarations of a deceased person—to establish her state of mind. *Khoury v. Barham*, 85 Cal.App.2d 202, 211, 192 P.2d 823.

[5] We do not understand respondent to seriously contend that Ellen knew or suspected that Jennie, *at the time* the deed was executed, "did not intend to have" the deed convey other than an undivided half

interest. His argument seems to be that Ellen is estopped from asserting that the deed did not have the legal effect intended by Jennie because the court found 1) that after the execution of the deed, Jennie, on several occasions in the presence of Ellen, referred to her property and "expressed her desire and intention to make a will disposing of her estate"; 2) that Ellen did not assert or claim in her presence that she "had disposed of all her real property and had no real property to dispose of by will"; 3) that the only real property owned by Jennie was that described in the deed; and 4) that a confidential relation existed between them. The argument seems to be that under the facts thus found there was a duty upon Ellen to tell Jennie that she (Jennie) had made a mistake. There is no finding that Ellen knew or suspected, at the time the declarations were made, that Jennie intended a tenancy in common and not a joint tenancy "at the time" the deed was executed. It cannot be inferred that Ellen "at the time" the deed was executed knew or suspected that Jennie at that time intended a tenancy in common and not a joint tenancy from the mere fact that Jennie, after the deed was executed, said in the presence of Ellen that she intended to make a will disposing of her estate. As we have said, Jennie had property other than that described in the deed, which was subject to disposition by will. Jennie's statements that she intended to make a will disposing of her estate cannot be said to have led Ellen to suspect that Jennie had made a mistake in making the deed read "as joint tenants." Jennie may well have referred to the making of a will to dispose of her other property. The facts found do not show a duty on Ellen to speak, an essential element of estoppel from silence. *People v. Ocean Shore Railroad*, 32 Cal.2d 406, 421, 196 P.2d 570, 6 A.L.R.2d 1179.

[6] A finding that Ellen knew or suspected at the time the deed was executed that Jennie intended a tenancy in common and not a joint tenancy was essential to reformation of the deed. Its absence is fatal. In view of the fact that the complaint

alleged that Ellen so knew, and the failure of the court to so find, would seem to be conclusive that the court did not intend to so find. We hold that the findings are insufficient to support the judgment.

Reversed.

SHINN, P. J., and WOOD, J. concur.



103 Cal.App.2d 172

JOHN et al. v. MARSHALL.

No. 14517.

District Court of Appeal, First District,
Division 1, California.

March 29, 1951.

Rehearing Denied April 28, 1951.

Hearing Denied May 24, 1951.

Phillip R. John and Harriett J. John, his wife, and others, brought action against John A. Marshall to determine rights of the parties under an agreement for maintenance of water system and to recover balance alleged due from defendant from his proportionate share of expense of the system and for water furnished him. A judgment for plaintiffs was entered in the Superior Court, in and for the County of Alameda, O. D. Hamlin, J., and the defendant appealed. The District Court of Appeal, Bray, J., held that defendant, as successor to a country club, was bound by agreement between country club and purchasers of lots from the club for maintenance of water system by club to provide water to club and to each lot owner who desired water, notwithstanding that all purchasers of lots did not sign the agreement.

Judgment affirmed.

1. Waters and water courses ☞201

Agreement between country club and purchasers of lots from the club for maintenance of water system by club to provide water to club and each lot owner who desired water would be construed as becoming binding on such lot owners as signed the agreement, and hence proof that agreement was not signed by all lot owners did not establish that agreement

was not binding upon defendant, as successor to the club.

2. Waters and water courses ☞201

If there was any ambiguity in agreement between country club and purchasers of lots from the club for maintenance of water system by club to provide water to club and each lot owner who desired water as to whether agreement had to be signed by all lot owners before it was binding, construction of the agreement by the parties before any controversy arose as to its meaning resolved that ambiguity.

3. Contracts ☞170(1)

When contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will when reasonable be adopted and enforced by the court.

4. Contracts ☞147(1), 170(1)

Court has duty to give effect to intention of parties to agreement where it is not wholly at variance with the correct legal interpretation of the terms of the contract, and a practical construction placed by parties upon the instrument is the best evidence of their intention.

5. Waters and water courses ☞201

Country club's consideration for entering into agreement with purchasers of lots for maintenance of water system by club to provide water to club and each lot owner who desired water was the sharing of the cost of the water and the operation and maintenance of the water system by each lot owner who signed, and that consideration would not be affected by failure of certain of the purchasers to sign.

6. Contracts ☞35

Although failure of one of the parties to sign agreement containing obligations of two will be ground for inference that the writing was not intended as contract of the party signing, it is not the rule that a contract, which on its face purports to be inter partes, must invariably be executed by all whose names appear in the instrument before it shall be binding upon any.

7. Waters and water courses Ⓒ201

Where agreement between country club and purchasers of lots from the club for maintenance of water system by club to provide water to club and to each lot owner who desired water expressly provided that agreement was to run with the land and was to be binding upon all assigns and successors of the parties, such agreement did run with the land and was binding on defendant, as successor to the club.

8. Waters and water courses Ⓒ201

Even if agreement between country club and purchasers of lots from the club for maintenance of water system by club to provide water to club and to each lot owner who desired water was merely a personal one and did not run with the land, agreement was of the type which courts would enforce against successor to the club who took with knowledge of it.

9. Waters and water courses Ⓒ201

Under agreement between country club and purchasers of lots from the club for maintenance of water system by club to provide water to club and to each lot owner who desired water, which provided that club, or its successor, was entitled to transfer water system to lot owners when club or successor ceased operating the property as a golf club or other similar enterprise, the operation of the property by club's successor as a dude ranch, offering public golf course, swimming pool and other facilities, was a similar enterprise to a golf club, and hence successor had no right under the agreement to refuse to continue to operate the water system.

10. Waters and water courses Ⓒ201

Purported transfer of water system by defendant to plaintiffs under agreement whereby defendant was maintaining water system for his own use and for use of plaintiffs was ineffective, where agreement provided that if defendant was entitled to transfer of the system to plaintiffs he must prior to effective date of such transfer place system in a reasonably efficient condition, order and repair, and evidence clearly disclosed defendant did not do so.

11. Waters and water courses Ⓒ201

Where agreement under which defendant maintained water system for his own use and for use of plaintiffs provided that in event system was transferred to plaintiffs the rates to be charged defendant for his requirement should be on same basis as were paid by each of the other parties, and system was transferred to plaintiffs, evidence supported finding that rates charged defendant, though not allowing a lower rate to defendant, as a large consumer, than was given ordinary home consumer, was reasonable.

12. Declaratory judgment Ⓒ295

Where action was brought only to determine rights under agreement between country club and purchasers of lots from the club for maintenance of water system by club to provide water to club and to each lot owner who desired water as between lot owners signing the agreement and defendant, as successor of the club, lot owners who did not sign the agreement could not claim any rights under the decree and were not "indispensable parties".

See publication Words and Phrases, for other judicial constructions and definitions of "Indispensable Parties".

Clark & Morton, Berkeley, for appellant.
William H. Gale, Jr., Pleasanton, Breed, Robinson & Stewart, Richard K. Dutton, Oakland, for respondents.

BRAY, Justice.

Defendant appeals from a judgment granting declaratory relief under a certain agreement and awarding plaintiffs the sum of \$2,901.76.

Questions Presented.

1. Is defendant bound by the agreement (a) in view of the fact that it is not signed by all the parties owning property described in it; (b) as defendant is not a party to the agreement?

2. If the parties are bound by the agreement, was defendant entitled under its terms to turn the water system over to plaintiffs?

3. Is defendant liable for the amount of water charges found by the court?

4. Are indispensable parties absent from the action?

Facts.

There is practically no dispute as to the facts. June 26, 1925, Markham and Moore conveyed to Castlewood Country Club certain real property in Alameda County, formerly owned by Phoebe A. Hearst, together with the right, title and interest of the grantors in a certain contract dated April 29, 1911, between Spring Valley Water Company and Mrs. Hearst, which provided for the use on the property of water to be furnished by the water company from large cisterns located thereon. The club thereafter sold off lots for home purposes, and through a water system located upon the club's land, with connecting facilities to the various lots, delivered water to the home owners as well as to itself. On December 11, 1939, as a result of considerable dissatisfaction and disputes concerning the water service, the agreement in question¹ was entered into. The club, and its successors in interest, continued to supply water to the home owners. The club had financial difficulties and was taken over by a bank. A considerable portion of the property was occupied by the premises used for a country club, including an eighteen-hole golf course, a swimming pool, riding stables, club house, etc. April 19, 1940, defendant entered into a contract to purchase the property including the club premises, and also the contract between Spring Valley Water Company and Mrs. Hearst. The contract specifically provided that the sale was subject to the agreement. Defendant took immediate possession of the property and water system and continued to supply the home owners with water as his predecessors had done and at the same rates, for a period of approximately eight years. While originally some of the water used came from wells on the property, by 1948 all the water used was supplied by the city of San Francisco as successor to

Spring Valley. From 1940 defendant has operated the premises as a dude ranch known as "The Old Hearst Ranch," offering to the public for remuneration the facilities of the golf course, dining room, bar, swimming pool, riding stables, etc. He contends he does not keep up the golf course, except the first hole. However, its use is open to the public for which he charges a "green fee." Defendant finally acquired title to the property and the water system by deed dated October 1, 1946. This deed conveyed the property expressly subject to the agreement. February 6, 1948, defendant sent a letter to the attorney for plaintiffs, stating "that, in accordance with the water agreement of December 11th, 1939, between the Castlewood Country Club and the individual property owners (known as the Castlewood Protective Association), I shall turn over to the property owners the operation and maintenance of the water system on Saturday, February 21st, 1948 * * *." He then ceased to operate the system and the home owners have been operating it ever since, supplying water to the dude ranch as well as to themselves.

At all times during the operation of the system prior to its being taken over by the home owners, a monthly meter rate of \$1.50 for the first 1,000 cubic feet and \$.75 per 1,000 cubic feet thereafter of water used was charged the home owners. When they were forced by defendant to take over the system, the home owners continued to charge these same meter rates. However, what charge to make defendant for water supplied the dude ranch raised quite a problem. Defendant took water from the system at thirty-six connections all without meters. After some study, the home owners decided to charge defendant on the basis of fifteen meters at the same meter rate charged themselves monthly. Bills were sent defendant accordingly. Defendant made part payment, leaving a balance of \$2,901.76 for water supplied up to April 30, 1949, and for defendant's pro rata share of the repairs to said system. While there was some testimony to the

1. Hereafter referred to as "the agreement."

contrary, there was ample evidence showing that at the time defendant turned the system over to the home owners it was in bad condition, order and repair.

Findings.

Among other matters, the court found that plaintiffs are either original parties to the agreement or successors in interest to them; that defendant continuously from the date of his acquisition of the property to February 21, 1948, operated the water system and furnished water to plaintiffs "in recognition of and in accordance with" the agreement; that all of those who signed the agreement were owners of improved property within the land described in the basic deed from Markham and Moore, that subject to seasonal requirements defendant utilized water from the system in an area greatly in excess of twenty acres for a golf course, riding stables, swimming facilities, gardens, restaurant, bar facilities and other similar activities connected with the conducting of a dude ranch and at the time of the turn-over of the system to plaintiffs had not ceased to operate the property as a "golf club or other similar enterprise"; that the water system was not then in a "reasonable, efficient condition, order and repair"; that the method used by plaintiffs to determine charges assessed against defendant and plaintiffs for their relative proportion of the operation, maintenance and repair of the water system was fair and reasonable; that there were other owners of parcels of property within the basic lands who did not sign the agreement, who became such either by purchase from the club or by succession to the title of persons who had so purchased; that such owners are at least fifteen in number, including Charles Daniel Haas and wife who purchased three acres directly from the club; that Haas and wife on the date of the agreement were persons who came within the description of "second parties" as used in the agreement; that defendant as successor in interest to the club continuously since acquisition of his interest assumed the obligations of the agreement and has operated and still does operate the property as a golf club within the meaning

of the agreement; and that the balance due plaintiffs from defendant for his proportionate share of the expenses of the system to December 31, 1948, and for water furnished him to April 30, 1949, is \$2,901.76.

Judgment.

The judgment provides (1) for the payment by defendant to plaintiffs of said last mentioned sum; (2) that the agreement became binding upon all persons signing it from the date of signing; (3) that defendant is bound by its terms and is obligated to maintain, manage and operate the water system and to furnish plaintiffs with water from the system; (4) that defendant, under its terms, was not entitled to transfer the operation of the system to plaintiffs.

The Agreement.

It states that it is between the club and "all of the parties or their successors in interest who purchase from first party" any part of the land described in the deed from Markham and Moore to the club "together with such parties who may not have purchased any part or parcel of said real property, but who nevertheless are using water as of the date hereof from the system hereinafter mentioned * * *." The provisions applicable here follow:

"Whereas, the first party, in subdividing a portion of said real property and selling certain parcels thereof to second parties or their predecessors in interest, caused water to be conveyed thereto and to other parcels not included in the land described in said deed aforesaid, from wells located on a part of said property owned by first party, by and through the equipment and facilities hereinafter called 'Water system' which it owns and maintains on said real property, for the purpose of sprinkling and irrigating its golf course, grounds and gardens, and for the purpose of supplying water for domestic and other uses, at its club house, swimming pool, and other buildings and appurtenances; and

"Whereas, certain of the second parties constructed improvements on their said real property and landscaped and beautified the same and have used water from said water system for their said gardens and

grounds and for other domestic purposes, at a specified monthly rate paid to the first party by second parties as their proportionate share of the cost of pumping, maintenance and repair charges; and

"Whereas, a dispute exists as to the respective rights and liabilities of the parties owning any part or parcel of said land described in the deed referred to in Paragraph 1 hereof, in and to said water and the system through which it is being conveyed to said land; and

"Whereas, it is the mutual desire of all the parties owning any part or parcel of said land that their rights and liabilities in the premises be fixed and determined by a uniform written agreement, and that all previous agreements and conditions, written or oral, express or implied, under which water has heretofore been furnished second parties or any of them, be terminated and set aside."

It is then agreed (1) that all parties have a pro rata interest in all water rights, including the wells and the waters developed thereby which are appurtenant to the property described in the deed, in the proportion that the acreage of each bears to the total acreage; (2) that the water system, including all its appurtenances, except such portion of the underground pipes as are within the lands of second parties, belongs to first party; that second parties' only interest in the system "is the continued right to be supplied with water through the present facilities for their said gardens and grounds and other domestic purposes," in proportion to acreage; (3) that during the times first party operates the system for its own needs and purposes, it shall continue to supply second parties with water at the present rates, without warranty as to quantity or quality (a provision is made for increase in rates and arbitration in case of dispute); (4) "If for any reason the first party at any time in the future shall determine to *cease operating said property as a golf club or other similar enterprise*, it shall be under no obligation whatever to continue to supply water to second parties, but in such event the second parties are hereby licensed and

authorized to operate said water system, and they agree to furnish and supply first party with water for the use and protection of its said buildings, swimming pool, and other appurtenances and the grounds and gardens within an area of at least twenty acres surrounding the largest of said buildings. Provided, however, that should first party cease to operate said system and elect to so transfer the operation thereof to second parties, it shall give to second parties at least fifteen days' written notice of such cessation and election, and the *first party agrees to place said system*, prior to the effective date of such transfer, *in a reasonable efficient condition, order and repair*, the cost of which is to be borne between the parties, as hereinafter provided." (Emphasis added.)

(5) A method is provided for first party to take back the water system if it desires to do so. (6) If second parties operate the system the rates to be charged first party for its requirements shall be on the same basis as is paid by each of second parties. Arbitration is provided in case of dispute. (7) Cost of operation and maintenance, repairs and replacements, except as to certain items included in the water rates, shall be paid 75 per cent by first party, 25 per cent by second parties. (10) Should any of the second parties who have not already done so, improve their property, they are entitled to connect with the water system and to receive water from it. (11) Should first party in the future sell other parcels of its real property the purchasers shall be entitled to water service on signing the agreement. (12) First party is not a public utility and "the sole right of the second parties under this agreement is to receive their pro rata share of said water on the basis which their acreage bears to all of the real property described in said deed mentioned in Paragraph 1 hereof under the terms and conditions herein contained, so long as said system is operated by first party or upon the cessation of said operation by said first party, to operate the same under the terms and conditions herein contained, and that no further or additional rights than in this agreement described are granted to or vested

in second parties." (14) "This agreement and all the terms and conditions thereof shall run with the land and be appurtenant thereto and be binding upon and inure to the benefit of the executors, administrators, heirs, assigns and successors of the parties hereto; * * *." (Emphasis added.) (15) The agreement shall not affect the rights of any of the parties as successors to Mrs. Hearst in her agreement with Spring Valley.

1. (a) Failure of Certain Owners to Sign.

[1-4] The agreement was signed by all of the purchasers of lots from the club who had improved their land and were then using water from the system. It was not signed by about fifteen persons who at that time were purchasers from the club but who had not improved their property. Defendant contends that by reason of the failure of these fifteen lot owners to sign, the agreement never was executed. Although the agreement stated that the second parties were *all* of the parties or their successors in interest who purchased from first party, and that a dispute existed as to the rights and liabilities, and that it was the mutual desire of *all* the parties owning any part or parcel of the land, etc., it is obvious from a reading of the whole agreement that in order to be binding on the parties signing, it did not require the signature of all who could have signed. An open class was contemplated and the agreement became binding on such owners as signed the agreement. If there is any ambiguity in the agreement in this connection, the construction of the agreement by the parties to it resolves that ambiguity. From the very beginning all of the signers, by their acts, construed the agreement as binding upon them. This includes the club, its successors in interest, and particularly defendant. At no time prior to the trial did he ever question that the agreement was binding upon him. There was no evidence offered to the effect that the agreement was not to be binding on all parties signing unless all parties in the second parties category had signed. "* * * applicable here is the familiar rule that when a contract is ambiguous, a construc-

tion given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court. *Work v. Associated Almond Growers*, 102 Cal.App. 232, 235, 282 P. 965; 6 Cal.Jur. 304, § 184. The reason underlying the rule is that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract, and a practical construction placed by the parties upon the instrument is the best evidence of their intention." *Universal Sales Corp. v. Cal. Press Mfg. Co.*, 20 Cal.2d 751, 761, 128 P.2d 665, 672.

For over eight years defendant supplied water and made charges under the terms of the agreement, and when he felt that the operation of the system was too much of a burden for him, he turned the system over to plaintiffs, as he said in his letter, "in accordance with the water agreement."

In *Tewksbury v. O'Connell*, 21 Cal. 60, cited by defendant, there was an agreement for partition which was not signed by five owners or lien claimants who were named as parties. The court held that the agreement was to become effective only when executed by all the persons named as parties. However, the court said, 21 Cal. at page 69: "Without entering into a separate examination of each case, it will suffice to say that they are cases in which, from the terms of the instrument, or from the nature of the subject-matter of the contract, it appeared that it was the intention of the parties who signed to be bound, without reference to an execution by all the parties; or where, by acting under it with a knowledge that it had not been fully executed, the parties had become estopped from denying its obligation upon them." The other cases cited by defendant are, like the *Tewksbury* case, not in point for the reason that the agreements were such as showed clearly that they required all parties to sign in order to become effective as to any.

[5,6] The agreement was primarily one to provide service of water to the club, and to each lot owner who desired water, and who signed the agreement. The club's consideration for entering into the agreement was the sharing of the cost of the water and of operation and maintenance of the system by each lot owner who signed. That consideration would not be affected by the failure of others to sign. The rule is well expressed in 6 California Jurisprudence, p. 233, § 153: "Although it has been stated that the failure of one of the parties to sign an agreement containing obligations of two will be ground for an inference that the writing was not intended as a contract of the party signing, it is not the rule that a contract, which on its face purports to be inter partes, must invariably be executed by all whose names appear in the instrument before it shall be binding upon any. One reason why it is held that an agreement which is not to be operative upon one until it has been signed by another is that such signing is the consideration upon which the first signer agrees to be bound. But when a consideration for the agreement on the part of the first signer is shown to be sufficient to authorize its enforcement, he cannot be released therefrom unless he shall show clearly that there were other considerations for his signing than those named in the instrument. If by parol stipulation, or, a fortiori, if by the writing itself, the contract was not to be deemed complete until other signatures should be added, it, without such addition, will not bind those who have signed it; but if nothing of this appears, the parties signing will be held, though even on the face of it the signatures of the others were contemplated by the draftsman."

1. (b) Is Defendant Bound?

[7,8] As above shown, defendant considered himself bound by the agreement as he operated under it for over eight years, and when he attempted to unload the burden of it, did so in accordance with its terms. The court did not expressly find that the agreement ran with the land but did find that defendant recognized it and

assumed its obligations. The evidence amply supports this finding. The agreement expressly provided that it was to run with the land and to be binding upon all assigns and successors of the parties. That such an agreement does run with the land and is binding, see *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 93 P. 858, 15 L.R.A.,N.S., 359; *Henrici v. South Feather Land & Water Co.*, 177 Cal. 442, 170 P. 1135; and *Farmer v. Ukiah Water Co.*, 56 Cal. 11, cited by defendant. In the latter case the contract to supply water was not of record but the court held that the purchaser of the water ditch property was required to perform the contract to supply water to plaintiff's land as it was put upon notice by the presence on the property of lateral ditches and pipes leading to plaintiff's property. Assuming, however, that the agreement here was merely a personal one, it was of the type which the courts will enforce against the successor who took with knowledge of it. It is within the rule set forth in *Hunt v. Jones*, 149 Cal. 297, 86 P. 686. There the defendant's predecessor had agreed to supply plaintiff with water on land which plaintiff was buying from the predecessor. Defendant purchased the property of the predecessor knowing of the agreement. There, referring to the covenant to supply water, the court said: "We do not discuss the point as to whether the covenant here in question was one running with the land so as to bind the assignee of the water company as grantee of plaintiff's covenantor, the Thermalito Colony Company, association, because we think that, treated simply as a personal covenant or agreement under the allegations of the complaint, a court of equity would be warranted in enforcing it against the defendant. There can be no doubt of the proposition that personal covenants or agreements bestowing benefits and imposing restrictions upon the use of land may be enforced in equity, where a subsequent purchaser from the covenantor takes with notice of an existing equitable claim or interest in favor of another." 149 Cal. at page 300, 86 P. at page 688. "* * * if the owner of land enters into a covenant concerning the land, concerning its uses,

subjecting it to easements or personal servitudes and the like, and the land is afterwards conveyed or sold to one who has notice of the covenants, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it; and it makes no difference whatever with respect to this liability in equity whether the covenant is or is not one which "in law runs with the land."'" 149 Cal. at page 301, 86 P. at page 688.

Cases cited by defendant, such as *Wolfert v. Guadagno*, 130 Cal.App. 661, 20 P.2d 360, holding that one purchasing real property subject to a mortgage or deed of trust does not thereby assume the obligations so secured, are not applicable here, as it is the rule set forth in the *Hunt* case which does apply. Nor can there be any application of the statute of frauds. Defendant was bound to comply with the agreement.

2. Was Defendant Entitled to Transfer the System?

[9] Under the agreement, defendant was entitled to transfer the system to plaintiffs only (a) when he ceased "operating said property as a golf club or *other similar enterprise*." (Emphasis added.) Defendant lays great stress upon the fact that he is not operating a golf club. He almost completely ignores the second phrase "other similar enterprise." The operation of a guest or dude ranch, offering the public golf course, swimming pool and the other facilities heretofore mentioned, obviously is a similar enterprise to a golf club. Especially is the use of water on such a ranch similar to the use of water by a golf club. Therefore, defendant had no right under the agreement to refuse to continue to operate the water system.

[10] The agreement provides that if defendant is entitled to transfer the system to plaintiffs, he must, prior to the effective date of such transfer, place the system in a reasonably efficient condition, order and repair. This the evidence clearly discloses defendant did not do. For this second reason defendant was not entitled to transfer the system.

3. Defendant's Liability.

[11] The agreement provided that in the event the system is operated by second parties, the rates to be charged defendant for his requirements shall be on the same basis as are paid by each of the other parties. Each is paying the same meter rate as was charged defendant. Of course, each plaintiff has only one connection from which to take water to his respective lot, and only one meter. The evidence shows that it was impracticable (and there is no evidence to the contrary) to place a meter on each of defendant's connections, or to obtain and place one meter for all connections. Defendant's main complaint is that he was denied a decreasing rate per 1,000 cubic feet after the first 2,000. He contends that generally, on other water systems, large consumers of water (which, of course, he is) are allowed a lower rate than is given the ordinary home consumer. Having in mind that the agreement says he shall be charged "on the same basis" as the rates paid by each of the others, and the testimony as to the method used in arriving at the charge to make defendant, we cannot say that the court's finding that the basis is reasonable is not well supported by the evidence. Moreover, it must be remembered that the rates charged are not similar to those charged by the ordinary water company. Here the rates paid are for the maintenance and operation of the system only. The water came to the system free, as it came from the wells on the club property as supplemented by water from San Francisco under the Spring Valley-Hearst agreement. No charge was made to the consumers for the water. The meter rate as to all parties was for the proportionate sharing of maintenance, operation and repairs, of the latter of which defendant was required under the agreement to pay 75 per cent. Again there was no evidence offered to show that the charges made by plaintiffs resulted in any greater expense to defendant than during his own operation of the system.

In view of the fact that defendant was not entitled to transfer the system to plaintiffs, it may be doubtful if the basis set

forth in the agreement applies. However, defendant certainly would not be entitled, because of his wrong, to any more favorable basis.

4. Are Indispensable Parties Absent?

[12] The court found that plaintiffs comprise all the parties having or claiming any interest in the agreement. It also found that there were at least fifteen others who owned property in the tract but who did not sign the agreement. Of these Haas and wife were persons who came within the description of second parties (apparently they are the only persons not agreement signers or successors of agreement signers who are receiving water). Defendant contends that these fifteen or more parties are indispensable parties to the action, apparently on the theory that the court was being asked to apportion water between all lot owners. Actually, this proceeding was brought only to determine the rights under the agreement as between those signing and defendant, and not for apportionment of water. The contest is over who should operate the system, rather than any apportionment of water or water rights. This decree binds and is for the benefit of the parties to the action only. Neither Haas nor the other property owners who did not sign the agreement can claim any rights under the decree. Therefore, they are not indispensable parties. Cases cited by defendant such as *Mitau v. Roddan*, 149 Cal. 1, 84 P. 145, 6 L.R.A., N.S., 275, holding that an action involving a general accounting between the beneficiaries under a trust deed required the joining of all the beneficiaries; *Olson v. Lovell*, 91 Cal. 506, 27 P. 765, holding that a contract for exchange of land which one of the second party owners failed to sign could not be specifically performed against the co-owner signing; *Mullarky v. Young*, 9 Cal.App. 686, 100 P. 709, where a con-

tract for the conveyance of real property between two named parties of the first part and two named parties of the second part, was signed by one only of each part, was held not to constitute a complete contract; as well as the other cited cases, are clearly not in point. The case of *Cavanaugh v. Casselman*, 88 Cal. 543, 26 P. 515, cited by defendant, actually supports the action of the trial court here. There, an agreement for sale of real property, which on its face purported to be an agreement inter partes, although signed by the other party, was not signed by the party seeking to enforce it. In holding that it could be enforced as there was no showing that it was not to be deemed complete unless signed by both parties, the court used this language applicable here, 88 Cal. at page 549, 26 P. at page 517: "It is not the rule that a contract which on its face purports to be *inter partes* must invariably be executed by all whose names appear in the instrument before it shall be binding upon any. One reason why it is held in many of the cases that an agreement which is not to be operative upon one until it has been signed by another is that such signing is the consideration upon which the first signer agrees to be bound; but when a sufficient consideration for the agreement on the part of the first signer is shown to authorize its enforcement, he cannot be released therefrom unless he shall show clearly that there were other considerations for his signing the agreement than those named in the instrument."

Defendant has not shown that there was any consideration for his signing the agreement other than its binding effect on those who did sign.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

103 Cal.App.2d 214

**FUMIKO MITSUUCHI v. SECURITY-
FIRST NAT. BANK OF LOS
ANGELES.**
Civ. 17804.

District Court of Appeal, Second District,
Division 1, California.

April 2, 1951.

Rehearing Denied April 23, 1951.

Hearing Denied May 28, 1951.

Action by Fumiko Mitsuuchi against the Security-First National Bank of Los Angeles, a national banking association, growing out of an escheat action and involving the issue whether the bank under an indemnity provision in a trust deed was entitled to reasonable attorney's fees and costs from the respondent by reason of his defense of the validity of its trust deed lien in the escheat action. From an adverse judgment in the Superior Court of Los Angeles County, Kurtz Kauffman, J., the defendant appealed. The District Court of Appeals, Hanson, J., pro tem., held that the bank was entitled to defend its security and receive the costs of its defense under the indemnity provisions of its trust deed.

Judgment reversed with instructions to enter judgment in favor of defendant.

1. Evidence ⇨18

The court will take judicial notice that property purchased in 1938 was in 1946 worth several times what the purchaser had paid for it.

2. Aliens ⇨6(1)

Public policy of California is to prevent title to agricultural lands vesting directly or indirectly in persons of Japanese ancestry who are not American citizens. Gen.Laws, Act 261.

3. Aliens ⇨6(1)

In view of the public policy of California to prevent title to agricultural lands vesting directly or indirectly in persons of Japanese ancestry who are not American citizens, the representatives of the state were not entitled to compromise that policy by in effect having the state sell agricultural lands to such persons. Gen.Laws, Act 261.

4. Mortgages ⇨125

Under indemnity provisions of a trust deed providing that should the beneficiary

or trustee elect to appear in or defend action or proceeding the trustor would pay all their "costs and expenses," quoted phrase included attorney's fees.

See publication Words and Phrases, for other judicial constructions and definitions of "Costs and Expenses".

5. Evidence ⇨271(20), 318(8)

An allegation in the pleading is not evidence against the opposite party and is not only self-serving but is hearsay as well.

6. Evidence ⇨271(20)

As respects right of bank to recover reasonable attorney's fees and costs from the state by reason of its defense of the validity of its trust deed lien in an escheat action, unproved allegations of the complaint in the escheat action possessed no evidential value and were irrelevant to any of the issuable facts involved.

7. Mortgages ⇨125

Where state sought to escheat land on which bank held a trust deed indemnifying it against payment of costs and expenses if necessary to appear and protect its security, on ground that beneficial ownership was in a person of Japanese ancestry not an American citizen, and the court found in favor of the bank, judgment in the escheat case established merely that a blanket charge had been made as to the validity of the trust deed, and the bank was entitled to defend the security and receive the costs of its defense under the indemnity provisions of the trust deed.

Paul E. Iverson and William P. Hogo-boom, Los Angeles, for appellant.

J. Marion Wright, Los Angeles, for respondent.

HANSON, Justice pro tem.

This case, which is an outgrowth of an escheat action instituted in 1944 by the State of California, is not in and of itself in any aspect unusual, but the action of the representatives of the State in the case upon which it is based seems to us to have violated the public policy of this State. While we shall have more to say concerning that observation it is suffi-

cient at this point to concede that the case before us presents a very simple question for solution. That question, stripped of unnecessary details, is whether the appellant bank under an indemnity provision in a trust deed was entitled to recover reasonable attorney's fees and costs from respondent by reason of its defense of the validity of its trust deed lien in the escheat action.

A statement of the facts addressed to the point under consideration will suffice. Sometime prior to the year 1936 one Arnold was the owner of the property here involved, generally known as "Arnold Ranch," subject to a trust deed lien in favor of the defendant bank. The property consisting of 71 acres was located at the corner of Sawtelle and National Boulevards in the city of Los Angeles. Arnold failed to comply with the terms of the trust deed, and hence, the bank foreclosed it and bid in the property. Thereupon the bank leased the property to the son of Arnold, for a year at a time, subject to sale with the right of immediate possession. The bank upon acquiring the fee title promptly listed the land for sale with brokers but it was not until March, 1938, that it received an acceptable offer for the land from the respondent, an American citizen of Japanese ancestry. As a result of negotiations between the parties, it was agreed that the bank should convey the land to respondent upon the payment of \$10,000 in cash and the execution and delivery of a purchase money note for \$78,562.50 to be secured by a purchase money deed of trust.

Thereupon the appellant bank opened an escrow with the Title Insurance and Trust Company for completion of the transaction. The bank's instructions required the delivery to it of a title insurance policy guaranteeing the validity of the proposed trust deed lien. A few days later the tenant Arnold called at the bank with respect to a renewal of his lease and was informed the land was being sold. Arnold had been hopeful of purchasing the land himself and upon learning respondent was the purchaser intimated to the bank that respondent was not purchasing the

property with her own money and in her own behalf, but in trust for persons of Japanese ancestry who were barred by the Alien Land Law, and accordingly, that the purchase was but a subterfuge to evade the law.

The bank promptly relayed this information to the Title company. As the Title company was not only under a duty to the bank to satisfy itself that the purchase was not being made to evade the law, but in its capacity as an insurer of titles was being called upon to insure the validity of the proposed trust deed, it concluded that, under the circumstances, it did not desire to undertake the possible liabilities involved. Accordingly, it so advised the appellant bank. Immediately thereafter, the respondent who had not been advised of the position taken by the Title company visited it for the purpose of proceeding with her part of the escrow. By her answers to various questions put to her by the Title company and from data and affidavits she supplied, the Title company became convinced that she was entitled to take and hold the land without in any respect violating the Alien Land Law. The bank upon being so advised by the Title company entered into a new escrow. This escrow resulted in a conveyance of the land by appellant bank to respondent and the execution and recording of the trust deed executed by the respondent in which the bank was named as the beneficiary and the Los Angeles Trust & Safe Deposit Company as trustee.

Approximately six years later, i. e., in 1944, while the grantee of the land, an American citizen of Japanese descent, was interned with a host of other like citizens the attorney general of the State concluded that the grantee had acquired the land contrary to the Alien Land Law and thereupon instituted an action against the respondent grantee, along with the trustee and the bank as beneficiary of the trust deed seeking to have the realty escheated to the State as of the date when in 1938 respondent acquired the property by conveyance from the appellant bank. In that action the State charged that not only had the respondent acquired the property in

violation of the provisions of the Alien Land Law but that the bank as beneficiary of the trust deed and as the grantor in the grant deed to respondent "had been informed of and knew that the defendant (respondent) Fumiko Mitsuuchi was taking the purported fee title to the aforesaid property in her name for the use and benefit of another person who was in fact an alien Japanese, a native of the Empire of Japan, and one ineligible to become a citizen of the United States of America."

The beneficiary (appellant bank) and the trustee of the trust deed elected to defend jointly against the escheat action and employed counsel of their own choice to represent them. Not only did the trustor of the trust deed by her answer deny the charges of the State, but the appellant bank and the trustee did likewise.

[1-3] At or about the close of the evidence on the last day of the trial, an assistant attorney general of the State accepted in behalf of the State an offer by the defendant Mitsuuchi (respondent here) that the State would upon the payment by her to it of \$75,000.00 stipulate to a judgment quieting title in Mitsuuchi and that the judgment would adjudicate that the trust deed lien of the appellant bank was in all respects valid. Pursuant to the acceptance of that offer respondent paid \$75,000.00 out of her own funds, despite the fact that six years before she had purchased the entire tract from the bank for a total consideration of only \$88,562.50. The reasons which impelled her to do so are not shown by the record, but the inferences from the facts of which we take judicial notice are crystal clear. We note that Mitsuuchi, a native-born American citizen entitled to all the guaranties of the federal and state constitutions had been placed in a detention camp by the military authorities. In view of all this, perhaps she feared that her property rights would be treated in the same manner, without regard to her constitutional rights. Accordingly, it undoubtedly appeared advisable to her to make the offer she made, in view of the fact, of which we take judicial notice, that the property she purchased in 1938 was in 1946 worth several times what

she had paid for it. On the other hand we note that it was the public policy of the State to prevent title to agricultural lands to vest directly or indirectly in persons of Japanese ancestry who were not American citizens. That being true it would seem that the representatives of the State were not entitled to compromise the policy of the State by in effect having the State sell agricultural lands to such persons.

[4] Under the indemnity provisions of the trust deed the trustor Mitsuuchi had agreed with the trustee and the beneficiary thereof, that either or both in order to protect the security of the trust deed were entitled "to appear and defend without cost to Beneficiary or Trustee any action or proceeding purporting to affect the security hereof or the rights or powers of either of them, and, should Beneficiary or Trustee elect * * * to appear in or defend such action or proceeding, [the trustor would] pay all their costs and expenses." The meaning of the phrase "costs and expenses" as thus used in the trust deed included attorney's fees. *Mitau v. Roddan*, 149 Cal. 1, 84 P. 145, 6 L.R.A.,N.S., 275.

It is contended, however, that attorney's fees and costs (which it is stipulated are reasonable) paid by the beneficiary to its counsel in appearing and defending its trust deed in the escheat action are not recoverable from the trustor for two reasons. *First*, it is contended that the indemnity embraces only such actions or proceedings as are required to protect the validity of the trust deed lien against charges or liens resulting from the *acts* of the trustor. Merely to state the contention is to answer it.

[5] The next contention is that the beneficiary and the trustee appeared and defended the escheat action not merely because the State sought to have the land escheated to it because the trustor was ineligible to take title but, additionally, because the attorney general charged the bank new *that fact*. The complaint of the attorney general sought no affirmative relief against the bank other than that it be decreed it had no valid lien by its trust deed.

It is a far cry for respondent to suggest, as she does, that the defense by the bank of its lien is not within the purview of its indemnity rights under the provisions of its deed. If it be assumed, for the purposes of argument, that the bank would have been a joint tort-feasor with the appellant if the two had entered into the transaction with knowledge on the part of both that the appellant was ineligible to take title, the short answer is that there is not a scintilla of evidence to sustain it. The respondent does not contend there is any evidence whatsoever to support her, other than the unproved charge made in the petition (complaint) by the attorney general. Since when has an allegation in a pleading ever been regarded as evidence against the opposite party? The answer is never at all in the history of the law. Such an allegation is not only self-serving, but is hearsay as well. In *Farmer v. Associated Professors of Loyola College*, 166 Md. 455, 171 A. 361, 363, it is said, "Of course, the bill of complaint, although sworn to, is not evidence of the facts therein alleged in favor of the plaintiff. And testimony that the allegations therein were in accordance with statements made by plaintiff to her counsel was improperly admitted over objection." So in *Thomson v. Reynolds*, 53 Utah 437, 174 P. 164, 166, it is said, "The record thus shows that all of the testimony of appellant respecting the advancement of money to her husband was stricken from the record, and that the statements to the same effect in her complaint in the action which was alleged to be pending was not considered by the court, except to support the allegation in the answer in this case that another action was pending. The complaint was competent for that purpose, but was wholly incompetent for the purpose of proving that appellant had advanced money to her husband. That statement was merely a self-serving declaration, and was, for that reason if for no other, wholly incompetent to prove the fact alleged." In the case of *Blankman v. Vallejo*, 15 Cal. 638, 639, 645, it was said that "An answer is no proof for the defendant, under our statute; but his ad-

mission of a fact stated in the bill, is conclusive evidence against him."

[6, 7] The unproved allegations of the complaint in the escheat action, as appears from the cases cited, possessed no evidential value whatsoever and were immaterial and irrelevant to prove any issuable facts in the instant case. However, it is worthy of note to observe that the appellant bank was not charged with having conspired with respondent to evade the Alien Property Law, but instead was merely charged with having knowledge of the fact that respondent was ineligible to take and hold the land in behalf of the alleged ineligible beneficiaries. The endeavor of the State was to obtain title to the land freed from any right, title or interest therein by the appellant and respondent. If the bank by the manner of its defense, and the proof it could procure and adduce to support it, would have been enabled to procure a finding that respondent was not ineligible to hold the property, its efforts would have redounded not only to its benefit but to that of respondent as well. The same is of course true with respect to the respondent. But the bank was not compelled under the indemnity provisions of the trust deed to rely upon any defense that might be made by the respondent. The judgment in the escheat action found that the charges made by the State were untrue. The respondent now and always has likewise maintained they were untrue and particularly that the charges made against the bank were false. Accordingly, it does not make sense for her to contend that because the bank sought to sustain her position and to repel false charges against itself the bank may not invoke its clear rights against her in accordance with the indemnity provisions of the trust deed. Nevertheless, respondent contends that the case of *Byron Jackson Co. v. Woods*, 41 Cal.App.2d 777, 107 P.2d 639, is an authority for her position. That the case is in no sense controlling or in point may readily be demonstrated. In that case the U. S. Tool Company sold its assets to the Byron Jackson Company and as a part of the consideration of the sale agreed to hold the purchaser

harmless from any claims against it arising prior to the date of sale. Before and up to the date of the sale the U. S. Tool Company had manufactured certain tools which the Hughes Tool Company had contended infringed its patent rights. Not only did the purchaser obtain knowledge of this claim, but the indemnity agreement was executed primarily for the purpose of holding the purchaser harmless from claims of this character. The seller, however, was not under any contract with any of its own customers to supply the tool and hence the purchaser likewise was not under any obligation to supply the customers of its predecessor unless it elected to do so and then only at its own risk. After the sale the Hughes Tool Company sued the U. S. Tool Company, the Byron Jackson Company and certain other companies for damages. After all the named defendants had appeared in the suit, one of the defendants made a cash settlement and as a consequence, the case was dismissed against all of the defendants without any determination as to their respective liabilities. The Byron Jackson Company thereupon sued the indemnitors on the indemnity agreement seeking to recover all the attorney's fees, expenses and costs it had incurred in defending the suit. In interpreting the contract of indemnity the court found that the U. S. Tool Company was liable for its own acts prior to the sale and that the Byron Jackson Company was liable for its acts of infringement subsequent to the sale. Accordingly, the court concluded that the Jackson Company could not recover at all because there was no evidence as to the ratio of liability as between the two companies. In the escheat case upon which the instant case is bottomed the judgment of the court found that there was no basis for a finding in favor of the State as against either the appellant bank or the respondent. Accordingly, the escheat case by the judgment entered therein stands merely as if a blanket charge had been made to the validity of the trust deed. On that basis the appellant bank was entitled to defend its security and receive the costs of its defense under the indemnity provisions of the trust deed.

We pass by a host of cases cited to us by the respondent as being altogether too far afield to require notice or discussion by us.

From what has so far been said by us it is apparent that the material findings of the trial court based, as they are, upon nothing other than the unproved charges in a petition (complaint) by the State are without a scintilla of evidence to support them. Accordingly as the trial court failed to find, as it should have found, that the appellant bank was entitled to judgment, the case is reversed with instructions to the trial court to enter judgment in favor of the appellant together with the costs below and on appeal.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; CARTER, J., dissenting.



103 Cal.App.2d 284

HART et al. v. LANDIS et al.

Civ. 14405.

District Court of Appeal, First District,
Division 2, California.

April 6, 1951.

Mandamus proceeding by Leonard T. Hart, and others, against Philip F. Landis, and others, to compel the Public Utilities Commission to discontinue practice of crediting to those formerly holding limited tenure appointments in municipal railway system, time served by them under such appointments after they received regular Civil Service appointments in determining priority of choice of runs, etc. The Superior Court, in and for the City and County of San Francisco, Frank T. Deasy, J., rendered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Dooling, J., held that in the absence of a controlling charter provision to the contrary the basis of choice of runs, etc., was an administrative problem and there was no abuse of discretion in recognition of actuality of service performed by persons serving under limited tenure appointments prior to their becoming Civil Service employees.

ployees for purpose of determining such priority of choice of runs, etc., under rule adopted by Public Utilities Commission.

Judgment affirmed.

1. Municipal corporations $\S$ 213

In management of municipal railway, Public Utilities Commission necessarily has a wide discretion except where expressly circumscribed by charter.

2. Administrative law and procedure $\S$ 751, 755, 761

Court should let administrative board and officers work out their problems with as little judicial interference as possible, as such boards are vested with a high discretion and abuse must appear very clearly before courts will interfere.

3. Municipal corporations $\S$ 213

In absence of a controlling charter provision to contrary, basis of choice of run, etc., in municipal railway system was an administrative problem and there was no abuse of discretion under rule adopted by Public Utilities Commission recognizing actuality of service performed by persons serving under limited tenure appointments prior to their becoming Civil Service employees for purpose of determining priority in choice of runs, etc. St.1931, pp. 3049, 3050, $\S$ 125; St.1940, Ex.Sess., p. 202, $\S$ 125; St.1943, p. 3132, $\S$ 145.1.

Frank J. Comaich, John F. O'Sullivan, San Francisco, for appellants.

Dion R. Holm, City Atty., A. Dal Thomson, Public Utilities Counsel and Bernard J. Ward, Jr., Deputy City Atty., all of San Francisco, for respondents.

DOOLING, Justice.

During the late war a section was added to the charter of the City and County of San Francisco numbered 145.1 and reading in part as follows: "When in time of war * * * eligibles are not available for appointment from registers established through the regular examination procedure * * * the civil service commission may qualify applicants for wartime appointments to entrance positions through infor-

mal and non-competitive tests. * * * Appointments made under the provisions of this section shall be designated 'limited tenure appointments' and may continue only until registers of eligibles are established through the regular examination procedure.

* * *. Persons serving under limited tenure appointments * * * shall by reason of such service acquire no right or preference to permanent civil service status * * * which is conferred on persons completing probationary appointments made from lists of eligibles established through the regular examination procedures * * *." Stats. 1943, p. 3132.

Pursuant to the authority conferred by this section many persons were given limited tenure appointments as motormen, conductors and bus operators in the San Francisco Municipal Railroad system. Thereafter the San Francisco Civil Service Commission held a series of regular civil service examinations for these positions and those holding limited tenure appointments were superseded in their positions by the eligibles on the registers resulting from these examinations. Many of the eligibles on these registers were persons already holding limited tenure appointments and the practice in such cases was to give each such eligible when his name was reached a regular probationary appointment to the same position which he was then occupying under a limited tenure appointment. This resulted in actual continuity of service, although with a change in status commencing with each such person's appointment from the regular civil service register.

It is the practice established by rule of the San Francisco Public Utilities Commission to give to the men holding positions as conductors, motormen and bus drivers a priority in the choice of carbarns, runs and vacation periods based upon length of service. Where persons holding limited tenure appointments were appointed from regular registers "to succeed themselves" in the same positions the Public Utilities Commission determined to count the period of their service under limited tenure appointments in fixing the total length of their service for the purpose of determining this priority of choice.

Plaintiffs are men holding similar positions in the municipal railway system by regular civil service appointment whose priority of choice of runs etc. is adversely affected by thus crediting to those formerly holding limited tenure appointments the time served by them under such appointments and they sought by writ of mandate to compel the Public Utilities Commission to discontinue this practice. From a judgment denying the writ plaintiffs have appealed.

It is appellants' position that under the charter the priority of choice of runs etc. must be based solely upon the time served as regular civil service employees. They admit that they can point to no provision of the charter which expressly so provides. However they rely on long established practice dating back to the establishment of the municipal railway.

They point also to the amendment of the charter in 1940, sec. 125, which provides: "Conductors and motormen may be assigned to duty as bus operators * * * Such assignment shall be governed by seniority of service * * *." Stats. Extra-Sess. 1940, p. 202.

This recognizes the right to preference in *assignment to duty* as bus operators based on *seniority of service*. It says nothing about choice of runs etc.

Appellants also point to the amendment to section 125 of the charter under which employees of the Market Street Railroad were "blanketed in" with equality of rights when that system was acquired by the City and County (Stats. 1931 pp. 3049-3050) and to the Mayor's proclamation at that time giving Market Street Railway employees equal seniority rights to compensation and runs. See *Mullins v. Henderson*, 75 Cal.App.2d 117, 120-121, 170 P.2d 118.

The difficulty with all of these arguments is that they seek to read into the charter language which cannot be found therein.

Nowhere does the charter contain any provision giving municipal railway employees a choice of barns, runs or vacations based on seniority of service as civil service employees.

[1,2] In the management of the municipal railway the Public Utilities Commission necessarily has a wide discretion except where expressly circumscribed by the charter. The classic statement of the rule applicable to such commissions is found in *Maxwell v. Civil Service Commission*, 169 Cal. 336, 339, 146 P. 869, 871: "Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. * * * Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere."

This quotation echoes through the reports again and again. *Nelson v. Dean*, 27 Cal.2d 873, 881, 168 P.2d 16, 168 A.L.R. 467; *Lindell Co. v. Board of Permit Appeals*, 23 Cal.2d 303, 315, 144 P.2d 4; *Mann v. Tracy*, 185 Cal. 272, 274, 196 P. 484; *Pratt v. Rosenthal*, 181 Cal. 158, 164, 183 P. 542; *Conroy v. Civil Service Commission*, 75 Cal.App.2d 450, 457, 171 P.2d 500; *Hansen v. State Board of Equalization*, 43 Cal.App.2d 176, 179, 110 P.2d 453.

[3] In the absence of a controlling charter provision to the contrary the basis of choice of runs etc. is an administrative problem and we cannot find an abuse of discretion in the recognition of the actuality of service performed by persons serving under limited tenure appointments prior to their becoming civil service employees for the purpose of determining such priority of choice under the rule adopted by the Public Utilities Commission.

Judgment affirmed.

NOURSE, P. J., and SCHOTTKY, Justice pro tem., concur.

103 Cal.App.2d 319

LEVEN v. LEGARRA et al.

Civ. 17851.

District Court of Appeal, Second District,
Division 2, California.

April 9, 1951.

Action by Aaron S. Leven against Phillip Legarra, and others, for purchase price of stock allegedly sold in violation of Corporate Securities Act. The Superior Court of Los Angeles County, Paul Nourse, J., rendered judgment in favor of plaintiff, and defendant Rolland Legarra appealed. The District Court of Appeal, Wilson, J., held that offer made and accepted in California was sale of stock therein, even though check for payment was mailed to defendant's office in Nevada and certificate of stock was sent from Los Angeles to Nevada from which point it was then mailed to plaintiff in Los Angeles.

Judgment affirmed.

Licenses ⇐ 39.5, 39.15

Where defendant who did not have permit required by statute to sell stock in California, made offer in California to sell stock on condition that check be mailed by purchaser to Nevada office and stock certificate was prepared in California, but was sent to Nevada where it was mailed to purchaser in California upon receipt of check, there was sale of stock in California in violation of statute and recovery of purchase price could be had. Gen.Laws, Act 3814 § 2(a) (8).

1. Section 2(a) (8) reads as follows:

"'Sale' or 'sell' shall include every disposition, or attempt to dispose, of a security or interest in a security for value. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. 'Sale' or 'sell' shall also include a contract of sale, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, subscription or an offer to sell, directly or by an agent, or a circular letter, advertisement or otherwise; provided, that a privilege pertaining to a security giving the holder the privilege to convert such security into another security of the same company

George E. Stoddard, Hollywood, for appellant.

Ludwig H. Gerber, Los Angeles, for respondent.

WILSON, Justice.

This is an action for the recovery of \$2,500 paid as the purchase price for stock in the Modern Engineering & Development Co., sold in violation of section 2(a) (8) of the Corporate Securities Act in force at the time of the transaction. (Stats. 1937, ch. 477, p. 1428; 2 Deering's Gen. Laws, pp. 1418, 1420, Act No. 3814.)¹ From a judgment in favor of plaintiff defendant Rolland Legarra appeals.

The corporation did not have a permit from the Division of Corporations to offer its stock for sale in California and the only question raised by this appeal is whether the court erred in finding that the sale of the securities was made in California.

There is no dispute as to the facts. The Modern Engineering & Development Co. was a Nevada corporation maintaining its executive offices in California. The company through its agents, defendants Legarra and Rollins, in Los Angeles, offered to sell to plaintiff 2500 shares of its stock, conditioning its offer upon plaintiff's accepting the same by mailing his check for the purchase price addressed to the corporation at Carson City, Nevada. Plaintiff mailed his check to the company office in Nevada. When the offer was made, when

shall not be deemed a sale of such other security within the meaning of this definition; and provided further, that the issue or transfer of a right pertaining to a security and entitling the holder of such right to subscribe to another security of the same company shall not be deemed a sale of such security within the meaning of this definition; but the sale of such other security upon the exercise of such right shall be subject to the provisions of this act."

The Corporate Securities Act was repealed in 1949 by section 100005 of the Corporations Code. (Stats.1949, ch. 384, pp. 698, 699.) The subject covered in section 2(a) (8) of the former Act is now in section 25009 of the Corporations Code.

it was accepted and at the time of the receipt of the check in Nevada the stock certificate book and the seal of the corporation were at its offices in Los Angeles. The certificate of stock received by plaintiff was signed by Legarra as secretary and the seal of the corporation was placed on the certificate in Los Angeles, after which the certificate was mailed to the company's agent in Carson City, Nevada, and subsequently redeposited in the mail in Carson City in an envelope addressed to plaintiff at Los Angeles, where it was received by him.

There can be no doubt but that the device of having plaintiff mail his check in Los Angeles to the corporation's agent in Nevada and mailing a completed certificate from Los Angeles to Nevada and then remailing it to plaintiff in Los Angeles was adopted in an attempt to evade the laws of the State of California. Indeed, appellant concedes as much but asserts that the sale was not complete until the stock was placed in the mail in Nevada and that it was therefore not a sale within the State of California as contemplated by section 2(a) (8) of the Corporate Securities Act, *supra*.

The cases cited by plaintiff do not support his contention since in each of those cases the actual delivery of the stock was made to the agent of the buyer outside the State of California and acceptance of the corporation's offer to sell was conditioned upon delivery to such agent. In the instant case the offer was made to and was accepted by plaintiff in California, the certificate was issued in this state and was delivered by mail to plaintiff in California.

The facts are similar to those in *Hertz Drivurself Stations v. Ritter*, 9 Cir., 91 F. 2d 539, in which the offer to sell was made and accepted in California and the stock was delivered by plaintiff in California by registered mail. The defendant contended that there was no evidence that the stock was not issued in Nevada. The court stated that the contract was performed

insofar as transferring title to the stock was concerned by the delivery of the certificates by mail to the plaintiff; that where there is nothing in the agreement to the contrary, the intent ordinarily is that a contract for the sale of stock is performed and title to the shares transferred upon delivery of the stock; that the negotiations had been carried on in California, the offer had been made and accepted in California and the stock was delivered in California. The court declared that it was clear that it was the intent of the parties that the place of delivery was in California.

In *B. C. Turf & Country Club v. Daugherty*, 94 Cal.App.2d 320, 329, 210 P.2d 760, 765, relied on by defendant, the court held that the preliminary discussions had in California at the time when, although the articles of incorporation had been filed, the foreign corporation had no permit to engage in business, no permit to sell stock, no assets and no plan of operation, did not amount to solicitation or to the type of preliminary negotiation requiring a permit under California law. The court stated, however, that "there can be no reasonable doubt but that these provisions of the statute require a foreign corporation to secure a permit to solicit a sale of its stock in this state, or to engage in preliminary negotiations looking towards such sale, even though the issuance of the securities and the transfer of their title will, in good faith, be completed in a foreign state. The sections quoted [Secs. 2(a) (3), 2(a) (8) and 3 of the Corporate Securities Act] clearly prohibit a foreign corporation from soliciting in this state a sale of stock of its own issue without first securing a permit, even though in good faith the issuance of the stock and transfer of title are to take place in the foreign state."

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

103 Cal.App.2d 287

INGRAM v. HIGGINS.

Civ. 18229.

District Court of Appeal, Second District,
Division 2, California.

April 6, 1951.

Douglas C. Ingram sued James J. Higgins to recover for personal injuries inflicted in assault upon plaintiff by defendant when plaintiff, a police officer off duty at the time of the encounter, stopped defendant who was driving his automobile upon highway in an erratic manner. The Superior Court, Los Angeles County, Robert L. Brock, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Wilson, J., held that the award was not excessive.

Affirmed.

1. Appeal and error ⇨758(3)

Brief headings such as "Point I" did not fulfill requirements of rule on appeal requiring that headings be descriptive of subject matter covered; and a statement of facts omitting any reference whatever to the record did not comply with the rules on appeal in that regard. Rules on Appeal, rule 15(a).

2. Damages ⇨127

There is no rule governing award of damages for personal injuries except that amount shall not be so large as to indicate abuse of discretion by trial court.

3. Appeal and error ⇨1004(1)

A reviewing court will not interfere with award of damages for personal injuries unless judgment is obviously so disproportionate to injuries received as to justify belief that it was not result of cool and dispassionate judgment of trier of facts.

4. Assault and battery ⇨30

Award of \$2,500 for actual damages resulting from assault with wine bottle and automobile and consisting of severe bruises on hip and left shoulder and sacroiliac injury and displacement of the sacroiliac bone which caused pressure on a nerve, was not excessive where injured plaintiff was forced by his injuries to be absent from

his duties as policeman for thirty days, thereby losing his vacation, and had to be off duty at end of that period to receive shots and orthopedic treatments.

5. Appeal and error ⇨1004(1)

Damages ⇨94

There should be reasonable proportion between amounts awarded for actual and exemplary damages, but discretion is reposed in trier of facts with regard to amount allowed as punitive damages which will not be disturbed on appeal unless sum appears to be excessive.

6. Assault and battery ⇨39, 40

In action by police officer to recover for personal injuries sustained when he was assaulted by driver of automobile which officer stopped, in his off duty hours, because automobile was being operated erratically, evidence showed that assault upon police officer both with wine bottle and with automobile had been deliberate, willful and wanton and there was no evidence that automobile driver had been under influence of intoxicating liquor, and therefore court was justified in rendering judgment for punitive damages, and award of \$1,000 as punitive damages was not excessive even though amount of actual damages awarded was only \$2,500.

7. Appeal and error ⇨1004(1)

In action by police officer to recover for personal injuries sustained in his off duty hours when he stopped assailant who was driving his automobile upon highway in erratic manner, record was devoid of any indication that judgment rendered was result of passion and prejudice of trial judge such as might justify reviewing court in interfering with trial court's judgment.

8. Assault and battery ⇨37

In determining amount that would adequately compensate plaintiff in assault and battery case for his injuries and a fair sum to be allowed as punitive damages, trial court properly considered current economic conditions and value of dollar and its purchasing power.

James M. Gammon, William V. Krowl,
Los Angeles, for appellant.

Francis M. Reiter, Nathan Kline, Los Angeles, for respondent.

WILSON, Justice.

[1] Defendant has appealed from a judgment rendered against him for damages for personal injuries inflicted upon plaintiff.¹

Plaintiff is a police officer of the city of Los Angeles. At an early morning hour defendant and a woman companion were traveling eastward on Riverside Drive in Los Angeles. Plaintiff was traveling in the same direction. He was not on duty or in uniform. Defendant was "weaving" from side to side across the highway in an erratic manner. Plaintiff drove alongside defendant's car, showed his police badge and ordered defendant to stop. Defendant did not stop until plaintiff drew a pistol. Plaintiff ordered defendant to get out of his car and when the latter did so he struck plaintiff with a wine bottle and then jumped back into his automobile and drove it against plaintiff causing serious injuries. Plaintiff pursued defendant and with the aid of a citizen arrested him.

[2-4] Without merit is defendant's contention that the amount of \$2,500 for actual damages is excessive. There is no rule governing the award of damages for personal injuries except that the amount shall not be so large as to indicate an abuse of discretion by the trial court. A reviewing court will not interfere unless the judgment is obviously so disproportionate to the injuries received as to justify the belief that it is not the result of cool and dispassionate discretion of the trier of facts. *Phelps v. Arnold*, 112 Cal.App. 518, 520, 297 P. 31. Plaintiff suffered a severe bruise on his hip and left shoulder, a sacroiliac injury and a displacement of the sacroiliac bone which caused pressure on a nerve. At the time of trial his suffering

had not entirely abated and he testified he must lie on his right hip in order to sleep. Plaintiff was treated at the receiving hospital and did not incur any medical bills. He therefore does not make any claim for special damages. He was forced to be absent from his duties for 30 days, thereby losing his vacation. At the end of that period he went back to work but was unable to continue and had to be off duty again, receiving shots and orthopedic treatments. The judgment for actual damages is not excessive.

[5] The court awarded the sum of \$1,000 as punitive damages and defendant contends that such allowance is unwarranted. The assaults were unprovoked, wilful and malicious. Defendant had been informed that plaintiff was a police officer and upon alighting from his car, without provocation struck defendant on the head with a bottle, knocking him to the ground. As he was attempting to regain a standing position defendant started his car and drove it against plaintiff causing the injuries above related. While defendant was driving erratically on the highway there is no evidence that he was under the influence of intoxicating liquor, hence his effort to avoid the judgment for punitive damages on the ground that he was intoxicated fails. Though there should be a reasonable proportion between the amounts awarded for actual and exemplary damages, discretion is reposed in the trier of facts with regard to the amount allowed as punitive damages which will not be disturbed on appeal unless the sum appears to be excessive. *Prentice v. Zumwalt*, 124 Cal.App. 646, 654, 13 P.2d 379.

[6] Since the evidence shows that the assaults both with the bottle and with the automobile were deliberate, wilful and wanton, the court was justified in rendering a judgment for punitive damages. There is no fixed ratio between actual and ex-

1. Appellant's brief fails in two particulars to conform with Rule 15(a) of Rules on Appeal, in force when brief was filed (22 Cal.2d 12): (1) There are no headings descriptive of the subject matter covered. Headings "Point I" etc., do not fulfill the requirements of the rule and

are of no assistance to the court. (2) The statement of facts does not contain any reference whatever to the record. (In the new rules which became effective January 1, 1951, (36 Cal.2d 15) Rule 15(a) has not been changed.)

emplary damages that may be awarded. The amount allowed is not excessive.

[7] The record is devoid of any indication that the judgment rendered is the result of passion and prejudice of the trial judge. He did not make a single statement during the trial which would give rise to an inference that he was acting other than as a dispassionate judge should act upon the facts shown by the evidence.

[8] In determining the amount that would adequately compensate plaintiff for his injuries and a fair sum to be allowed as punitive damages the court properly considered the current economic conditions, the value of the dollar and its purchasing power. In view of such considerations and of plaintiff's injuries and defendant's conduct the judgment does not appear to be excessive nor to have resulted from passion or prejudice. *Squires v. City of Los Angeles*, 100 Cal.App.2d 708, 714, 224 P.2d 774; *Butler v. Allen*, 73 Cal. App.2d 866, 870, 167 P.2d 488; *Moran v. Zenith Oil Co.*, 92 Cal.App.2d 236, 244, 206 P.2d 679; *Nason v. Leth-Nissen*, 82 Cal. App.2d 70, 73, 185 P.2d 880; *Kircher v. Atchison, T. & S. F. Ry. Co.*, 32 Cal.2d 176, 187, 195 P.2d 427.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



REITANO v. YANKWICH et al.

Civ. 18441.

District Court of Appeal, Second District,
Division 2, California.

April 11, 1951.

Hearing Granted June 7, 1951.*

John J. Reitano brought action against Leon R. Yankwich and another to recover damages for alleged libel. The trial court rendered a judgment for the defendants, and the plaintiff appealed, and the defendants moved to dismiss the appeal. The District

Court of Appeal, Moore, P. J., held that plaintiff's right to appeal was not lost because plaintiff paid costs assessed against him and because there was a satisfaction of the judgment for costs filed.

Motion to dismiss appeal denied.

1. Appeal and error ⇐162(1)

Voluntary payment of a judgment does not deprive judgment debtor of right to appeal, unless payment has been made by way of compromise or with agreement not to take or prosecute an appeal.

2. Appeal and error ⇐163

Fact that plaintiff who was denied recovery in libel action, and who was assessed for costs, paid the costs, and fact that satisfaction of the judgment was filed, did not require dismissal of plaintiff's appeal.

Aaron Sapiro and Edwin M. Rosendahl, Los Angeles, for plaintiff-appellant.

David Mellinkoff, Beverly Hills, for petitioner Yankwich.

MOORE, Presiding Justice.

Plaintiff having sued the defendants for libel, he was denied recovery and was assessed for costs in the sum of \$112.50. That sum was paid and a satisfaction of the judgment was filed.

[1, 2] Respondent Yankwich now seeks a dismissal of the appeal on the ground that his judgment has been satisfied and cites in support of such contention *Hurt v. Bauer*, 37 Cal.App. 109, 173 P. 601, and *Brochier v. Brochier*, 17 Cal.2d 822, 825, 112 P.2d 602. Neither authority is persuasive. The *Brochier* decision involved a situation that was not even remotely similar to the case at bar. A dismissal of an appeal was not involved. In *Hurt v. Bauer* an appeal was dismissed because "by the payment of the judgment the questions presented on the appeal have become moot." No facts are given in the opinion, no authority is cited and the case has not been followed. It is the established rule that the voluntary payment of a judgment does not deprive the judgment debtor of his right to appeal unless the payment has been made by way of com-

* Subsequent opinion 237 P.2d 6.

promise or with an agreement not to take or prosecute an appeal. *Hartke v. Abbott*, 106 Cal.App. 388, 391, 289 P. 206.

The motion to dismiss the appeal is denied.

McCOMB and WILSON, JJ., concur.



103 Cal.App.2d 373

SIFFERT v. McDOWELL et al.

Civ. 17834.

District Court of Appeal, Second District,
Division 1, California.

April 10, 1951.

Rehearing Denied April 26, 1951.

Hearing Denied June 7, 1951.

Action by Otto K. Siffert against Harry F. McDowell, and another, for malicious prosecution. The Superior Court, Los Angeles County, Charles E. Haas, J., rendered a judgment for the plaintiffs, and the defendants appealed. The District Court of Appeal, Doran, J., held that the evidence supported the verdict.

Judgment affirmed.

1. Malicious prosecution ⚡72(1)

In action for malicious prosecution arising out of civil arrest of plaintiff, instruction given on elements of malicious prosecution embraced proper definitions and explanations of elements which were to be applied by jury to facts in evidence.

2. Trial ⚡296(2)

In action for malicious prosecution arising out of civil arrest of plaintiff, court's instructions on probable cause, which omitted certain phrases and words contained in defendant's requested instructions, disclosed no reversible error when considered in connection with all instructions given to jury.

3. Malicious prosecution ⚡71(2)

When there is no dispute as to existence of facts relied upon to show probable cause, trial court must determine as

matter of law whether inference of existence of probable cause is warranted by undisputed facts, but where evidence bearing on issue of probable cause is in conflict in essential particulars, jury must determine whether facts are shown which will warrant or overcome inference of probable cause.

4. Malicious prosecution ⚡71(1)

In action for malicious prosecution arising out of civil arrest of plaintiff, whether elements of malicious prosecution had been established was a question for the jury.

5. Malicious prosecution ⚡10

Fact that statutes relating to civil arrest were closely followed was no defense to arrested party's subsequent action for malicious prosecution brought after judgment in his favor in action in which arrest was made. Code Civ.Proc. §§ 478-504.

6. Malicious prosecution ⚡71(2)

In action for malicious prosecution arising out of civil arrest of plaintiff, whether defendants made full disclosure to attorney in seeking advice was a question for the jury.

7. Malicious prosecution ⚡21(2), 59(10)

In malicious prosecution action, evidence of fact that defendant brought charge on advice of counsel is admissible on question of probable cause, but if advice of counsel is to be a defense, it must affirmatively appear that defendant made full, fair and complete disclosure of all facts and acted in good faith on advice.

8. Malicious prosecution ⚡21(2)

Advice of counsel must be sought in good faith and not as mere cloak to protect one against action for malicious prosecution or to refute theory of malice.

9. Malicious prosecution ⚡42

One who procures third person to institute malicious prosecution is liable in damages to injured party to same extent as if he had instituted proceeding himself, and it is enough if he was instrumental in setting law in motion and caused prosecution to proceed.

10. Malicious prosecution §71(1)

In action for malicious prosecution arising out of civil arrest of plaintiff, jury could reasonably find that both husband and wife were liable notwithstanding wife's claim that she did not personally sign papers leading to the arrest, and was not a party plaintiff to civil action in which arrest occurred. Code Civ.Proc. §§ 478-504.

11. Malicious prosecution §38

Under rule that actions for malicious prosecution are for reasons of public policy "not favored", quoted phrase merely means that public policy is in favor of apprehension and punishment of criminals and limits the person complaining of criminal charges by placing upon him burden of proving basic elements of the tort.

See publication Words and Phrases, for other judicial constructions and definitions of "Not Favored".

12. Malicious prosecution §64(1)

In action for malicious prosecution arising out of civil arrest of plaintiff, evidence supported verdict for plaintiff. Code Civ.Proc. §§ 478-504.

M. E. Lewis, Jr., Robert E. Krause, and Allen R. Steele, Long Beach, Harry E. Sackett, Los Angeles, for appellants.

John A. Ellis, Los Angeles, Henry J. Sullivan, Burbank, for respondent.

DORAN, Justice.

This is an action for malicious prosecution against appellants for damages sustained by the respondent Siffert on or about February 18, 1948, when Siffert was arrested and jailed for nine days under the provisions of Sections 478-504 of the Code of Civil Procedure relating to the Provisional Remedy of Arrest and Bail. Respondent's civil arrest was incident to a claim and delivery action instituted by appellant Harry F. McDowell to regain possession of a Plymouth automobile in respondent's possession. A jury returned a verdict in favor of respondent Siffert in the amount of \$25,000 which amount was reduced by the trial court to \$5,500. The present appeal is from that judgment.

The record discloses evidence to the effect that the Plymouth automobile here involved, originally belonged to appellant Lorraine Busch, now the wife of appellant Harry F. McDowell, who transferred title thereto to Lucy Hillyer, the mother of Lorraine Busch McDowell. On or about July 24, 1947 respondent Siffert became associated as a real estate salesman with Lorraine Busch, and claims to have purchased the Plymouth at that time from Mrs. Hillyer for use in the real estate business. Appellants claim that the automobile was loaned to the respondent. According to appellants' brief, "Lucy Hillyer, orally, made a tentative sale * * * to respondent", and respondent "did not pay as much as a single dollar for the Plymouth automobile".

In reference to payment for the Plymouth, respondent testified: "I had my Terminal Leave Bond from the Army in Mrs. Busch's office, and I consented to turn it over to her and pay her, either through what I made at the office or by giving Betty (Lorraine Busch's daughter) lessons, and any property that I sold until the car was paid for". The terminal leave bond was in the amount of \$225; a commission of \$415 earned by respondent was said to have been applied on the purchase price; the balance of "\$120.00 or so", was purportedly paid by giving skating and golf lessons to Mrs. Busch's daughter.

On August 26, 1947, Lucy B. Hillyer left for a trip to Canada and according to respondent, Mrs. Hillyer left the pink slip for the Plymouth with the daughter Lorraine Busch (McDowell) for delivery to respondent Siffert. However, in place of delivering the pink slip to respondent, Lorraine Busch, about October 9, 1947, turned it over to Harry F. McDowell on an alleged sale to McDowell for \$860. At that time Lorraine Busch was not married to Mr. McDowell. It is further claimed that Lorraine Busch had received the Plymouth back from Lucy B. Hillyer on a trade for a Chrysler car.

Previous to the transfer of the Plymouth to McDowell, the car had been "borrowed" from the respondent "for a couple of days". Upon Siffert's demand for its return Lor-

raine Busch stated: "I can't give you that car. * * * It isn't yours. It is in the estate. Mother didn't have any right to sell it to you". Thereafter Lucy B. Hillyer returned from Canada and said, according to respondent, "Why, Lorraine * * * she can't do that to you". Mrs. Hillyer took respondent to a lawyer, a claim and delivery action was instituted in the Santa Monica Municipal Court, the Plymouth was found on a street in Long Beach, and taken home by Siffert. Siffert's claim and delivery action was thereafter dismissed.

Following Siffert's recovery of the Plymouth, Harry F. McDowell instituted a claim and delivery action in the Los Angeles Municipal Court resulting in a trial before Judge Ida May Adams who found in favor of respondent Siffert. On appeal to the Appellate Division there was a reversal of this decision, and a retrial before Municipal Judge Fay and a jury again resulted in a verdict and judgment for Siffert. No appeal was taken from the latter judgment.

Incident to the claim and delivery action against Siffert, civil arrest papers were sued out; respondent was incarcerated in the County Jail for nine days, fingerprinted, required to wear jail clothes, and taken, handcuffed, to the claim and delivery trial in Municipal Court. Following judgment in respondent's favor, the present action for malicious prosecution was instituted which resulted in a judgment for respondent.

Appellants allege reversible error in reference to the trial court's instructions as to probable cause. The jury was instructed that the three elements of malicious prosecution, namely malice, want of probable cause, and termination of the proceeding in the plaintiff's favor, "must be established by a preponderance of the evidence before the plaintiff will be entitled to recover". Appellants' requested instruction defining probable cause was given, but complaint is made of the trial court's modification thereof in striking out the words, "and that is a full defense". Appellants also object to the giving of an instruction in reference to the advice of an attorney, probable cause and malice, which states that

"It raises a question of fact for the jury". In another instruction requested by appellants, the trial court inserted the words "then you may find" in place of the bare statement that "there was not such malice", etc. Appellants' argument in reference to these instructions is that probable cause is not a question of fact for the jury, but one of law for the court.

[1,2] When considered in connection with all of the instructions given to the jury rather than in reference to isolated words and phrases used in the particular instructions singled out by appellants, no reversible error is apparent. With only minor changes appellants' requested instructions on probable cause, etc. were given by the trial court. These instructions embraced proper definitions and explanations of the elements of malicious prosecution which were to be applied by the jury to the facts in evidence.

[3] As set forth in *Singleton v. Singleton*, 68 Cal.App.2d 681, 691, 157 P.2d 886, 891, it is the rule that "When there is no dispute as to the existence of the facts relied upon to show probable cause, it is for the trial court to determine as a matter of law whether an inference of the existence of probable cause is warranted by such undisputed facts, but where, as in the instant case, the evidence bearing upon the issue of probable cause is in conflict in essential particulars, it is the province of the jury * * * to determine whether or not such facts are shown as will warrant or overcome an inference of probable cause. *Franzen v. Sherk*, 192 Cal. 572, 578, 221 P. 932."

[4] The record herein discloses a history of successive events, episodes, statements and circumstances, some of which are flatly contradicted by the opposing parties or by pertinent circumstantial evidence. Moreover, many of the surrounding circumstances are reasonably susceptible of different interpretations. There was, for example, a conversation in which appellants are said to have "stated that they didn't have to sign the complaint, either of them; that they had arranged it so the Marshall had caused his (Siffert's) arrest;

that they were very much relieved". Were appellants, then, "relieved" because of a supposed escape from liability for bringing about respondent's arrest in connection with a civil action? There was also testimony to the effect that appellants stated "they were going to get Mr. Siffert, or words to that effect", and that appellant Harry F. McDowell said: "I am going to get that little S. O. B. out of there, and I am going to get that car too". In such a situation it was certainly a jury function to determine whether the elements of malicious prosecution had been established.

[5] Appellants' argument that the complaint states no cause of action because the code sections relating to civil arrest were closely followed, and that respondent's arrest was therefore legal "even though unjust", is without merit. The action herein was one for malicious prosecution rather than for false imprisonment. Doubtless, appellants followed the letter of the law in securing respondent's arrest; neither the validity of that law nor the jurisdiction of the Municipal Court is here questioned.

[6] The fact that appellants were advised by an attorney is strongly urged as a defense to the action. Naturally, appellants insist that a full disclosure was made to the attorney in seeking that advice. As hereinbefore indicated, however, there were various matters affecting this phase of the case, and statements by appellants which might be taken as throwing light upon the question of good faith. Under such circumstances, the submission of this issue to the jury cannot be deemed improper.

[7,8] As conceded by both parties, the law on this matter is unquestioned, and is correctly stated in *Starkweather v. Eddy*, 210 Cal. 483, 487, 292 P. 467, 468, as follows: "It is also well settled that evidence of the fact that the defendant brought the charge on the advice of counsel * * * is admissible on the question of probable cause, but, in order to constitute a defense it must affirmatively appear that the defendant made a full, fair, and complete disclosure of all the facts, and acted in good faith on the advice". And, as said

in *Walker v. Jensen*, 95 Cal.App.2d 269, 274, 212 P.2d 569, 572, "It is, however, true that the advice of counsel must be sought *in good faith* and not as a mere cloak to protect one against a suit for malicious prosecution or to refute the theory of malice".

From what has already been said, it follows that appellants' contentions that the trial court erred in failing to grant motions for a directed verdict and for a judgment notwithstanding the verdict which was returned in favor of respondent, are untenable. The cases cited in support of appellants' position, although doubtless correct under the facts there existing, cannot be deemed authority for a reversal in the present case.

[9,10] As noted in respondent's brief, whether Mrs. McDowell did or did not personally sign papers leading to respondent's arrest, or whether such appellant was or was not a party plaintiff to the civil action of claim and delivery, is not decisive as to liability for false imprisonment. In *Blancett v. Burr*, 100 Cal.App. 61, 62, 279 P. 668, and elsewhere, the rule is laid down that one may be civilly liable who, without personally making the affidavit or complaint, has falsely, maliciously and without probable cause, procured its issuance. "One who procures a third person to institute a malicious prosecution is liable in damages to the party injured to the same extent as if he had instituted the proceeding himself. * * * It is enough if he was instrumental in setting the law in motion and caused the prosecution to proceed". Under the evidence presented the jury may reasonably have found, and did so find that appellants, husband and wife were both liable.

[11] Nor is there any merit in appellants' argument that "Actions for malicious prosecution are, for reasons of public policy, 'not favored'." As noted by respondent, "This cliché never did mean as much as it seems to say". Properly applied, as the reviewing court points out in *Jaffe v. Stone*, 18 Cal.2d 146, 159, 114 P.2d 335, 342, 135 A.L.R. 775, the term merely "means that

public policy is in favor of the apprehension and punishment of criminals, and limits the person complaining of criminal charges by placing upon him the burden of proving the basic elements of the tort".

[12] Under the record here presented, it cannot be said that the verdict and judgment are not supported by substantial evidence and reasonable inferences arising from the existing circumstances. The verdict returned by the jury was reduced from \$25,000 to \$5,500; no reversible error appears to have been committed, and no merit is presented in any of appellant's numerous contentions.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



SFLINSKY v. OLSEN.

Civ. 18193.

District Court of Appeal, Second District,
Division 2, California.

April 9, 1951.

Rehearing Denied April 26, 1951.

Hearing Granted June 4, 1951.*

Max Selinsky sued A. W. Olsen for personal injuries sustained in an automobile collision. From an order of the Superior Court of Los Angeles County, Otto J. Emme, J., granting plaintiff's motion for a new trial after a jury's verdict for defendant, defendant appealed. The District Court of Appeal, Wilson, J., held that the last clear chance doctrine was inapplicable.

Order reversed.

1. Negligence ⇨83.4

The absence of any one of necessary elements of last clear chance doctrine renders it inapplicable, and case must be governed by ordinary rules of negligence and contributory negligence.

2. Negligence ⇨83.4

The last clear chance rule presupposes plaintiff's exercise of ordinary care for his

own protection after becoming aware of his danger.

3. Negligence ⇨83.5

The last clear chance doctrine is not pertinent where injuries ensue to one of two mutually careless parties, both of whom are contemporaneously and actively at fault at very moment of injuries.

4. Automobiles ⇨227(5)

The last clear chance doctrine is inapplicable where negligence of party injured in automobile collision was contemporaneous, concurrent, continuing and contributory up to very moment of impact.

5. Automobiles ⇨227(1)

In action for injuries to driver of automobile, struck by defendant's automobile when plaintiff suddenly turned his automobile to left, directly in front of defendant's approaching automobile, from right hand curb, at which plaintiff's automobile had been parked, last clear chance doctrine was inapplicable, as defendant did not know that plaintiff would continue to move into traffic lane or was unaware of his danger.

6. Negligence ⇨83.7

The last clear chance doctrine is applicable against defendant in personal injury suit only if he actually perceived plaintiff's predicament and danger in time to avoid accident by exercising ordinary care, as defendant cannot be held liable under such doctrine on theory that he would have discovered plaintiff's peril but for remissness on defendant's part.

7. Automobiles ⇨173(6)

One driving automobile, traveling with other automobiles in same direction in both traffic lanes of boulevard, had right to assume that driver of automobile, parked at right hand curb in place of safety, would exercise his faculties of observation and caution and would not change his position to one of peril and recklessly expose himself to danger of collision with passing automobiles by turning left into traffic lane when it was obvious that with slightest care, he could have avoided collision with other driver's automobile by waiting until moving traffic passed.

* Subsequent opinion 237 P.2d 645.

8. Appeal and error ⇐989

The District Court of Appeal cannot select fragmentary portions of evidence and disregard remainder in order to provide foundation on which to rest last clear chance rule, when, considering record as whole, such rule is inapplicable.

Crider, Runkle & Tilson, Los Angeles, for appellants.

Edward Mosk, Hollywood, for respondent.

WILSON, Justice.

This is an action for personal injuries. After a trial by jury a verdict was rendered in favor of defendant. The court granted plaintiff's motion for a new trial on the sole ground of errors of law. From this order defendant has appealed.

[1-4] The only issue is whether the court erred in refusing to instruct the jury on the doctrine of last clear chance. The five necessary elements of that doctrine are fully stated and discussed in *Korchak v. Pacific Electric Railway Co.*, 9 Cal.App. 2d 89, 92, 48 P.2d 752; *Girdner v. Union Oil Co.*, 216 Cal. 197, 202, 13 P.2d 915, and *Darling v. Pacific Electric Railway Co.*, 197 Cal. 702, 707, 242 P. 703. The absence of any one of the elements renders the doctrine inapplicable and the case must be governed by the ordinary rules of negligence and contributory negligence. *Korchak v. Pacific Electric Ry. Co.*, supra, 9 Cal.App.2d at page 93, 48 P.2d 752. The last clear chance rule presupposes that if plaintiff becomes aware of his danger he must thereafter exercise ordinary care for his own protection. *Palmer v. Tschudy*, 191 Cal. 696, 218 P. 36; *McHugh v. Market Street Ry. Co.*, 29 Cal.App.2d 737, 743, 85 P.2d 467. The doctrine is not pertinent to a situation where, by their mutual carelessness, injuries ensue to one of two parties, both of whom are contemporaneously and actively at fault at the very moment of the injury. *Young v. Southern Pacific Co.*, 189 Cal. 746, 755, 210 P. 259. If the negligence of the injured party was contemporaneous, concurrent, continuing and con-

tributory up to the very moment of the impact the doctrine is not applicable. *Center v. Yellow Cab Co.*, 216 Cal. 205, 207, 13 P.2d 918; *Girdner v. Union Oil Co.*, supra, 216 Cal. at page 203, 13 P.2d 915; *Rasmussen v. Fresno Traction Co.*, 138 Cal.App. 540, 550, 32 P.2d 1091.

[5] Plaintiff's car was parked, headed north, on the easterly side of Crenshaw Boulevard a short distance north of 8th Street. Plaintiff testified he got into his car, looked into his rear-view mirror and saw cars standing at 8th Street. He moved out about two feet and looked back to see whether the cars were still standing and then moved farther, looked again, and his motor stalled. He also testified that during the time he was moving away from the curb he was watching a car that was parked in front of his car, in order to be certain he would not collide with it in turning out from the curb; that he was actually watching the latter car at the time the accident happened.

In Crenshaw Boulevard there are two lanes for north-bound moving traffic and one lane for parking. Defendant was traveling northerly in the right-hand lane next to the line of parked cars. He testified he was driving at between 20 and 25 miles an hour immediately before the accident; a car was traveling ahead of him in the same lane and another car in the lane to his left. He stated that when the front end of his car was about even with plaintiff's car the latter suddenly turned from the curb directly in front of defendant's car; he applied his brakes and tried to swerve to the left but plaintiff's car came out so quickly there was no chance to avoid the collision; he did not see plaintiff give any kind of hand-signal. Defendant stated that plaintiff's car was in motion at all times during the fraction of a second between the time he saw it and the impact. Defendant's car stopped within a few feet.

Obviously the doctrine of last clear chance is not applicable in this case. If, as plaintiff testified, his car stalled and he was unable to move, defendant did not know that fact and therefore was not aware of and had no means of realizing plaintiff's

dangerous situation or his inability to escape. If plaintiff looked back he did not see what was to be seen since defendant's car was approaching. If he did not look back he was negligent in turning from his place of safety at the curb into a lane where traffic was moving. When plaintiff's car turned into the traffic lane defendant did not have a clear chance of avoiding the accident by the exercise of ordinary care since he did not know that plaintiff would continue to move into the traffic lane.

[6] It is the rule in this state that the last clear chance doctrine is applicable as to a defendant only when he actually perceives the predicament and danger of the plaintiff in time to avoid the accident by the exercise of ordinary care. A person cannot be held liable upon the theory that he would have discovered the peril but for remissness on his part. *New York Lubricating Oil Co. v. United Railroads*, 191 Cal. 96, 101, 215 P. 72, and cases cited. Even if plaintiff was in a position of danger from which he could not extricate himself because he was unaware of his danger, defendant did not know plaintiff was so situated because he had no means of knowing that plaintiff was unaware of his danger. *Johnson v. Southwestern Engineering Co.*, 41 Cal.App.2d 623, 626, 107 P.2d 417; *Bogardus v. Snyder*, 17 Cal.App.2d 411, 413, 62 P.2d 153.

[7] Since defendant's car and other cars were traveling northerly in both lanes of traffic and since plaintiff's car was parked at the curb in a place of safety, defendant had the right to assume that plaintiff would exercise his faculties of observation and caution and would not change his position from one of safety to one of peril and recklessly expose himself to the danger of a collision with passing automobiles when it is obvious that with the slightest care he could have avoided the collision by waiting until moving traffic had passed. *Korchak v. Pacific Electric Ry. Co.*, supra, 9 Cal.App.2d at page 93, 48 P.2d at page 754; *Haber v. Pacific Electric Ry. Co.*, 78 Cal.App. 617, 631, 248 P. 741.

[8] We cannot select fragmentary portions of the evidence and disregard the remainder in order to provide a foundation upon which to rest the rule of last clear chance, when considering the record as a whole such rule is inapplicable. Since all the necessary elements of the doctrine do not appear from the evidence it would have been reversible error to give an instruction thereon and the court therefore erred in granting the motion for a new trial on the sole ground that such instruction had not been given. *Wallis v. Southern Pac. Co.*, 184 Cal. 662, 672, 195 P. 408, 15 A.L.R. 117; *Johnson v. Southwestern Engineering Co.*, 41 Cal.App.2d 623, 626, 107 P.2d 417.

Order granting new trial reversed.

MOORE, P. J., and McCOMB, J., concur.



103 Cal.App.2d 397

CILIBRASI v. REITER et al.

Civ. 18326.

District Court of Appeal, Second District,
Division 2, California.

April 11, 1951.

Anita Cilibrasi brought action against M. S. Reiter, and others, for injuries received while using defendant landlords' rest room while an employee of a tenant. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., entered judgment adverse to plaintiff and she appealed. The District Court of Appeal, Moore, P. J., held that where plaintiff had executed a full unrescinded release of the defendants from all liability, she could not recover.

Judgment affirmed.

I. Release ☞24(2)

In the absence of the rescission of a contract of settlement of a claim for personal injuries accomplished according to law, and of a restoration of the consideration paid for the release of the claim, the

release of tort-feasor is a valid contract and prevents recovery on the disputed claim.

2. Compromise and settlement ⇨15(1)

A compromise of a claim proves no more than that a dispute existed.

3. Compromise and settlement ⇨19(1)

Where employee of tenant was injured on landlords' premises, and employee settled claim against landlords and executed a full release, the claim was completely extinguished by the contract of settlement, in absence of fraud or other overreaching by landlords as a ground for rescission.

4. Compromise and settlement ⇨2

Settlement of legal controversies is favored.

5. Statutes ⇨181(2)

When a statute is susceptible of two constructions, a court must give it such interpretation as will avoid confusion and absurdity and must adopt that which is consistent with sound reason and good morals.

6. Workmen's compensation ⇨2203

Where employee of tenant was injured on landlords' premises, and employee settled claim against landlords and executed total release, Labor Code provision making a release void when executed without written consent of both employer and employee, would not, when rationally interpreted, make release executed by employee to landlords void without consent of employer. Labor Code, § 3859.

7. Workmen's compensation ⇨186

Workmen's Compensation Act and Labor Code do not govern liability of one who is not the employer to an employee of another. Labor Code, §§ 3201 et seq., 3859; Const. art. 20, § 21.

8. Constitutional law ⇨89(1)

The only basis for the state's limitation upon a person's right of contract with

respect to his property is the promotion of the public welfare.

9. Constitutional law ⇨48

Where employee of tenant was injured on landlords' premises, and employee settled claim against landlords and executed total release, and then brought action against landlords contending that release was void under Labor Code provision because executed without written consent of employer, employee's interpretation of provision would violate equal protection of law and guarantee of uniformity of laws, and therefore, employee's interpretation would not be adopted. Labor Code, §§ 3201 et seq., 3859; Const. art. 1, §§ 1, 11, 13, 21; art. 4, § 25; art. 20, § 21; U.S.C.A. Const.Amend. 14.

Theodore A. Epstein, Burbank, for appellant.

Moss, Lyon & Dunn and Gerold C. Dunn, all of Los Angeles, Henry F. Walker, Los Angeles, of counsel, for respondents.

MOORE, Presiding Justice.

Appellant while she was an employee of a tenant of respondents sued the latter for injuries received while using the rest room of the landlords. The answer included a special plea that for \$1000 paid to the plaintiff she had compromised her claim and executed a full release of the defendants from all liability. Such plea having been established to the satisfaction of the trial court, Code Civ.Proc. sec. 597, judgment was entered against appellant, denying recovery.

On this appeal it is contended that by virtue of section 3859¹ of the Labor Code such release is void by reason of the fact that it was executed without the written consent of appellant's employer; that solely by virtue of the subrogation provisions of the Labor Code an employee is limited to one recovery and the employer may

ployee filed in court in writing together with the approval of the court, is sufficient in any action or proceeding where such approval is required by law."

1. Section 3859, Labor Code: "No release or settlement of any claim under this chapter is valid without the written consent of both employer and employee. The consent of both the employer and em-

recover his damages where the employee was injured by the negligence of the third party. After she had settled her claim against respondents, appellant filed against her employer before the Industrial Accident Commission and an award was made against him and his insurance carrier. The employer received credit for the \$1000 paid by respondents.

May plaintiff now sue respondents on the identical claim for which they paid her \$1000 and took her total release? She can not do so for two good reasons, namely, (1) she did not rescind her contract of release and (2) the statute which she asserts to be determinative of the nullity of the release is violative of constitutional provisions if interpreted as urged by appellant.

[1-3] It is a familiar principle of adjective law that in the absence of the rescission of a contract of settlement of a claim for personal injuries accomplished according to law, and of a restoration of the consideration paid for the release of the claim the release of the tortfeasor is a valid contract and prevents recovery on the disputed claim. *Garcia v. California Truck Co.*, 183 Cal. 767, 769, 192 P. 708; *State Compensation Insurance Fund v. Thackery*, 132 Cal.App. 10, 14, 22 P.2d 250. Compromises of claims are often made on the basis of buying peace and prove no more than that a dispute existed. *Rich v. Edison Electric Company*, 18 Cal.App. 354, 358, 123 P. 230; 15 C.J.S., *Compromise and Settlement*, § 22, page 737. But there is no principle known to the law whereby a claimant who has been dealt with fairly may ignore her solemn covenants once made with her antagonists and recover again for the same injuries. Wherever such second recovery has been allowed it was upset on appeal. Appellant's claim was extinguished by her contract of settlement as completely as if she had accepted the money in payment of a judgment for her injuries. To allow her recovery in this action would be contrary to both law and good morals. It would place a premium upon the dishonest practice of the employee who effects a settlement of his claim against a party other

than his employer and then obtains an award from the Industrial Accident Commission, to be followed by a court action against the same third party on the identical account. *San Bernardino County v. Industrial Accident Commission*, 217 Cal. 618, 626, 20 P.2d 673.

[4-6] The law favors settlement of legal controversies. *Armstrong v. Sacramento Valley R. Co.*, 179 Cal. 648, 650, 178 P. 516. If appellant was dissatisfied with her contract of settlement, and if she had been the victim of fraud or other overreaching by respondents, the courts were open for the enforcement of a rescission and to obtain such recovery as the law would warrant. But it was not void by virtue of section 3859, Labor Code. To hold that the language of that statute means that such a settlement of a claim as was made by appellant is void would be to construe the statute contrary to the legislative intent. When a statute is susceptible of two constructions, it is the duty of a court to give it such interpretation as will avoid confusion and absurdity and to adopt that which is consistent with sound reason and good morals. *State Compensation Insurance Fund v. Thackery*, supra. By giving a rational interpretation to the section as a part of a far-reaching enactment designed not to deprive citizens of traditional rights vouchsafed by the federal and state constitutions but to enlarge the rights of industrial workers, the statute cannot be so interpreted as to render void a release contract executed by a workman in favor of the asserted tortfeasor.

The Section is Void as Construed by Appellant.

[7] The statutes relating to workmens' compensation derive their validity from section 21, Article XX of the constitution. That section directs the legislature to enact legislation which would create the employer's liability to make "adequate provisions for the comfort, health and safety and general welfare of any and all workmen and those dependent upon them for support to the extent of relieving from the consequences of any injury or death

incurred or sustained by workmen in the course of their employment," etc., regardless of the cause of the death or injury. Nothing in section 21 or in the act adopted pursuant thereto was intended to place restrictions upon an employed workman's enforcement of his claims against another who is not his employer. Section 21 was essential to the validity of the contemplated act. Without that section the Employer's Liability Act would have been invalidated by the doctrine of freedom of contract which is ingrained in all organic laws. Such act was adopted as the expression of this state's policy for preserving the manpower of the toiling masses and to minimize the losses resulting to them in industry. Insofar as any section of the Labor Code attempts to coerce an industrial employee or his dependent to abstain from making contracts with others who are not his employers, it transcends the authority conferred by section 21 and is therefore void. By no rational interpretation can it be said that the liability of *one who is not the employer* to an employee of another is governed by the statutes enacted pursuant to section 21. Commercial Casualty Insurance Company v. Industrial Accident Commission, 211 Cal. 210, 217, 295 P. 11; Yosemite Lumber Company v. Industrial Accident Commission, 187 Cal. 774, 783, 204 P. 226, 20 A.L.R. 994; Pacific Gas & Electric Company v. Industrial Accident Commission, 180 Cal. 497, 503, 181 P. 788; Flickenger v. Industrial Accident Commission, 181 Cal. 425, 433, 184 P. 851, 19 A.L.R. 1150. Therefore, appellant's proposal that a contract between an industrial employee and a stranger to the employer is not a valid obligation finds no support in either the Workmen's Compensation Act or in the Labor Code, section 3201 et seq.

[8] Merely because the *laissez faire* policies prevailing in the industrial world prior to the twentieth century were eliminated by the cited constitutional provision and the statutes, it must be borne in mind that claims of a workman against those who are not his employers are protected by the same constitutional guaranties that have always given security to the con-

tracts of other classes of citizens. Federal Constitution, 14th Amendment; California Constitution, Art. I, secs. 1 and 13; In re Smith, 193 Cal. 337, 339, 223 P. 971. The only basis for the state's limitation upon a person's right of contract with respect to his property is the promotion of the public welfare. 11 Am.Jur. 1165. To extend such restriction so as to hinder a toiler who in the course of his employment is injured by a stranger to his employer from settling his claim against the tortfeasor would be to deprive such workman of his traditional constitutional rights, while his companion who may never have been an employee would be wholly free to release the tortfeasor. Thus, to interpret the Workmen's Compensation Act as contended by appellant would violate the equal protection clause of the 14th Amendment and would run counter to sections 11 and 21 of Article I, and section 25 of Article IV of the California Constitution which guarantee uniformity of all laws and abhor the granting of special privileges to a favored class. Also, such interpretation would violate the doctrine enshrined in numerous federal decisions which condemn discriminatory statutes, *Torao Takahashi v. Fish and Game Commission*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478; *Oyama v. State of California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249, and uphold the 14th Amendment as guaranteeing "equal protection of the laws" to all classes of citizens.

[9] In *Johnson v. Goodyear Mining Company*, 127 Cal. 4, 59 P. 304, 47 L.R.A. 338, a statute undertook to give a lien to employees of a foreign corporation doing business in this state on all its properties without requiring an affidavit or bond or a description of the property to be levied upon, but granted such privilege to no other class of laborers who had to enforce their judgments by execution. Such statute was held void in that it denied equal protection of the laws. In *People v. Yosemite Lumber Company*, 191 Cal. 267, 216 P. 39, a tax measure imposing tax for revenue was held void for the reason that it did not lay its burdens uniformly upon all those who came within

a proper classification of those to be subjected to the burden of the tax. Inasmuch as appellant's interpretation of section 3859, Labor Code, attempts to deprive a workman employed by another than the tortfeasor of the privilege of settling his controversy arising out of the injury caused to the employee in the course of his employment and does not place such limitation upon those who are not employed but suffer the same injury from the same cause, the section would be void as violative of the cited provisions of the federal and state constitutions.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.



103 Cal.App.2d 273

DELUCA v. FISH & GAME COMMISSION et al.

Civ. 17894.

District Court of Appeal, Second District,
Division 1, California.

April 5, 1951.

Action for declaratory judgment by Jack Deluca and another, co-partners doing business as Santa Monica Seafood Co., against Fish and Game Commission of the State of California and others. The Superior Court of Los Angeles County, William B. McKesson, J., rendered judgment in favor of the defendants, and the plaintiffs appealed. The District Court of Appeal, Drapeau, J., held that under Fish and Game Code, §§ 919, 1065, sardines taken with bait nets in District 19A could not lawfully be used in reduction plants or canneries.

Judgment affirmed.

1. Statutes § 190

Where the law is plain and unambiguous and no conflict between statutes is apparent, the canons of construction will not be resorted to.

2. Fish § 13(2)

Under statutes permitting ocean fishing for sardines in certain ocean districts for use in reduction plants or by packers and statute providing that bait nets may be used to take fish for bait in any ocean district except District 20, sardines taken with bait nets in District 19A could not lawfully be used in reduction plants or in canneries. Fish and Game Code, §§ 919, 1065.

J. H. Morris, Hollywood, for appellants.

Fred N. Howser, Atty. Gen., Dan Kaufman, Deputy Atty. Gen., for respondents.

DRAPEAU, Justice.

Plaintiffs' complaint alleges: That they own and operate a wholesale and retail fish business; that an important part of the business is buying, taking, and possessing sardines to sell to packers for canning purposes; that Santa Monica Bay is in Fish and Game District 19A; that plaintiffs propose to purchase and possess sardines taken in said district during the open season with bait nets, to sell to packers for canning; that plaintiffs contend it is lawful to do so, whereas defendants, the California Fish and Game Commission, and its members, contend that it is unlawful to do so.

The complaint sounds in declaratory relief, and prays for judgment declaring the rights of the plaintiffs.

Demurrer to the complaint was sustained without leave to amend, and from the judgment which followed plaintiffs appeal.

Section 919, Fish and Game Code, defines the term "bait net," and provides, "Bait nets may be used to take fish for bait in any ocean district except District 20."

Do the words "for bait" in the section mean that fish caught in bait nets may be used only for bait and may not be used for canning?

Plaintiffs contend that reading Sections 919 and 1065 of the Fish and Game Code together, sardines may be taken with bait nets and used for canning, and in any

event, that Section 1065 permits taking of sardines in District 19A.

Section 1065 permits ocean fishing for sardines in a number of districts up and down the California coast, for use in reduction plants or by packers. Section 919 prohibits taking of sardines in bait nets except for bait.

[1] No conflict between the sections is apparent. The law is plain and unambiguous. No resort to any canons of construction is required. The words of the statute mean what they say, no more and no less.

[2] The law forbids taking sardines in bait nets except for bait; or, stated conversely, when bait nets are used to take sardines in District 19A such sardines may not lawfully be used in reduction plants or in canneries.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



103 Cal.App.2d 403

CONSTRUCTION PRODUCTS CORPORATION et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 18418.

District Court of Appeal, Second District,
Division 2, California.

April 11, 1951.

The Construction Products Corporation, a corporation, and others, petitioners, filed a petition for review against the Superior Court of the State of California in and for the County of Los Angeles and others, respondents, to review order compelling petitioners to permit inspection of documents. The District Court of Appeal, Moore, P. J., held that Superior Court did not abuse its discretion in entering order for inspection of documents.

Order to show cause discharged and petition for writ of review denied.

1. Appeal and error ⇨920(1)

Discovery ⇨85

A trial court's action under statute relating to inspection of documents is discretionary, and all intendments are in favor of the validity of order authorizing inspection. Code Civ.Proc. § 1000.

2. Appeal and error ⇨951

A trial court's action in authorizing inspection of documents will not be annulled on appeal unless a clear abuse of discretion appears. Code Civ.Proc. § 1000.

3. Joint adventures ⇨4(1)

Where relation of joint adventure exists, parties thereto have a common interest in business records and their right to access to such records cannot, in justice, be denied.

4. Discovery ⇨89

Where individuals advanced money to corporation for manufacturer of trench diggers, and court in action by individuals against corporation to recover damages for alleged fraud, was warranted in determining that parties were in position of joint adventurers, court did not abuse its discretion in entering an order directing corporation to make available to individuals for inspection all books, accounts, documents, and papers in possession or under control of corporation relating to business, operations, and financial condition of corporation. Code Civ.Proc. § 1000.

Larwill & Wolfe, Los Angeles, for petitioners.

W. B. Etheridge, Pasadena, for respondents John A. Moore and Elizabeth J. Moore.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent, Superior Court of the State of California, in and for the County of Los Angeles.

MOORE, Presiding Judge.

The question presented for decision is whether the court below has exceeded its

jurisdiction in issuing an order pursuant to Section 1000 of the Code of Civil Procedure compelling petitioners to make available to respondents for inspection "all * * * books, accounts, documents and papers now in the possession and/or under the control of defendants * * * in connection with * * * and relating to the business, operations and financial condition of defendant, Construction Products Corporation. * * *"

Such order was granted on the motion of Mr. and Mrs. Moore, respondents here and plaintiffs below, in connection with their action instituted against the corporation and its president, Frank W. Wells, demanding damages for fraud, enforcement of certain contracts and recovery of various sums of money on counts for moneys had and received. The complaint in that action reveals that the allegations of fraud are predicated upon alleged misrepresentations as to the business and financial condition of the corporation prior to plaintiffs' advancing \$60,000 to the firm, manipulation of the corporate books and records and commingling of plaintiffs' funds held in trust by defendants.

Petitioners urge in their petition for a writ of review that this court annul the order in question on the ground that it is in excess of the trial court's jurisdiction. Basing their contention on the decision in *Shell Oil Company v. Superior Court*, 109 Cal.App. 75, 292 P. 531, they assert that the order is void in that it fails to designate the precise documents which are to be made available for inspection; that the respondents have not shown that any such books and papers contain evidence material to the issues awaiting trial; that in short, such plaintiffs are merely seeking to enter upon a "fishing expedition."

[1,2] In determining the propriety of an order under section 1000, Code of Civil Procedure, it must be borne in mind that

the trial court's action thereunder is discretionary and that all intendments are in favor of the validity of such order. Accordingly, such action will not be annulled unless a clear abuse of that discretion appears. *Milton Kauffman, Inc., v. Superior Court*, 94 Cal.App.2d 8, 16, 210 P.2d 88.

[3] The complaint against petitioners incorporates by reference the agreement between the parties executed at the time plaintiffs advanced their funds. From this contract it is clear that the court was warranted in determining that the parties were in the position of joint adventurers. It was contemplated that with plaintiffs' capital contribution petitioners would manufacture certain "trench diggers" to fill orders then on hand for the mutual profit and benefit of all concerned. Where such relationship exists the parties thereto have a common interest in the business records and the right to their access cannot, in justice, be denied. *Milton Kauffman, Inc., v. Superior Court*, supra, 94 Cal.App.2d at page 17, 210 P.2d 88.

[4] The court's order herein purports to award rights of inspection to plaintiffs. Such rights are not in the slightest more comprehensive than rights of inspection and of making copies provided for by the very terms of the agreement made by the parties. By specific provision in this contract, Mr. Moore and his attorney "and all agents, representatives, and auditors" were given rights of inspection of the plant, sales operations and permission to copy and examine all books and records thereof. Therefore, by what authority can petitioners complain when the trial court has, in reality, only confirmed the very contract provision to which they themselves previously assented?

The order to show cause hereinbefore issued is discharged and the petition for writ of review is denied.

McCOMB and WILSON, JJ., concur.

LONDON et al. v. MARCO et al.

Civ. 18332.

District Court of Appeal, Second District,
Division 2, California.

April 13, 1951.

Rehearing Denied May 4, 1951.

Hearing Denied June 11, 1951.

Action to restrain foreclosure sale of property under deed of trust by William A. London, and others, against Vincent A. Marco, and others. The Superior Court of Los Angeles County, W. Turney Fox, J., entered an order denying plaintiffs' motion for a preliminary injunction, and the plaintiffs appealed. The District Court of Appeal, Wilson, J., held that the denial of the preliminary injunction was not an abuse of discretion, where plaintiffs' hands were soiled by false statements made in first action that taxes had been paid when in fact more than \$3,000 remained unpaid at time statement was made and by dismissal of first action on filing of second action in branch court in same jurisdiction without disclosing that former action had been dismissed and that in such action the court had dissolved preliminary injunction by reason of false statement as to taxes.

Order affirmed.

1. Appeal and error ☞954(1)
Injunction ☞135

The granting of a preliminary injunction is addressed to the sound discretion of the court, and the refusal to grant such injunction will not be reversed on appeal unless there appears to have been an abuse of discretion.

2. Appeal and error ☞1054(3)

Where every allegation in plaintiffs' complaint and affidavits is denied, and there is substantial conflict in evidence regarding an issue which may affect discretion of court in passing on application for an injunction, an order denying injunction will not be reversed.

3. Equity ☞65(1)

One who seeks the interposition of a court of equity must come into court with clean hands.

4. Equity ☞65(2)

Mortgages ☞338

Denial of preliminary injunction restraining foreclosure sale of property under

deed of trust was not abuse of discretion, where plaintiff's hands were soiled by false statements made in first action that taxes had been paid when in fact more than \$3,000 remained unpaid at time statement was made, and by dismissal of first action and filing of second action in branch court in same jurisdiction without disclosing that former action had been dismissed and that in such action the court had dissolved the preliminary injunction by reason of false statements as to taxes.

Sylvan Y. Allen, Los Angeles, for appellants.

Jerry K. Harter, Beverly Hills, for respondents.

WILSON, Justice.

Plaintiff has appealed from an order denying his motion for a preliminary injunction to restrain a foreclosure sale of property under a deed of trust.

Defendants Marco sold a single-family dwelling to plaintiffs. Pursuant to the terms of the escrow relating to the sale plaintiffs took possession of the property and some or all of them have occupied it continuously since September 15, 1949. As a part of the consideration the Marcos accepted a promissory note secured by a third deed of trust executed by plaintiff Theodore London for an amount in excess of \$40,000, payable in installments. By reason of the nonpayment of the installment of \$9,000 which became due on March 15, 1950, the trustee on April 11, 1950, gave a 90-day notice of declaration of default. After a lapse of 59 days from the date of the notice plaintiffs served a notice of rescission of the transaction. The 90-day notice of declaration of default elapsed on July 11, 1950. On that date the entire amount of the promissory note, plus interest, attorney's fees and costs, became due, in the sum of \$40,867.97.

Notice of trustee's sale was published and shortly before the date fixed for the sale plaintiffs filed an action to restrain the sale. Upon the hearing of the order to show cause why a preliminary injunction

tion should not issue counsel for plaintiffs stated that all taxes, including those due in the preceding April, had been paid. The court granted a preliminary injunction enjoining the sale of the property, in which order the court directed that plaintiffs make all payments of taxes assessed or payable against the property when the same were required and due. About 18 days after the issuance of the preliminary injunction defendants ascertained that the taxes which became due and delinquent in April had not been paid, amounting to the sum of \$3,394.11, and that on April 22, 1950, prior to the issuance of the preliminary injunction, an income tax lien had been filed against the property in the sum of \$15,222.82. Thereupon defendants made a motion to dissolve the preliminary injunction on the ground that plaintiffs had misrepresented essential facts to the court with reference to the taxes. The motion was granted and the preliminary injunction dissolved on August 28, 1950, upon the ground that plaintiffs had perpetrated a fraud upon the court through their misrepresentations upon which the court had relied.

The trustee again began publication of notice of sale, scheduling the sale for September 26, 1950. On September 19 plaintiffs filed a dismissal of the action and simultaneously filed in the Santa Monica Branch of the Superior Court a complaint almost identical in substance with that in the dismissed action. In the latter complaint, and in affidavits filed in the action in support of an application for a preliminary injunction, plaintiffs did not disclose the fact that the former action had been heard in Los Angeles and that the preliminary injunction had been dissolved because of the fraud perpetrated upon the court. Upon motion of defendants the Santa Monica action was transferred for hearing before the court in Los Angeles, where plaintiffs' application for a preliminary injunction was denied.

In one of the affidavits filed upon the latter hearing plaintiffs' counsel stated he felt that an appeal from the order dissolving the preliminary injunction in the first

action would be futile and the court was justified in feeling as it did and in dissolving the injunction.

[1,2] The granting of a preliminary injunction is addressed to the sound discretion of the court. *Lutz v. Western Iron & Metal Co.*, 190 Cal. 554, 560, 213 P. 962; *Kendall v. Foulks*, 180 Cal. 171, 174, 179 P. 886; *Fresno Canal & Irr. Co. v. People's Ditch Co.*, 174 Cal. 441, 447, 163 P. 497. The refusal to grant such injunction will not be reversed on appeal unless there appears to have been an abuse of discretion. *Williams v. Los Angeles Ry. Co.*, 150 Cal. 592, 596, 89 P. 330; *Fresno Canal & Irr. Co. v. People's Ditch Co.*, supra, 174 Cal. at page 451, 163 P. at page 497. Where, as here, every allegation in plaintiffs' complaint and affidavits is denied, *Asiatic Club v. Biggy*, 160 Cal. 713, 715, 117 P. 912, and where there is a substantial conflict in the evidence regarding an issue which may affect the discretion of the court in passing upon the application for an injunction, *Piper v. Hawley*, 179 Cal. 10, 19, 175 P. 417, an order denying an injunction will not be reversed.

[3,4] It is a familiar rule not requiring the citation of authority that one who seeks the interposition of a court of equity must come into court with clean hands. Plaintiffs' hands were more than slightly soiled (1) by the false statements made in the first action that taxes had been paid when in fact more than \$3,000 remained unpaid at the time the statement was made, and (2) by the dismissal of the first action and the filing of the second in a branch court in the same jurisdiction without disclosing that the former action had been dismissed and that in such action the court had dissolved the preliminary injunction by reason of the false statement with reference to taxes.

Giving effect to all the facts and circumstances shown by the record, we do not find that the court abused its discretion in denying a preliminary injunction.

Order affirmed.

MOORE, P. J., and McCOMB, J., concur.

PETERSON et al. v. BURKHALTER.

Civ. 17905.

District Court of Appeal, Second District,
Division 2, California.

April 11, 1951.

Rehearing Denied April 27, 1951.

Hearing Granted June 7, 1951.*

Action by Clarence A. Peterson and Jon Peterson, a minor, by his guardian ad litem, Clarence A. Peterson, against Everett G. Burkhalter, to recover damages resulting from an automobile accident. The Superior Court of Los Angeles County, Samuel R. Blake, J., rendered judgment for plaintiff after jury verdict and defendant appealed. The District Court of Appeal, McComb, J., held that under the facts of the case the trial court properly instructed jury upon the doctrine of last clear chance.

Affirmed.

1. Automobiles ⇨243(58)

Where defendant motorist was proceeding north on a street and observed plaintiff riding on motor scooter, coming from a cross street, but that plaintiff was looking to the rear and not observing the traffic ahead, and defendant then looked away and when he next saw plaintiff he was four or five feet from the left side of his automobile, but defendant did not apply his brakes, which were in good condition, nor sound his horn nor swerve to the right until he was into the intersection and plaintiff's motor scooter hit the left side of defendant's automobile, trial court properly instructed the jury upon the doctrine of last clear chance.

2. Negligence ⇨83.4

The doctrine of last clear chance consists of a plaintiff who is not aware of danger confronting him, who has placed himself in impending danger by his own negligence, and a defendant who knew or should have known that plaintiff was in danger and had a clear chance of avoiding the accident by some maneuver of his own.

—◆—
Betts, Ely & Loomis, Los Angeles, for appellant.

Cushman, Lynch & Wetherbee, Los Angeles, for respondents.

* Subsequent opinion 237 P.2d 977.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before a jury in an action to recover damages resulting from an automobile accident, defendant appeals.

Question: Was it proper for the trial court to give an instruction to the jury upon the doctrine of last clear chance?

Yes. The evidence being viewed in the light most favorable to plaintiffs (respondents) discloses that on April 10, 1948, at the intersection of Craner Avenue and Collins Street in the City of Los Angeles the following occurred:

[1] Defendant was proceeding in a northerly direction on Craner Avenue traveling about 35 miles per hour about 50 feet south of its intersection with Collins Street when he observed plaintiff riding on a motor scooter while looking over his right shoulder in the opposite direction from which he was traveling. Plaintiff was proceeding east on Collins Street about 75 feet west of the intersection at about 30 miles per hour.

Defendant looked away and when he next saw plaintiff he was 4 or 5 feet from the left side of defendant's automobile in the intersection still looking back over his right shoulder. Defendant did not apply his brakes which were in good condition, nor sound his horn, nor swerve to the right until he was into the intersection and just prior to the time plaintiff's motor scooter hit the left rear door and running board on defendant's automobile causing plaintiff serious injuries.

Clearly from the foregoing evidence the trial court properly instructed the jury upon the doctrine of last clear chance, since the jury may have believed:

(a) That when defendant first saw plaintiff, the latter was not aware of the danger confronting him (*Cady v. Sanford*, 57 Cal. App. 218, 226, 228, 207 P.2d 45);

(b) That plaintiff by his own negligence placed himself in a position of impending danger of which he was wholly unaware (*Gillette v. City and County of San Francisco*, 58 Cal.App.2d 434, 442, 136 P.2d 611);

(c) That defendant as a reasonably prudent man should have known that plaintiff was in danger (*Cady v. Sanford*, 57 Cal.App. 218, 226, 207 P.2d 45);

(d) That defendant knew plaintiff was in danger; and

(e) That after knowing of plaintiff's danger defendant by applying his brakes, sounding his horn or changing his course had a clear chance of avoiding the accident, and that he did not avail himself of the opportunity which he had of avoiding the accident.

[2] The foregoing constitute the essential elements of the doctrine of last clear chance which the jury, supported by substantial evidence, found to be present in the instant case.

Affirmed.

MOORE, P. J., and WILSON, J., concur.



103 Cal.App.2d 291

PEOPLE v. LOPEZ.

Cr. 4578.

District Court of Appeal, Second District,
Division 2, California.

April 6, 1951.

Ysidro Lopez was convicted in the Superior Court of Los Angeles County, Gregory P. Maushart, J., of bookmaking and he appealed. The District Court of Appeal, Wilson, J., held that the evidence sustained the conviction.

Judgment affirmed.

1. Gaming ⚡98(3)

Evidence sustained conviction for bookmaking. Pen.Code, § 337a.

1. Section 337a: "Every person * * *
"3. Who * * * receives, holds,
* * * or purports or pretends to receive, hold * * * any money * * * bet or wagered, or to be * * * bet or wagered, or offered for the purpose of being * * * bet or wagered, up-

2. Criminal law ⚡1213

In bookmaking prosecution, in view of defendant's record, where sentence was suspended and defendant placed on three years probation on condition that defendant serve three months in county jail, pay \$250 fine at rate of \$25 a month, refrain from using intoxicating liquors, remain away from places where such liquors were principal articles of sale, and refrain from bookmaking activities, sentence was not cruel, unusual or excessive punishment. Const. art. 1, § 6; U.S.C.A.Const. Amend. 8; Vehicle Code, § 503.

Russell E. Parsons, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Defendant was found guilty of violating section 337a of the Penal Code.¹ He has appealed from the judgment of conviction on the grounds that (1) the evidence is insufficient to sustain the judgment, and (2) the punishment imposed upon him is cruel and unusual.

Sufficiency of the Evidence.

[1] A police officer entered a cocktail bar at about 2:00 o'clock in the afternoon and observed defendant who was seated at the bar with three or four other persons. The officer kept defendant under observation for about 40 minutes; during that time defendant looked at a scratch sheet which was lying on the bar; the other persons looked at the scratch sheet and pointed to it while they were talking to defendant; one man handed some money to defendant who picked up the scratch sheet, went to a telephone booth and dialed a number. While talking on the telephone he looked

on the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of * * * speed * * * between * * * beasts, * * *.
"Is punishable by imprisonment * * *."

at the scratch sheet. He then returned to the bar. Another person looked at the scratch sheet and said to defendant, "I want two and two on Gold Jig." This person removed his wallet from his pocket and handed defendant some currency. Defendant went to another telephone booth, dialed a number and held a short conversation while looking at the scratch sheet. When he returned to the bar the officer placed him under arrest. He had \$16 in his pocket.

The officer obtained the scratch sheet which had been used by defendant and the other persons. It was entitled "National Scratch Sheet" and its date was the date of the occurrence above mentioned.

It was stipulated that the officer was qualified to testify concerning the manner in which bookmaking is conducted in Los Angeles County. He testified that Gold Jig was the name of a horse and, referring to the scratch sheet which had been taken from defendant, testified that Gold Jig was entered in the sixth race at Golden Gate Fields, a horse racing track in the United States.

The foregoing evidence is sufficient to sustain the conviction. *People v. Oliverio*, 99 Cal.App.2d 743, 222 P.2d 245; *People v. Hoffman*, 94 Cal.App.2d 379, 382, 210 P.2d 885; *People v. Woods*, 35 Cal.2d 504, 507, 509, 218 P.2d 981; *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778.

Defendant denied he was bookmaking and stated he had come to the barroom to see his brother. He denied that any one gave him money to place on a horse race and explained his telephoning by saying that he was calling his wife; he was not sure of her number and for that reason reached into his wallet each time to find her number. He did not explain his looking at the scratch sheet during each conversation. Defendant's brother testified he was the person who conversed with defendant about Gold Jig; he denied he had given his brother any money.

The evidence of defendant and his brother merely created a conflict and since the trial court accepted the officer's testimony

and rejected conflicting evidence we cannot interfere.

Defendant relies on *People v. Banks*, 39 Cal.App.2d 164, 102 P.2d 818. We pointed out in *People v. Hoffman*, *supra*, that the *Banks* case is inapplicable since the reviewing court weighed conflicting evidence and decided in accordance with the testimony of witnesses who were not believed by the trial court and accepted as true and controlling the evidence which the court had rejected. The *Banks* case was expressly disapproved by the Supreme Court in *People v. Woods*, *supra*, 35 Cal.2d at page 509, 218 P.2d 981.

Alleged Cruel and Unusual Punishment.

[2] The court sentenced defendant to the state prison for the term prescribed by law, suspended the sentence and placed him on probation for three years. The conditions of probation are that he serve three months in the county jail, pay a fine of \$250 at the rate of \$25 a month, refrain from using intoxicating liquors, remain away from places where such liquors are the principal article of sale, and refrain from book-making activities.

Defendant contends that the punishment meted out to him is cruel, unusual and excessive, in violation of the Eighth Amendment to the Constitution of the United States and section 6 of article I of the Constitution of California.

"Like Niobe, all tears," defendant deplores what he deems the "harsh attitude" of the trial court and avers he is entitled to "fair play" which, by his announced standard, is absent from the court's judgment. He asserts the judgment is unreasonable and is in excess of that which has been imposed upon other violators of the same section of the Penal Code. In view of defendant's record a comparison of his sentence with those imposed upon other bookmakers would be futile, if it were necessary, which it is not.

Defendant laments that the terms of the sentence and probation impede the progress of a young man who is just trying to get along. The record shows he has already progressed too far along the path that

eventually leads to serious trouble. This is not his first encounter with the law. In pronouncing judgment the court read from the probation officer's report that defendant had previously been found guilty of purse snatching, had served a term in Preston Reformatory, had been found guilty of grand theft and violation of section 503 of the Vehicle Code (driving a vehicle not his own without the consent of the owner) and of a violation of the Narcotics Act. In view of this record there is no ground for defendant's contention that the punishment imposed upon him is cruel, unusual or excessive.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



103 Cal.App.2d 426

**WILSON v. LOS ANGELES COUNTY
CIVIL SERVICE COMMISSION et al.**

Civ. No. 17831.

District Court of Appeal, Second District,
Division 1, California.

April 12, 1951.

Rehearing Denied May 1, 1951.

Hearing Denied June 11, 1951.

Petition for an alternative writ of mandate by H. J. Wilson against Los Angeles County Civil Service Commission and others, commanding the Commission to annul its order denying petitioner's appeal from examination for chief deputy county clerk, and to annul the eligible list created for the positions of executive assistant to the county clerk and chief deputy county clerk, and for a determination that purported appointments to such positions were unlawful and void. The Superior Court of Los Angeles County, Clarence M. Hanson, J., denied the petition and dismissed the proceedings therefor and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that the trial court properly denied the application for the writ.

Judgment affirmed.

See also 97 Cal.App.2d 777, 218 P.2d 547.

1. Mandamus ☞159

Trial court did not err in denying petition for alternative writ of mandamus "out of hand" because respondents filed neither an answer nor a demurrer to the petition, but instead filed a memorandum of points and authorities under statute providing therefor. Code Civ.Proc. §§ 1094.5, 1107.

2. Mandamus ☞75

Denial of alternative writ of mandamus to compel county civil service commission to annul certain order denying an appeal from examination for county office and to annul certain eligible list did not amount to an abuse of discretion.

3. Mandamus ☞71

Mandamus is a remedial writ which will be used to correct those acts and decisions of administrative agencies which are in violation of law where no other adequate remedy is provided, not only to compel administrative action which was refused in violation of law, but also to annul or restrain administrative action already taken which is in violation of law.

4. Mandamus ☞72

Writ of mandamus may not be employed to compel a public administrative agency possessing discretionary power to act in a particular manner.

5. Evidence ☞23(1)

It is a matter of common knowledge that written examinations are often waived in the selection of appointees for positions in the civil service particularly in those fields requiring special or professional training.

6. Mandamus ☞154(4)

Petition for alternative writ of mandamus commanding county civil service commission to annul an order denying petitioner's appeal from examination for county office and to annul certain eligible lists, charging that secretary and chief examiner for commission wilfully but without lawful authority changed certain requirements set forth in original bulletin in respect of examination for office, was insufficient to show abuse of discretion vested in the commission under the county charter.

7. Officers ☞26(1)

The evaluation of efficiency and seniority as part of examinations conducted by county civil service commission for promotion is within discretion of the commission.

H. J. Wilson, in pro. per.

Harold W. Kennedy, County Counsel, and Andrew O. Porter and John B. Anson, Deputy County Counsel, Los Angeles, for respondents.

DRAPEAU, Justice.

From a judgment denying his first amended petition for an alternative writ of mandate and dismissing the proceeding therefor, petitioner appeals.

The facts alleged in said petition are briefly the following: On May 3, 1949, the respondent commission ordered a promotional examination for the position of chief deputy county clerk. In fixing the requirements therefor, the commission arbitrarily restricted applicants to permanent employees of the county clerk's office and caused an official bulletin to be posted. On May 16th, the acting secretary and chief examiner for the commission "wilfully, but without lawful authority" posted a "rebulletin" changing the requirements which had theretofore been fixed "for the sole purpose of admitting W. G. Sharp as an applicant for said position."

Thereafter the commission created an eligible list from the examination held for the position of chief deputy county clerk, on which W. G. Sharp stood first and petitioner stood second. On June 28, 1949, Mr. Sharp was appointed to fill that position.

The gist of the instant petition appears to be that Mr. Sharp was not eligible to participate in any promotional examination in the classified service of Los Angeles County, particularly the examination for chief deputy county clerk. This for the reason that the advancement of Mr. Sharp "is part of a common scheme or plan * * to debase the principles of civil service" through the preferment and favoritism of chosen applicants brought into the service

as "interns in government", and given special credits through a method of "secret and confidential recommendations" so evaluated as to constitute 25% of the total grade in any examination taken by such interns.

The petition then recites the various positions held by Mr. Sharp from the time he entered the service in 1937 as an "intern in government" it being alleged that many of Mr. Sharp's appointments were not made from eligible lists, and some from eligible lists created under circumstances violative of the county charter. Petitioner particularly calls attention to the appointment of Mr. Sharp as executive assistant to the county clerk on August 5, 1946. It is alleged that such appointment was void for the reason that no examination for the position was ever given, no one other than Mr. Sharp ever applied to take it and his name alone appeared on the purported list from which the appointment was made.

Petitioner then alleges on information and belief that "each, all and every of the purported eligible lists above set out, and the positions held by W. G. Sharp" thereunder were in violation of express provisions of the county charter, and as a result Mr. Sharp "has not acquired any promotional rights in the classified service of Los Angeles County, and was not eligible to participate in the examination for the position of Chief Deputy County Clerk."

Petitioner also takes exception to the method used by the commission in adding credits for efficiency and seniority to the weighted average of one of the candidates for the position of chief deputy county clerk and the alleged unlawful inclusion of the name of such candidate on the eligible list for said position. Also, that the commission's method of evaluating the efficiency and seniority of appellant was arbitrary and capricious and in contravention of the provisions of the county charter and therefore void.

Petitioner duly appealed from the examination for the position of chief deputy county clerk in the manner provided by law, and "the said appeal was peremptorily denied without hearing or consideration."

The prayer is for an alternative writ of mandate commanding the Commission (1) to annul its order denying petitioner's appeal from the examination for chief deputy county clerk; and (2) to annul the eligible lists created for the positions of executive assistant to the county clerk and chief deputy county clerk and (3) for a determination that the purported appointments of W. G. Sharp to such positions on August 5, 1946 and June 28, 1949, respectively, were unlawful and void.

Neither answer nor demurrer to the petition was filed. However, pursuant to section 1107, Code of Civil Procedure, respondents on November 3, 1949, filed their points and authorities in opposition to the amended petition for the writ. On the last named date a minute order was made denying the application for the alternative writ of mandate. Thereafter, on January 4, 1950, judgment was entered denying the petition and dismissing the proceeding.

By his statement of questions involved, appellant presents the following questions for determination:

"1. Was the denial of the petition 'out of hand' by the trial court contrary to the express provisions of section 1094 of Code of Civil Procedure, and therefore reversible error?

"2. Does the petition make a sufficient *prima facie* showing for the issuance of an alternative writ of mandate, and was the action of the trial court in denying 'out of hand' the issuance of the alternative writ prejudicial abuse of discretion?

"3. Does section 1094.5 Code of Civil Procedure provide the remedy for seeking judicial review of the acts of an administrative board, and did the act of the trial court in denying the petition 'out of hand' constitute a denial of procedural and substantive due process?

"4. Was the pleading of the Commission in fact a general demurrer, notwithstanding that it was termed 'points and authorities in opposition to the issuance of the writ of mandate under section 1107 Code of Civil Procedure'; and was it reversible error for the trial court to fail to

give a time and place for argument of the general demurrer, or to rule upon the general demurrer?"

In *Dare v. Board of Medical Examiners*, 21 Cal.2d 790, 796, 136 P.2d 304, 307, the Supreme Court outlines the procedure to be followed in mandamus proceedings:

"First, the petitioner comes before the court governed by the provisions of the Code of Civil Procedure applicable to mandamus proceedings, Code Civ.Proc., §§ 1084 to 1097 inclusive. In the disposition of such proceedings the court is likewise governed by those code sections. The powers and duties of the court in the premises are provided for therein. Historically the writ of mandamus was devised to provide a remedy where no other remedy existed. Its purpose was to afford a means of procuring justice in the proper field of its operation where there was an asserted legal right and no specific legal remedy for the enforcement of that right. * * * The proceeding is initiated by the filing of a verified petition. The practice is to present the petition to the court with a request that the alternative writ be issued *ex parte*. But a petitioner is not entitled as a matter of right to the issuance of that writ. He must make a proper showing by the allegations of his petition. If his petition fails to state a *prima facie* case entitling him to the issuance of the alternative writ, it is within the power of the court to deny it out of hand. This is familiar practice in all courts having original jurisdiction in mandamus. Furthermore, the power of the court is not without a discretion, wisely exercised, to grant or deny either the alternative or the peremptory writ. *Wiedwald v. Dodson*, 95 Cal. 450, 30 P. 580; *Betty v. Superior Court*, 18 Cal.2d 619, 116 P.2d 947; *Bartholomae Oil Corp. v. Superior Court*, 18 Cal.2d 726, 117 P.2d 674. For an abuse of this discretion on the part of a lower court appropriate remedies are available in a higher court * * *.

"Second: If the alternative writ is issued it may be said that the matter then proceeds as an ordinary civil action. But this is not so in some important particulars. The requirements of the alternative writ

are that the respondent do the act demanded or show cause at a specified time and place why he has not done so. In the event of non-compliance the order then is in the nature of an order to show cause where the burden is cast upon the respondent to proceed and show to the satisfaction of the court why he has not performed the act demanded by the petitioner. * * * In the superior court, on the return of the alternative writ, the respondent may file an answer under oath, § 1089, in which questions of law also may be raised. § 1094. But the petitioner is not precluded by the answer from any valid objection to its sufficiency. § 1091.

"Third: When the matter is at issue on controverted questions of fact, the cause may then be said to proceed as a civil action, that is, it is set down for trial and is tried as a civil action during the course of which any competent evidence may be introduced and received and the ordinary procedural rules apply. At the close of the hearing the court makes findings of fact and conclusions of law, and enters judgment either denying or granting a peremptory writ."

[1] The court did not err in its denial of appellant's petition "out of hand" for the reason that respondents filed neither an answer nor a demurrer to the petition. Instead, they filed a memorandum of points and authorities under the provisions of section 1107 of the Code of Civil Procedure. Such memorandum is in the nature of a brief filed for the benefit of the court and had no effect on the procedure provided for in section 1094, *supra*, to-wit: "If no answer be made, the case must be heard on the papers of the applicant. * * *"

Repeating the language of *Dare v. Board of Medical Examiners*, *supra*, 21 Cal.2d 790, 796, 136 P.2d 304, 308: "But a petitioner is not entitled as a matter of right to the issuance of that writ. He must make a proper showing by the allegations of his petition. If his petition fails to state a *prima facie* case entitling him to the issuance of the alternative writ, it is within the power of the court to deny it out of hand."

[2] Neither did the action of the trial court in denying the petition amount to an abuse of discretion.

[3] Appellant cites *Bodinson Mfg. Co. v. California E. Comm.*, 17 Cal.2d 321, 329, 109 P.2d 935, 940, as authority for the proposition that "mandamus is the remedial writ which will be used to correct those acts and decisions of administrative agencies which are in violation of law, where no other adequate remedy is provided * * * not only to compel administrative action which was refused in violation of law * * * but also to annul or restrain administrative action already taken which is in violation of law."

[4] Conceding the correctness of the statement, nevertheless, as stated in *Lindell Co. v. Board of Permit Appeals*, 23 Cal.2d 303, 315, 144 P.2d 4, 11: "It is the general rule that the writ of mandamus may not be employed to compel a public administrative agency possessing discretionary power to act in a particular manner. The court in response to appropriate application may compel such agency to act, but it may not substitute its discretion for the discretion properly vested in the administrative agency. 16 Cal.Jur. 809, § 28, and cases there cited; 34 Am.Jur. 856, § 68, with supporting authority. In a proceeding of this character, challenging the propriety of a decision of an administrative board, the attitude of the courts is well stated in the following language found in the case of *Maxwell v. Civil Service Commission*, 169 Cal. 336, 339, 146 P. 869, 871: 'Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. * * * Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere.' Like expression of this general policy of the courts toward administrative agencies may be found in *Pratt v. Rosenthal*, 181 Cal. 158, 164, 183 P. 542; *Mann v. Tracy*, 185 Cal. 272, 274, 196 P. 484; *Bank of Italy v. Johnson*, 200 Cal. 1, 31, 251 P. 784; *Mitchell v. McKevitt*, 128 Cal.App. 458, 465, 17 P.2d 789; *Dierrsens v. Civil Service Commission*, 43 Cal.App.2d 53, 59, 110 P.

2d 513; and *Hansen v. State Board of Equalization*, 43 Cal.App.2d 176, 179, 110 P.2d 453." See, also, *Conroy v. Civil Service Commission*, 75 Cal.App.2d 450, 457, 171 P.2d 500.

The foregoing rules of law appear particularly applicable to the instant situation. Under Article IX of the County Charter establishing civil service, it is incumbent upon the respondent commission to adopt and enforce such rules and regulations as may be proper and necessary for the enforcement of the provisions of such article. As stated in *Almassy v. Los Angeles County Civil Service Comm.*, 34 Cal.2d 387, 396, 210 P.2d 503, 508: "It is manifest from the provisions of the charter and rules above quoted that subject to the limitation that 'all examinations shall be impartial and shall deal with the duties and requirements of the position to be filled', art. IX, sec. 36; rule VII, sec. 3, the civil service commission has been given broad discretionary powers in determining the subjects of examination and the qualifications which are to be measured. See *Field, Civil Service Law*, 1939, p. 86, pp. 132-133; *Keller v. Hewitt*, 109 Cal. 146, 147, 41 P. 871; *Maxwell v. Civil Service Comm.*, 169 Cal. 336, 338-339, 146 P. 869; *Haub v. Tuttle*, 80 Cal.App. 561, 569-570, 251 P. 925; *Mitchell v. McKevitt*, 128 Cal.App. 458, 465, 17 P. 2d 789. Judicial interference under such circumstances is unjustified except on a showing of arbitrary, fraudulent, or capricious conduct, or a clear abuse of discretion. *Pratt v. Rosenthal*, 181 Cal. 158, 163-164, 183 P. 542; *Nelson v. Dean*, 27 Cal.2d 873, 881, 168 P.2d 16, 168 A.L.R. 467; *Dierssen v. Civil Service Comm.*, 43 Cal. App.2d 53, 63, 110 P.2d 513."

Turning again to the allegations of the instant petition, appellant first charges that as to the examination for chief deputy county clerk, the secretary and chief examiner for the commission, "wilfully, but without lawful authority" changed the five year requirement of "administering or managing the personnel and activities of a major division of the Department of County Clerk", as set forth in the original bulletin, to "administering or managing or assisting in the administration or management of the

personnel and activities of the Department of County Clerk, or administering or managing a major division thereof."

Pursuant to an order of this court granting appellant's application for leave to produce additional evidence, a certified copy of Rule V of the respondent commission is now before us. This provides that "subject to the direction and approval of the Commission", the secretary and chief examiner "shall have charge of all matters pertaining to the preparation and conduct of examinations", down to the smallest detail, including the preparation and posting of official bulletins.

Appellant next complains that the examination for chief deputy county clerk was void because limited to employees in the department of county clerk; that such examination should have been an inter-departmental promotional examination. This was a promotional examination and was given in accordance with a rule of the commission providing for two types of promotional examinations: (a) Departmental and (b) Inter-departmental.

[5] As heretofore stated, appellant's main complaint is that the respondent commission had no right to permit Mr. Sharp to take the examination for chief deputy county clerk based upon a void appointment to the position of executive assistant county clerk. The latter appointment was made from an eligible list, a copy of which is here in evidence. True, it contains only one name. But it shows that its basis was an "Unassembled examination" and that the candidates were "Rated on their professional training and experience and their aptitude and personal suitability as evidenced by investigation." It is a matter of common knowledge that written examinations are often waived in the selection of appointees for positions in the civil service, particularly in those fields requiring special or professional training.

[6] The respondent commission is vested under the county charter with a high discretion, and the instant petition is insufficient to show an abuse thereof.

[7] With respect to appellant's criticisms of the method used by the commis-

sion in evaluating efficiency and seniority, the case of *Almassy v. Los Angeles County Civil Service Commission*, 34 Cal.2d 387, 210 P.2d 503, puts at rest for all time the validity of the practice of the commission of adding credits for efficiency and seniority to the weighted averages in promotional examinations.

There is no allegation in the instant petition showing that any inquiry under section 1094.5, Code of Civil Procedure, was involved herein.

In the circumstances presented, the trial court properly denied the application for the writ.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



103 Cal.App.2d 462

PEOPLE v. MERCER.

Cr. 700.

District Court of Appeal, Fourth District,
California.

April 13, 1951.

Charles Mercer was convicted in the Superior Court of San Bernardino County, A. D. Mitchell, J., of the crime of burglary with explosives and he appealed. The District Court of Appeal, Mussell, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Burglary ☞41(1)

Circumstantial evidence sustained conviction for crime of burglary with explosives.

2. Criminal law ☞552(1)

The commission of a crime may be adequately established by circumstantial evidence.

3. Criminal law ☞741(6)

The sufficiency of incriminating circumstances is a question exclusively within province of jury.

4. Criminal law ☞1159(2)

In prosecution for burglary with explosives, claimed inconsistencies in testimony of technical director of scientific crime investigation laboratory of city police department were matters which should have been directed to attention of trier of fact and could not be urged on appeal.

5. Burglary ☞36

Fact that defendant was familiar with burglarized premises is a circumstance which may be considered by jury.

6. Criminal law ☞333, 739(2)

In prosecution for burglary with explosives burden was on defendant to prove his alibi and whether he did, was a matter solely for determination of jury.

7. Criminal law ☞683(4)

In prosecution for burglary with explosives admission of certified copy of weather report admitted in rebuttal of testimony offered by defendant to support his alibi was not error.

8. Criminal law ☞1159(2)

After conviction, all intendments are in favor of judgment and a verdict will not be set aside unless record clearly shows that on no hypothesis whatsoever is there sufficient substantial evidence to support it.

Richard J. Weller, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., and Gilbert Harelson, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Prosecution for burglary with explosives.

Defendant was convicted by a jury of the crime of burglary with explosives. He appealed from the judgment of conviction and from the order denying his motion for a new trial. Two points are urged on appeal: (1) That the evidence is insufficient to sustain the verdict; and (2) That the court erred in admitting in evidence a certified copy of a weather report.

On January 21, 1950, at about 9:00 o'clock A.M., one of the owners of the

Stembridge Bros. Market, near Colton in San Bernardino County, discovered that his place of business had been entered through a hole cut in the roof and that a rear door was open. The market had been closed about 7:00 P.M. on January 20th, at which time two safes in the office in the rear of the store had been locked and tested and the burglar alarm set.

Officers called to investigate the burglary found that a $1\frac{3}{8}$ ths inch hole had been bored in the office door and the burglar alarm wires near the hole had been cut. An empty wooden rack with three shelves was found near the rear of the store. The rack, approximately 39 inches high, had been constructed out of new lumber on the afternoon of January 20th and left outside the market near a motor room attached to the building. A "tennis shoe" footprint was found on the lower shelf of this rack and partial footprints on the other two. There was also a similar footprint in the sand about 20 feet south of the rack. About 6 feet north of the wall of the motor room, the tar paper on the roof of the market had been torn away, holes bored in two of the boards on the roof and the boards pulled off, leaving a hole approximately 20 inches in diameter in the roof. This hole opened into the surplus stock area of the market. Near the hole was a keyhole saw blade and a rope leading down into the market through the hole was fastened to a vent pipe on the roof. One of the boards had been pulled from the roof and was found about 2 feet from the hole and a short distance from it was a drain trough in which there was considerable sand. In this sand were footprints which appeared to be of the same pattern as the prints on the rack of shelves and on the ground at the rear of the market. One of the safes in the office had been broken open and a chisel and two punches were still imbedded in it. An attempt had been made to break the concrete in which the other safe was encased. Loose dynamite was removed from a hole in the concrete and a burned dynamite fuse was found on the floor near it.

On April 15th defendant's car was searched and in it the officers found a pair

of tennis shoes, a hacksaw, 15 punches, a set of steel drills, 6 cold chisels, an electric drill and a $1\frac{3}{8}$ ths inch wood bit.

Defendant, on April 16th, upon being questioned by the officers, stated that he owned the tennis shoes and all of the tools which were found in his car on that occasion and that the tools and shoes had been in the car for about a year. On May 12th, upon being again questioned, he stated that he purchased the car on January 10, 1950, and had returned that week end to Los Angeles to have a window replaced; that he then returned to San Bernardino on the week end of January 20th and took his family "on a drive" to Palm Springs. A few days later he stated that the tennis shoes found in the car were his and that they had been in his possession for approximately a year.

Ray H. Pinker, technical director of the scientific crime investigation laboratory of the Los Angeles Police Department, made extensive examinations and comparisons between appellant's tennis shoes (found in the car) and the footprints found at the scene of the burglary and between holes which he bored with the $1\frac{3}{8}$ ths inch wood bit (also found in the car) and the drill holes found in the board on the roof of the market. He also examined the dynamite removed from the hole in the concrete in which one of the safes was encased and the burned fuse. He made microscopic examinations, chemical analyses, exemplars, photographs and photomicrographs and determined as the result of his examinations and comparisons that the left sole of Mercer's tennis shoes made the footprint in the rear of the market; that the right sole of appellant's tennis shoes made the footprint on the shelf of the wooden rack found in the rear of the market; that appellant's $1\frac{3}{8}$ ths inch wood bit had been used on the board torn from the roof, and the door; and that the dynamite found in the concrete around the floor safe was Trojan dynamite.

Mrs. Mammie F. Smith, a Trojan powder distributor, whose place of business was near San Bernardino, testified that around September, 1949, she sold the defendant some Trojan dynamite powder and

everything that went with it for explosion purposes.

Defendant testified in his own behalf and denied entering the Stembridge Market on January 20th or 21st and denied that he had ever purchased dynamite from Mrs. Smith. He stated that he left San Bernardino on January 16th and arrived in Los Angeles that evening and remained there until January 22nd. Several witnesses were produced in his behalf, who testified, in effect, that the defendant was in Los Angeles on January 20th and 21st and that he and his wife played Canasta with them from 7:00 o'clock P.M., January 20th, until 4:00 o'clock the following morning and that the defendant was still in Los Angeles between 8:00 and 9:00 o'clock of the morning of January 21st. These witnesses were appellant's relatives, with the exception of one, who was a good friend.

[1-3] The evidence was sufficient to justify the verdict of the jury. While the evidence was circumstantial, it is well settled that the commission of a crime may be adequately established by such evidence. *People v. Koenig*, 29 Cal.2d 87, 91, 173 P.2d 1; *People v. Green*, 13 Cal.2d 37, 42, 87 P.2d 821. The sufficiency of the incriminating circumstances is a question exclusively within the province of the jury. *People v. Sanchez*, 35 Cal.App.2d 231, 235, 96 P.2d 169; *People v. Willison*, 116 Cal.App. 157, 159, 2 P.2d 543.

In *People v. Taylor*, 4 Cal.2d 495, 497-498, 50 P.2d 796, the only evidence connecting the defendant with the burglary was testimony by an expert that in his opinion the imprint of a heel of a man's shoe found on an invoice near the burglarized safe was made by a rubber heel from shoes found in the defendant's apartment. It was held that the evidence was sufficient to sustain the verdict of guilty. And in *People v. Lyle*, 91 Cal.App.2d 45, 46-47, 204 P.2d 356, evidence quite similar to that in the instant case was held to be sufficient to support a conviction of second degree burglary.

[4] The defendant argues that the evidence, while it admittedly shows the commission of a burglary, does not connect him

with the commission of the crime, and in this connection attacks the testimony of Mr. Pinker. The claimed inconsistencies in the testimony of Mr. Pinker were matters which should have been directed to the attention of the trier of fact and cannot be urged on appeal. *People v. Munoz*, 97 Cal.App.2d 432, 435, 218 P.2d 122; *People v. Alexander*, 92 Cal.App.2d 230, 234, 206 P.2d 657.

[5] From an examination of the record before us it is apparent that there is ample proof that the footprints made at the scene of the crime were made by the tennis shoes admittedly owned by the defendant; that the holes bored in the roof of the market and in the office door were bored by the same 1 $\frac{3}{4}$ ths inch bit found in the defendant's car; that the defendant, a few months prior to the commission of the crime, purchased and had in his possession the same kind of dynamite as that found near the safe in the market; that the wood bit and tennis shoes were contaminated with tar such as was found in the tar paper covering the roof of the market. It was also shown that the defendant was familiar with the burglarized premises, a circumstance which may be considered by the jury. *People v. Bennett*, 93 Cal.App.2d 549, 552, 209 P.2d 417. It was also shown that the defendant was familiar with explosives, having admitted that he learned their use while in the service.

[6] The burden was on the defendant to prove his alibi and whether he did, was a matter solely for the determination of the jury. *People v. Alexander*, 92 Cal.App.2d 230, 234, 206 P.2d 657. The jury was justified in rejecting the alibi evidence. The defendant testified that he purchased his automobile in Los Angeles on January 17th and it was shown that the insurance policy on the car was written as of January 10th and the contract as of January 15th. He testified that he left San Bernardino on January 16th and that before he departed that day, he paid the light and gas bills and withdrew approximately \$25.00 from his savings account in the American National Bank in San Bernardino. It was shown by the records of the bank that no withdrawals had been made from defend-

ant's savings account at any time during the month of January, 1950, and it was also shown that the payment on defendant's gas bill was made on January 12th.

Defendant stated to the officers when he was questioned on May 12th that he, with his wife and family, had driven to Palm Springs on the week end of January 20th, a statement which is entirely inconsistent with his testimony at the trial to the effect that he was in Los Angeles during that time.

[7] Defendant contends that the court erred in admitting in evidence a certified copy of a weather report. This document was admitted in rebuttal of testimony offered by the defendant to support his alibi. In this connection, a picture of defendant, his wife and children was introduced in evidence and testimony given that it was taken one sunny afternoon in Los Angeles during the week of January 17th to 22nd. Defendant testified that when this picture was taken the Cornwells, who lived in the house next door, were building a wall around the front part of their house. However, Mr. Cornwell testified that the only wall he ever constructed around his house was started in September, 1949, and completed in November of that year, and that during the course of the construction, pictures were taken next door and at that time defendant, his wife and two children were present. The weather report was admitted to show that the only afternoon the sky was clear during the week January 17th to 22nd was from Noon to 2:00 o'clock P.M. on January 17th and that all the afternoons of that week were either hazy, smoky or foggy. Appellant's contention that the admission of this document constituted prejudicial error is entirely without merit. *People v. Neal*, 97 Cal.App.2d 668, 673, 218 P.2d 556.

[8] The circumstances disclosed by the record reasonably justify the verdict of the jury and do not warrant interference with its determination. *People v. Huizenga*, 34 Cal.2d 669, 675-676, 213 P.2d 710. As was said in *People v. Gutierrez*, 35 Cal.2d 721, 727, 221 P.2d 22, 25: "After conviction all

intendments are in favor of the judgment and a verdict will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it."

Judgment and order affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



103 Cal.App.2d 202

JOHNSTON et al. v. RAPP.

Civ. 4087.

District Court of Appeal, Fourth District,
California.

March 30, 1951.

Mandamus proceeding by Eugene M. Johnston and others, against Leo D. Rapp, Auditor, County of Kern, State of California, to compel the Auditor to approve salary warrants issued to plaintiff pursuant to an increase in his salary voted by school board trustees. The Superior Court, Kern County, R. B. Lambert, J., rendered judgment for plaintiffs, and the Auditor appealed. The District Court of Appeal, Mussell, J., held that the school board had authority to increase salary of plaintiff district superintendent and principal during period for which he contracted to render services, when contract contained a provision reserving board right to increase salary during such period.

Judgment affirmed.

1. Schools and school districts ⚡63(5)

Generally, school board has a wide discretion and authority in fixing and varying salary of their employees. Education Code, §§ 13802-13804.

2. Constitutional law ⚡102(1)

Schools and school districts ⚡63(5)

Employee of school board has no vested right to any particular salary, but such salary may be changed by administrative authority. Education Code, §§ 13802-13804.

3. Schools and school districts ⚡144(4)

Where district superintendent and principal's contract contained provision that board reserved right to increase salary during its four year period, such reservation indicated that named salary was subject to increase within discretion of board and was not for a fixed amount for entire four year period, and effect of increase voted by board at end of first year of contract was to fix salary for ensuing year, and therefore did not constitute "extra compensation" for services performed and was not prohibited by constitutional provision against extra compensation or allowance. Const. art. 4, §§ 31, 32.

See publication Words and Phrases, for other judicial constructions and definitions of "Extra Compensation".

4. Administrative law and procedure ⚡763

Where act of a local or subordinate legislative body is not only legislative but discretionary in required exercise of judgment, concerning a matter committed to its care, courts cannot enter board room nor interfere at all with its action, unless board is exceeding its legislative powers, or its judgment or discretion is being fraudulently or corruptly exercised.

5. Administrative law and procedure ⚡760, 790

If reasonable minds may well be divided as to wisdom of administrative board's action, or there appears to be some reasonable basis for classification made by board, such action is conclusive, and court will not substitute its judgment for that of administrative body.

6. States ⚡119

Expenditures of public funds or property which involve a benefit to private persons are not gifts within constitutional provision prohibiting such gifts by legislature, if those funds are expended for a public purpose, which is a matter primarily for legislative discretion. Const. art. 4, § 31.

7. Schools and school districts ⚡110

Where district superintendent and principal was hired under a four year written contract by school board at salary of \$8,250 a year, a subsequent increase to

\$10,000 per year voted by board for services to be rendered because of increased duties, was not a "gift" within constitutional provision prohibiting legislative authorization of a gift of any public money to individual. Const. art. 4, § 31.

See publication Words and Phrases, for other judicial constructions and definitions of "Gift".

8. Evidence ⚡83(4)

Where board had reserved right to increase superintendent's annual salary for additional duties and responsibilities assumed by superintendent because of addition of schools, augmentation of building program or any other cause, and board minutes contained recital that there was discussion of superintendent's salary following which increase was unanimously voted, there was a presumption that board regularly performed its official duty.

9. Mandamus ⚡15

Where district superintendent's salary was increased as provided for in his contract, by school board, allegations that superintendent had not actually performed additional duties, which was given as reason for increased salary, pleaded a fact which if true did not constitute a defense or justify a denial of a writ to compel county auditor to approve salary warrant issued to superintendent pursuant to such increase.

Norbert Baumgarten and Roy Gargano, Bakersfield, for appellant.

Borton, Petrini & Conron, Bakersfield, for respondents.

MUSSELL, Justice.

Mandamus proceedings against the auditor of Kern County.

Petitioner, Eugene M. Johnston, district superintendent of schools and principal of the Taft Union High School District, and the board of trustees of said district, by these proceedings, seek a writ mandate to compel the auditor of Kern county to approve salary warrants issued to petitioner Johnston pursuant to an increase in his salary voted by the trustees.

The facts stipulated to by counsel for the respective parties are, in part, as follows: That at a regular meeting of the board of trustees of the Taft Union High School District, held on May 6, 1948, it was regularly moved, seconded and unanimously carried that the board give Mr. Eugene M. Johnston a four year written contract as district superintendent in accordance with the terms and provisions of the resolution incorporated in the minutes of said meeting; that thereafter a contract of employment was executed employing Johnston as district superintendent and principal of the Taft Union High School District for the period beginning July 1, 1948 and ending June 30, 1952; that the contract provided for an annual salary of \$8,250, payable monthly, and contained the following provisions: "The board reserves the right to increase the salary during the four year period;" that at a regular meeting of said board held on May 5, 1949, the trustees unanimously voted to increase the salary of Johnston as district superintendent from \$8,250 to \$10,000 for the school year commencing July 1, 1949, and ending June 30, 1950; that thereafter warrants were drawn for Johnston's increased salary, which warrants were presented to the Kern county auditor, who refused to approve and return them; that because of the refusal of the auditor to approve and return the warrants, Johnston has not received his salary for his services as superintendent for the periods covered by the warrants.

It was alleged in an amendment to the petition, in paragraph four thereof, in addition to the foregoing stipulated facts, that the said increase in salary was made to compensate Johnston for various increases in his duties and responsibilities and in that connection it was alleged that an extensive building and expansion program, involving an expenditure in excess of \$2,000,000, was entered upon by the district which required the constant supervision and attention of superintendent Johnston, and resulted in substantial increases in his duties and responsibilities as superintendent of the district; that in addition, the duties of the superintendent dur-

ing the year 1949 increased over the year 1948 for the reason that the enrollment in the high school, junior college and adult education division of the district increased 17.9 per cent; that the instructing staff in the Taft Union High School increased from 115 to 128; that the school budget increased from \$1,208,905.80 in the school year 1948-1949 to \$2,499,145.00 in the school year 1949-1950; that a good portion of the increase in the budget in the year 1948-1950 was to be for capital outlay and the rehabilitation of the school plant; that all of the foregoing matters resulted in the substantial increase of the duties and responsibilities of the superintendent during the school year 1949-1950 over those responsibilities he carried in the school year 1948-1949; that because of said increased responsibilities and duties of the superintendent, his salary was increased to compensate him for the increased duties.

The respondent auditor filed an answer in which he admitted the execution of the contract and alleged that the board of trustees had no legal power or authority to increase the said salary. He denied each and every allegation contained in paragraph four of the amendment to the pleadings and alleged that there were no changes or increases of any kind or character in the duties of petitioner Eugene M. Johnston for the school year commencing July 1, 1949 and ending June 30, 1950.

Motion was made by petitioners for judgment on the pleadings. This motion was granted and it is from the judgment entered pursuant thereto that the respondent auditor appeals.

The principal question here involved is whether the school board had the authority and power to increase the salary of its district superintendent and principal during the period for which he contracted to render services as such superintendent and principal when the contract contained a provision reserving to the board the right to increase the salary during said period.

[1, 2] It may be stated as a general rule that school boards have a wide discretion and authority in fixing and varying the

salary of their employees, Education Code, secs. 13802, 13803, 13804; *Fidler v. Board of Trustees*, 112 Cal.App. 296, 303, 296 P. 912; *Rible v. Hughes*, 24 Cal.2d 437, 444, 150 P.2d 455, 154 A.L.R. 137, and this court has heretofore held that such an employee has no vested right to any particular salary but the same may be changed by administrative authority. *Hodge v. Board of Education*, 22 Cal.App.2d 341, 70 P.2d 1009. This principle of law is not disputed by appellant. However, he contends that once the salary has been fixed by contract for a prescribed period of time, it may not be increased during said period because of the provisions of sections 31 and 32 of article IV of the California Constitution, the pertinent parts of which are as follows:

Section 31. "The Legislature shall have no power * * * to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever * * *."

Section 32. "The Legislature shall have no power to grant, or authorize any county or municipality authority to grant, any extra compensation or allowance to any public officer, agent, servant, or contractor, after service has been rendered, or a contract has been entered into and performed, in whole or in part, * * * and all such unauthorized agreements or contracts shall be null and void."

[3] The constitutional provision in the last mentioned section is against "extra compensation or allowance". In the instant case the contract contains the following provision: that the board "reserves the right to increase the salary during the four year period." Such a reservation clearly indicates that the named salary was subject to increase within the discretion of the board and was not, therefore, for a fixed amount for the entire four year period. The effect of the increase voted by the board at the end of the first year of the contract was to fix the salary for the ensuing year. It did not constitute extra compensation for the services performed

and was not prohibited by section 32 of article IV of the Constitution. The result obtained was the same as if a new contract had been executed for the school year commencing July 1, 1949 and ending June 30, 1950.

In *Stewart v. Eaves*, 84 Cal.App. 312, 257 P. 917, a city superintendent of schools was employed for a four year term at an annual salary of \$3,500. He resigned before the expiration of the first year and was reemployed at an annual salary of \$4,000. Before the expiration of the second year he again resigned and was reemployed at a salary of \$5,000. The court held that the board of trustees had the power to terminate the contract by mutual consent and reemploy the superintendent at the higher salary. It was there stated, 84 Cal.App. at pages 322-323, 257 P. at page 921: "* * * 'the modification or rescission of a school district contract must ordinarily be made in the manner in which the execution must have been made.'"

"There are several cases in which the Supreme Court of this state has sanctioned the modification and termination of contracts with boards of education, notably *Harris v. Central [Union] High School Dist.*, 45 Cal.App. 669, 188 P. 617; *West v. [Board of Education of] Pasadena [High School]*, 43 Cal.App. 199, 184 P. 877; and *Armstrong v. [Board of Education of City of] Vallejo*, 173 Cal. 217, 160 P. 414."

The court further said, 84 Cal.App. at pages 323-324, 257 P. at page 922: "Under the charter of the city of Santa Barbara, approved by the Legislature, the board of education is clothed with the entire control and management of the public schools in the city in accordance with the Constitution and general laws of the state, and 'is hereby vested with all the powers and charged with all the duties of such control and management.' Certainly under this language there is no limitation and nothing is left to depend upon implication. If the board has full power in the management and control of the school, it must be vested with the power to make contracts and unmake contracts."

[4,5] It is apparent that the board in the instant case could have executed a new contract with petitioner at a salary of \$10,000 per year, unless such action was arbitrary, discriminatory or unreasonable. *Rible v. Hughes*, supra, 24 Cal.2d at page 444, 150 P.2d at page 455, 154 A.L.R. 137. The record before us is devoid of any allegation of facts showing an abuse of such discretion. As was said in *Berkeley High School Dist. v. Coit*, 7 Cal.2d 132, 137-138, 59 P.2d 992, 994: "Where the act of a local or subordinate legislative body is not only legislative but also is discretionary in the required exercise of judgment, concerning a matter committed to its care, the courts 'cannot enter the board room * * * nor interfere at all with its action unless the board is exceeding its legislative powers, or its judgment or discretion is being fraudulently or corruptly exercised.' *Nickerson v. San Bernardino County*, 179 Cal. 518, 177 P. 465."

And in *Rible v. Hughes*, supra, 24 Cal. 2d at page 445, 150 P.2d at page 459, where the following language appears: "If reasonable minds may well be divided as to the wisdom of an administrative board's action, its action is conclusive. Or, stated another way, if there appears to be some reasonable basis for the classification, a court will not substitute its judgment for that of the administrative body."

[6] The argument that the compensation voted to petitioner Johnston is a gift of public money is without merit. As was said in *California Employment Stabilization Comm. v. Payne*, 31 Cal.2d 210, 216, 187 P.2d 702, 705: "It is well settled, however, that expenditures of public funds or property which involve a benefit to private persons are not gifts within the meaning of sections 22 and 31 of article IV of the Constitution if those funds are expended for a public purpose, which is a matter primarily for legislative discretion. (*County of Alameda v. Janssen*, 16 Cal.2d 276, 281, 106 P.2d 11, 130 A.L.R. 1141.)"

[7] The increased salary voted to petitioner was for services to be rendered for a public purpose and in no sense a

"gift" within the meaning of section 31, article IV of the Constitution. The petitioner is not being paid more than provided in the contract for past or future services.

[8] Appellant argues that since the answer denied that there were additional duties to be performed by plaintiff as alleged in the petition as reasons for the increased salary, that an issue of fact was presented which should have been determined at a trial of the action. However, it was stipulated that on May 5, 1949, the trustees at a regular meeting of the board voted to increase the salary of petitioner Johnston from \$8,250 to \$10,000 for the school year commencing July 1, 1949, and it appears from the pleadings that at the board meeting on May 6, 1948, the trustees reserved the right to increase the annual salary rate after the first year of service under the agreement for the subsequent years or any of them for any and all additional duties assumed by the said superintendent not otherwise imposed by law or by the rules and regulations of the said district at the time of the execution of the contract and for any and all substantial increases in the duties and responsibilities otherwise assumed by said superintendent at the time of the execution of the contract, such as increase in duties and responsibilities brought about by the increase in enrollment, addition in personnel, addition of schools, augmentation of the building program or *any other cause*, whether similar or otherwise to those enumerated. This specification of reasons for reserving the right is very broad and comprehensive in its scope. In this connection it may be observed that the minutes of the board at the meeting of May 5, 1949, at which the increase involved was voted, contain a recital that "There was a short discussion of Mr. Johnston's salary for next year", following which the increase was unanimously voted to petitioner. It thus appears that there may have been sufficient reasons for said increase discussed and acted upon in addition to those alleged in the amendment to the petition. Under such circumstances it must be presumed that the board regu-

larly performed its official duty. *Berkeley High School Dist. v. Coit*, 7 Cal.2d 132, 136, 59 P.2d 992.

[9] At best, the allegations of the answer raise an issue which was immaterial and pleaded a fact, which, if true, did not constitute a defense or justify a denial of the relief sought. If we treat all of the allegations in the answer as true, there is no statement of facts therein showing an abuse of discretion on the part of the board or that it exceeded its powers.

Under the circumstances here shown and in view of what we have here said, we see no error in the granting of the motion for judgment on the pleadings.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



IN RE FIELD'S ESTATE.

AUBRY v. BOTH et al.

Civ. 14496.

District Court of Appeal, First District,
Division 2, California.

March 30, 1951.

As Corrected on Denial of Rehearing
April 28, 1951.

Hearing Granted May 28, 1951.*

Proceedings in the matter of the estate of William Austin Field, deceased, wherein Edna F. Aubry, as administratrix of the estate of Anna Caroline Field, deceased, filed a petition against Walter Both, as executor of the last will and testament of William Austin Field, deceased and others, to revoke probate of will of William Austin Field. The Superior Court in and for the City and County of San Francisco, Lile T. Jacks, J., entered an order sustaining a demurrer without leave to amend and an order denying motion to amend, and the petitioner appealed. The District Court of Appeal, Nourse, P. J., held that the administratrix, who sued as administratrix only, was an interested person entitled to contest the will.

* Subsequent opinion 238 P.2d 578.

Order sustaining demurrer, reversed, appeal from order, denying leave to amend, dismissed.

1. Wills ⇐358

An order denying motion to amend petition to revoke probate, after a demurrer had been sustained without leave to amend, was not an appealable order. Probate Code, § 1240.

2. Wills ⇐226

Where a will contest has been started by a party beneficially interested and that party dies, right to contest survives and may be continued by executor or administrator. Probate Code, § 380.

3. Wills ⇐229

A guardian of an insane person may make election to contest will when authorized to do so by court in which guardian estate is pending. Probate Code, § 380.

4. Wills ⇐229

Administratrix of estate of deceased widow, in official capacity, was an "interested person" entitled to contest will of widow's predeceased husband. Probate Code, § 380.

See publication Words and Phrases, for other judicial constructions and definitions of "Interested Person".

G. I. Hoffman, S. Joseph Theisen, San Francisco, for appellant.

J. Clark Benson, San Francisco, for Shriners Hospital for Crippled Children, respondent.

Marion Vecki and John E. Anderton, San Francisco, for respondents Walter Both, as executor of the Last Will and Testament of William Austin Field, Walter Both and Martha S. Both.

NOURSE, Presiding Justice.

[1] W. A. Field died testate on January 6, 1949, of the age of about 80 years. His wife, of about the same age, died testate June 19, 1949. At the time of the execution of the will Mrs. Field had been declared incompetent and had been under the care of her husband as guardian. Under the terms of the will the wife was given

a life estate in all the property with the right to use all principal and income as needed. On her death certain real property was to go to two friends of the testator, the residue to the Shriner's Hospital for Crippled Children of San Francisco. Appellant was appointed administratrix with will annexed of the estate of Mrs. Field which was executed in 1900 and left all her estate to the husband who predeceased her. On July 21, 1949, within the statutory period, this administratrix filed her petition, as administratrix only, to revoke probate of the husband's will. That will had been admitted to probate on January 25, 1949. A demurrer was sustained without leave to amend and a subsequent motion to amend was denied. The appeal was taken from these orders. As the second order is not an appealable order under section 1240 of the Probate Code that appeal will be dismissed.

The controlling question is whether the petitioner, as administratrix, was an "interested person", entitled to contest the will within the terms of section 380 of the Probate Code. (The petitioner sued as administratrix only, and not in her individual capacity as an heir.)

A direct answer to the question cannot be found in any of our decisions. If the contest were confined to the charitable bequest to the Shriners' Hospital the will would not be subject to attack by this appellant under the rule of *Estate of Bunn*, 33 Cal.2d 897, 206 P.2d 635. In that case a wife left a life estate to her husband and on his death all her property to be "given to a worthy charity, selected by my executors." The executor became trustee under the will and appealed from an order awarding one-half of the proceeds of the wife's estate to collateral heirs and one-half to the administrator of the husband's estate. In reversing the decree the Supreme Court held that the collateral heirs could not challenge the bequest to charity and also that 33 Cal.2d at page 901, 206 P.2d at page 638 "Nor is the administratrix of the estate of Mrs. Bunn's husband in any better situation, for the right to contest a will on this ground has been held to be purely personal, to be narrowly restricted,

and one which does not pass to the representative of a decedent as a part of his estate. (In re Webster's Estate, 178 Misc. 342, 33 N.Y.S.2d 862.)"

[2] On the question of the right to contest on the other grounds mentioned in the Probate Code the authorities are not in harmony, one line of cases holding that the right is personal and must be exercised by an heir to the estate, another line holding that the right is a property right which may pass by assignment. Where a contest has been started by a party beneficially interested and that party dies the accepted rule, at least in this state, is that the right to contest survives and may be continued by his executor or administrator. In *Estate of Baker*, 170 Cal. 578, at page 586, 150 P. 989, 992, our Supreme Court said: "The contest of a will therefore goes to establish upon the part of the contestant that his right to property has been violated. It is in all strictness such a right as the Civil Code declares upon in section 954 in the following language:

"A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in office."

"Such then was the right which this contestant was seeking to enforce and establish at the time of her death. What are the legal consequences of that death? The question is answered by section 385 of the Code of Civil Procedure:

"An action or proceeding does not abate by the death, or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In the case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest."

It should be noted that the *Baker* case involved the question of the survival of the right to continue a contest of a will commenced before the death of the heir

whose right of action was held to have been assignable. Where, however, the party "interested" has failed to assert his right to contest the will, the right of his heirs or representatives to *initiate* such a contest has not been determined by any case in this jurisdiction. It is on such question that the authorities differ and the confusion is the more complicated because many of the cases fail to note the difference. And this is true as to some of the text writers. Note 129 A.L.R. p. 324, where, in reviewing *Campbell v. St. Louis Union Trust Co.*, 346 Mo. 200, 139 S.W.2d 935, 135 A.L.R. 316, the writer stated: "In the majority of the cases where the question has arisen it has been held that on the death of one having a right to contest a will, the right of contest survives." The statement is too general, and anything said in the *Estate of Baker* touching the right to *initiate* a contest after death of the party interested is pure dictum.

On the question of the survival of the right of contest where the heir having that right died without having exercised it, the cases are in hopeless confusion. In general those cases treating the question of the survival of the right of action (as distinguished from a cause of action where the right to sue on the cause has been exercised) rest the decision on either of these two principles—the existence of the right "at the time the will was probated", or the application of the doctrine of election—whether the party primarily interested in a contest of the will elected to take under the will or to seek to annul it by a contest.

On the first question the authorities are not in accord. *Campbell v. St. Louis Union Trust Co.*, *supra*; *Allen v. Pugh*, 206 Ala. 10, 89 So. 470; *Cain v. Burger*, 219 Ala. 10, 121 So. 17; *Storrs v. St. Luke's Hospital*, 180 Ill. 368, 54 N.E. 185; *Ligon v. Hawkes*, 110 Tenn. 514, 75 S.W. 1072; *In re Hart's Estate*, 105 Misc. 290, 172 N.Y.S. 807; 68 C.J. p. 932; 57 Am.Jur. p. 557. In *Cain v. Burger*, *supra*, the Alabama court said 121 So. at page 19, the right of contest "[n]ot being a property right, but one passing no beneficial interest by descent, it logically follows the personal representative has no cause of action as

trustee for the same beneficiaries." If we were to follow these authorities we would have to conclude that, since the collateral heirs of Mrs. Field had no interest in the estate of deceased at the time of the probate of the will they were not parties interested entitled to contest such will. And, as we have said, there is no case in this state holding to the contrary.

The contrary rule is found in the following cases in which the person directly interested had failed to start a contest and where his representative or heirs were held entitled to do it after his death. In *Dickson v. Dickson*, Tex.Com.App., 5 S.W. 2d 744 it is expressly held that every person who acquires an interest during the period provided by statute for the contest is entitled to contest the will. The Texas statute is similar to ours. To the same effect is *In re Morrow's Will*, 41 N.M. 723, 73 P.2d 1360. *Chilcote v. Hoffman*, 97 Ohio St. 98, 119 N.E. 364, L.R.A.1918D, 575 reasons that when there is a question of survival it does not make any difference whether the action has been instituted or not. When the action instituted does not lapse also the right itself without prior action must survive. In *Crawfordsville Trust Co. v. Ramsey*, 178 Ind. 258, 98 N.E. 177, it is argued in detail that a right to contest is a cause of action which survives although no court action had been instituted. In this case as in ours the person directly interested who died was insane from his inheritance to his death but the decision is not based on this fact.

In *re Siebs' Estate*, 70 Wash. 374, 126 P. 912 is a case like ours and there the insanity of the direct heir which prevented him from instituting the contest is mentioned as a ground for considering his heirs as persons interested in the original will. Considering the cases cited on both sides, it can hardly be said that there is a weight of authority one way or the other. We must then choose what we think is the best and fairest system.

Contrary to the contention of appellant there is no confusion here between the right of election by the widow to contest the will and her right to insist upon her community share or dower. Primarily it

should be borne in mind that since the case comes up on demurrer there is no evidence showing whether the property was the separate property of the husband or whether it was community property. If the latter she would have the right to insist upon her community share at anytime before probate. But if she sought the other half of the community she could do so only by a contest of the will. Such would also be the case if the property were the separate property of the husband. Manifestly, if she were in full possession of her mental faculties she might elect to accept the life estate in the whole property rather than title to one-half of the separate property under sections 221 and 223 of the Probate Code.

The cited cases on this question come from non-community property states, in many of which the right of dower obtains. Uniformly these cases hold that the right of the widow to accept or renounce the provisions of a will is a personal privilege which must be exercised by her alone. A case directly in point is *Moorman v. Louisville Trust Co.*, 181 Ky. 566, 205 S.W. 564, where it was held that acceptance by the guardian of a minor of the support provisions in the will did not preclude the minor from *electing to contest* the will in toto after she had obtained her majority. What is stated to be the majority rule in such cases is clearly put in 57 Am.Jur. p. 1040, as follows:

"It is generally agreed, the question having apparently arisen only in connection with elections by a surviving spouse for or against the will of a deceased spouse, that the right of a beneficiary to elect to accept or renounce the provisions of a will is a personal privilege which must be exercised by him during his lifetime, and may not, after his death, be undertaken by his personal representative even if the beneficiary was suffering under some legal disability, such as insanity, between the time of the testator's death and that of his own." *Flynn v. McDermott*, 183 N.Y. 62, 75 N.E. 931, 2 L.R.A.,N.S., 959, held directly that the right of the widow to take against the provisions of her husband's will was personal and did not pass to her

legal representatives. A more direct statement of the rule is found in *Vanderlinde v. Bankers' Trust Co. of Muskegon*, 270 Mich. 599, 259 N.W. 337, at page 339, where, after referring to the right of the surviving wife to elect to take under her husband's will, or to have dower, or to take her share as of an intestate estate, the court said: "The right of election is personal to the wife and is not assignable by her. In *re Service's Estate*, 155 Mich. 179, 118 N.W. 948. On her death it does not pass to her representatives or heirs. 69 C.J. 1108. Where a wife is insane or incompetent, she does not lose the right of election, but it may remain in abeyance until her restoration to competency. During her incompetency, election cannot be made by her guardian alone, but may be made by him only upon authority of the court having charge of her. In *re Estate of Andrews*, 92 Mich. 449, 52 N.W. 743, 17 L.R.A. 296. Nor does the right of election pass to the representatives or heirs of the wife on her death, although she was insane from the time election first could have been made to the time she died. *Nordquist's Estate v. Sahlbom*, 114 Minn. 329, 131 N.W. 323; *Harding's Adm'r v. Harding's Ex'r*, 140 Ky. 277, 130 S.W. 1098, Ann.Cas.1912B, 526; *Sippel v. Wolff*, 333 Ill. 284, 164 N.E. 678; [In *re*] *Arnold's Estate*, 249 Pa. 348, 94 A. 1076; 69 C.J. 1108, 1109; 74 A.L.R. 462, note."

Appellant relies on *Estate of Baker*, 170 Cal. 578, 150 P. 989, and *Estate of Johnson*, 31 Cal.App.2d 251, 87 P.2d 900, 903. The cases are clearly distinguishable. In the *Baker* case an heir had commenced proceedings for the contest of a will and had died before the contest was heard. The court held that the contest when filed became a chose in action which was a part of the heir's estate. As an asset of the estate it was held that the administrator could continue the contest.

[3] *Estate of Johnston* requires some explanation. At the close of the opinion we stated: "The appellant was the natural heir of *Ira Spangler* and as such was a proper party to contest this will * * *". An examination of the record in that case discloses that appellant had not contested

"as the natural heir" of Ira Spangler, but that she sued as his guardian, Mr. Spangler then being alive but adjudged incompetent. The point was not raised on that appeal but it must have been assumed that the guardian had obtained permission of the court having jurisdiction of the guardianship to prosecute the contest. On that basis the Johnston case is in accord with the authorities heretofore cited holding that a guardian of an insane person may make the election to contest when authorized to do so by the court in which the guardian estate is pending.

The difference between the two cases is this—in the Johnston case the natural heir was incompetent and his guardian made the election and filed the contest "as guardian"; here the incompetent heir was deceased without having made an election and her administratrix filed the contest "as administratrix."

It would appear from the foregoing that the rule of those cases from jurisdictions outside of California is that the right of a widow to contest her husband's will, to move to take her statutory share notwithstanding the will, or to accept the will as written is a right personal to the widow and must be exercised by her. However, the inequity of such a rule in a case like the present, where the widow was incompetent is clearly shown in *Mead v. Phillips*, 77 U.S.App.D.C. 365, 135 F.2d 819, 147 A.L.R. 322, where, on closely related facts, the circuit court held that such conclusion was wholly inequitable and that a court of equity, after the death of the incompetent widow, should be permitted to make the election for her. The court there said 135 F.2d at pages 830, 831; "In the case of a competent widow, it is fair to assume that she has balanced all considerations which may affect her and her heirs, and that failure to renounce constitutes a deliberate choice. In the case of an incompetent widow we know the contrary is true. In the former case, it may be fair to limit the exercise of the power to the lifetime of the widow. In the latter case it would be, not only unfair, but, an inducement to persons with interests adverse to the widow and her heirs to ex-

ercise undue influence upon the husband, secure appointment as her trustee, and then wait for her death to gather in the spoils."

[4] The inequities of the prevailing rule which are so clearly pointed out in *Mead v. Phillips* impress us here particularly since the complaint alleges that both the testator and his widow were incompetent. Under such circumstances the heirs of both should be given their day in court to protect their interests in the estate. On that basis we are more inclined to follow those cases holding that an heir of the deceased "party interested" may contest notwithstanding the failure of such party to elect to contest in his life time.

The order sustaining the demurrer is reversed.

The appeal from the order denying leave to amend is dismissed.

SCHOTTKY, Justice pro tem., concurs.

DOOLING, Justice.

I concur. There is no question of election in this case and the discussion in the main opinion of cases involving the doctrine of election only serves to complicate a simple question: Does the right to contest a will survive the death of the person initially possessing that right? The reasoning of the court in *Estate of Baker*, 170 Cal. 578, 150 P. 989 compels an affirmative answer.

It is true that in the *Baker* case the heir commenced the contest before her death, but the survival of the right of contest was not put by the supreme court on that narrow ground.

I quote from *Estate of Baker*, supra, 170 Cal. at page 586, 150 P. at page 992: "While the mere expectancy of an heir is not usually regarded as property, the moment the ancestor has died, that expectancy is changed into a vested interest in property. It becomes thus vested by virtue of the death. If, then, those rights are destroyed or impaired by an instrument which, though in form a will, is not for any reason recognized by the law a valid instrument, clearly the heir is being stripped of his vested rights to property by a paper writing

as iniquitous [in its effect] as though it were forged as indeed it may be.

"The contest of a will therefore goes to establish upon the part of the contestant that his right to property has been violated. It is in all strictness such a right as the Civil Code declares upon in section 954 in the following language:

"A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in office."

The court could not have said more clearly that the right to contest a will is a property right which survives the death of the heir.



JUNEAU SPRUCE CORP. v. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION et al.

No. 14577.

District Court of Appeal, First District,
Division 1, California.

March 30, 1951.

As Corrected on Denial of Rehearing

April 28, 1951.

Hearing Granted May 28, 1951.*

Action by the Juneau Spruce Corporation against International Longshoremen's & Warehousemen's Union, an unincorporated association, and another. Defendants' motion for change of venue from the Superior Court of Marin County to San Francisco Superior Court was denied in the Superior Court of the county of Marin, Edward I. Butler, J., and the defendants appealed. The District Court of Appeal, Bray, J., held that an unincorporated association such as a labor union is to be treated as a "corporation" in determining venue under the constitutional provision so that the union's principal place of business determine venue in action brought against the union rather than the residence of the individual members of the union.

Order reversed.

* Subsequent opinion 235 P.2d 607.

1. Corporations ⇨503(1)

Under the constitutional provision authorizing a corporation or association to be sued in the county where contract is made or is to be performed, etc., each of the clauses stating where the corporation or association may be sued is a correlative clause so that the words "such corporation" in the last clause authorizing suit at the principal place of business of "such corporation" refers back to "a corporation or association" in the first clause. Const. art. 12, § 16; Code Civ.Proc. § 395.

2. Corporations ⇨503(1)

Constitutional provision respecting venue in actions against a corporation or association is to be interpreted under present day conditions even though at time of adoption of the Constitution in 1879 unincorporated associations of those days were not included. Const. art. 12, § 16.

3. Corporations ⇨503(1)

The constitutional provision respecting venue in actions against corporations or associations manifests intent that for venue purposes a jural entity was to be treated as such rather than to break that entity into its component parts, and that if a particular unincorporated association was a legal entity of a corporation type it should be so treated. Const. art 12, § 16.

4. Associations ⇨1

As respects unincorporated associations, the entity theory is applied.

5. Trade unions ⇨1

Unincorporated associations such as labor unions are no longer comparable to voluntary fraternal orders or partnerships but they are sui generis and approximate corporations in their methods of operation and powers.

6. Trade unions ⇨9

An unincorporated association such as a labor union is to be treated as a "corporation" in determining venue under the constitutional provision so that the union's principal place of business determines venue in action brought against the union rather than the residence of the individual members of the union. Labor-Management Relations Act of 1947, 29 U.S.C.A. § 141 et

seq.; Code Civ.Proc. § 395; Const. art. 12, § 16.

See publication Words and Phrases, for other judicial constructions and definitions of "Corporation".

Gladstein, Andersen, Resner & Leonard, George R. Andersen, Lloyd E. McMurray, San Francisco, for appellants.

Thelen, Marrin, Johnson & Bridges, San Francisco, for respondent.

BRAY, Justice.

Defendants' motion for change of venue from the Superior Court of Marin County to the San Francisco Superior Court was denied. Defendants appeal.

Question Presented.

Is a labor union (unincorporated association) to be treated for venue purposes as a corporation, or does the residence of its individual members determine venue?

Facts.

In 1948 plaintiff, under the Federal Labor-Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq., recovered judgment against both defendants in the District Court for the Territory of Alaska in the sum of \$750,000 plus costs, attorneys' fees, etc., in the sum of \$10,467.55. Thereafter plaintiff sued defendants on said judgment in the Superior Court of Marin County. The first named defendant moved timely for change of venue to San Francisco, filing affidavits to the effect that its principal and only place of business is San Francisco and that the other defendant does not have an office anywhere in California, nor do any of its members reside anywhere in California. The motion was made upon the grounds that the moving defendant maintains its place of business in San Francisco and that the complaint does not allege, nor is it the fact, that the cause of action sued upon, or the obligation upon which it is based, arose in California or in Marin County or was to be performed therein. Plaintiff filed an affidavit in opposition to the motion, stating that the moving defendant is an unincorporated association consisting of several thousand members resid-

ing throughout the State of California; that among the members are two residing in Marin County, giving their names and addresses. It is stated on information and belief that there are in excess of two hundred members residing in Marin County. The court, apparently on the theory that there were members of the association residing in Marin County, denied the motion. For Venue Purposes Is a Labor Union a Jural Entity?

[1] Article XII, section 16, of the Constitution provides: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." It is conceded that Marin County does not come within the categories set forth in the first portion of section 16. Plaintiff contends that the second portion of the section permitting suit in the county of the principal place of business, applies solely to corporations, and that as to venue for unincorporated associations, section 395 of the Code of Civil Procedure, which provides for venue in the county of a defendant's residence, allows venue in the county of any member of the association. Defendants contend that the whole constitutional section applies as well to unincorporated associations, and, in any event, for venue purposes an unincorporated association of the type of a labor union should be treated as a corporation. This question has not been determined heretofore in California.

In interpreting section 16 the form in which it was quoted in *Ivey v. Kern County Land Co.*, 115 Cal. 196, at page 200, 46 P. 926, 927, is suggestive: "The constitution of this state provides as follows: 'A corporation or association may be sued (1) in the county where the contract is made (2) or is to be performed (3) or where the obligation or liability arises, (4) or the breach occurs, (5) or in the county where the principal place of business of such corporation is situated, subject to the power

of the court to change the place of trial as in other cases.' Const. art. XII, sec. 16." The form of the test above quoted emphasizes that each one of the clauses or phrases to which it gives a number (from 1 to 5) is a correlative clause, each, as much as any of the others, telling where in a given situation "A corporation or association" may be sued. This is emphasized by the concluding phrase "subject to the power of the court to change the place of trial as in other cases." This "subject to" manifestly was intended to apply equally to each of the preceding five clauses, thus reaching back through the semi-colon in the official text. This de-emphasis of the importance of the semi-colon suggests a further thought: In each of the first four numbered clauses there was no occasion to mention either "corporation" or "association," those clauses dealing with the place where the contract was made or to be performed, or where the obligation or liability arose, or the breach occurred. Only in the fifth clause was there any occasion to use a word or words mentioning or referring to "corporation or association." Admittedly, the expression "such corporation" is a bit ambiguous, but the reasonable intentment was that these words were merely words of reference to what the section was about, to wit, the place of the commencement of the suit of the designated transitory actions against a "corporation or association." Viewed simply as a term of reference, "such corporation" would seem adequately to refer back to "A corporation or association." This view receives added emphasis because of the utter lack of any apparent reason for treating an association like a corporation in the first four instances mentioned, and differently in the fifth.

[2, 3] Moreover, the section must be interpreted under present day conditions. Even if it were true, as contended by plaintiff, that at the time of the adoption of the Constitution in 1879 the unincorporated associations of those days were not included, such fact does not determine the question. The law is progressive and must necessarily be so. We must bear in mind that business conditions are never static, nor must the

law be. The unincorporated associations of 1879 are a far cry from those of today, and particularly is this so of labor unions. In interpreting the constitutional provision, if the association of today is more nearly akin to corporations than to the associations of those days, it is imperative that it be treated as a corporation. An analysis of section 16 as a whole shows that it was intended that for venue, a jural entity was to be treated as such rather than to break that entity into its component parts. If, then, the particular unincorporated association is a legal entity of a corporation type, it should be so treated. That it is such is shown by the legislation and decisions concerning it.

Section 388 of the Code of Civil Procedure provides that when two or more persons, associated in any business, transact such business under a common name, the associates may be sued by such common name, and the summons may be served on one or more of the associates. The judgment in such action shall bind the joint property of all the associates and the individual property of the parties served, in the same manner as if all had been named and sued upon their joint liability. In interpreting this section, in *Artana v. San Jose Scavenger Co.*, 181 Cal. 627, at pages 629, 630, 185 P. 850, 851, the court said: "The association, whether it be a copartnership or other association of individuals transacting business under a common name, is, for the purposes of the section, *a legal entity distinct from its members, and it is this legal entity which is in this action the sole party defendant.*" (Emphasis added.) If, as there held, the association, a legal entity, is the sole party defendant, how can it be broken up into terms of its membership and venue be determined by the residence of any of its members?

[4] As said concerning unincorporated associations in *Jardine v. Superior Court*, 213 Cal. 301, 309, 2 P.2d 756, 760, 79 A. L.R. 291: "In California, the entity theory has been established by a number of decisions. [Citing cases.]" In *Armstrong v. Superior Court*, 173 Cal. 341, 159 P. 1176, it was held that section 388 applied to a

labor union. Plaintiff contends that the language in the *Jardine* case, 213 Cal. at page 310, 2 P.2d at page 760, "So far as constitutionality is concerned, we see no distinction between such a statute applied to partnerships and to other unincorporated associations," supports their contention that as to venue, associations are to be treated as partnerships as to whom it has been held that venue depends upon residence of the individual partners. The question in the *Jardine* case was not one of venue but whether section 388 was constitutional in providing for judgment against the joint property of all the associates of an unincorporated association without serving all its members. The court pointed out that its constitutionality had long been established in this state. A second objection was that the Los Angeles Stock Exchange was not the type of association to which section 388 applied. In holding that it was, the court said, 213 Cal. at page 320, 2 P.2d at page 764, "there is certainly no reason to restrict its application to any one class of associations doing business. It abrogates a rule unsuited to present conditions, and should receive a liberal construction." This liberality of construction should be applied to section 16, as, logically, in an action against an association, such as a labor union, having members scattered all over the state, it would be ridiculous to allow venue in any county in which one of the members might happen to reside. The statement in the *Jardine* case that as to the constitutionality of the act there is no difference between an association and a partnership, cannot be construed to mean that as to other matters there is no distinction between them.

Plaintiff contends that defendants' contention confuses jurisdiction with venue, pointing out that actually any superior court in California would have jurisdiction if plaintiff saw fit to file the suit there, and no proper motion for change of venue were made. However, in *Krogh v. Pacific Gateway & Development Co.*, 11 Cal. App. 237, 104 P. 698, it was held, in effect, that section 16 applies to venue, because the court stated that where a corporation

Cal.Rep. 229-230 P.2d-15

is sued in a county other than those mentioned in the first part of the section, the corporation, under the second portion of the section, has the right to change the venue to the county of its principal place of business. It held that a corporation was entitled to a change of venue also under section 395 of the Code of Civil Procedure. Thus, the question here is one of venue and its solution depends upon whether the association is to be treated as a corporation and therefore entitled, under section 16, or section 395 of the Code of Civil Procedure, to a change to its place of residence, i. e., its principal place of business, or treated as lacking an entity, and hence under section 395, venue lies in the county of any member.

A case which is quite persuasive on the subject is *Sperry Products v. Association of American Railroads*, 2 Cir., 132 F.2d 408, 145 A.L.R. 694 (L. Hand, J.). The effect of this case on the question before us is twofold: (1) In interpreting section 16 of the Constitution, an unincorporated association must be considered a jural entity similar to a corporation for procedural and venue purposes; and (2) in applying section 395, residence of an unincorporated association of the type under consideration here is its principal place of business rather than the residence of its individual members. There the plaintiff appealed from a judgment dismissing its complaint for the infringement of a patent, on the ground that the action had been brought in the wrong district. The action was brought against a corporation, an individual and an unincorporated association—the Association of American Railroads, comprised of two hundred railroads. For reasons unimportant here, the other two defendants were disregarded, and the action treated as one against the association alone. Section 109, Title 28 U.S.C.A., as it then read, provided that in patent cases, jurisdiction lay in the district court in the district in which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement "and have a regular and established place of

business." The district selected by plaintiff for the action was one in which members of the association were "inhabitants." Defendant moved to dismiss on the ground that it was not an inhabitant¹ of the district, nor was its principal place of business there. The trial court, as in our case, held the venue proper as one or more of its members was an inhabitant of the district, and dismissed the action. On appeal to the United States Circuit Court of Appeals, the judgment of dismissal was reversed. The court pointed out that in *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975, it was held that an unincorporated association (a labor union) could be sued in a federal court as an entity without joining all its members, although theretofore the contrary had been the rule. It then said that although for diversity of citizenship the courts would look to the membership, "for most purposes the law still looks at such associations as mere aggregations of individuals. Since, however, for the purpose of suit it has come to regard them as jural entities, we can see no reason why that doctrine should not be applied consistently to other procedural incidents than service of process, and venue is one of such incidents. Certainly that promotes simplicity, and simplicity was one of the conveniences which induced the original change. Therefore in construing § 48, Jud.Code, 28 U.S.C.A. § 109, in its application to an unincorporated association it seems inevitable that we should attribute an 'inhabitancy' to it as though it were a single jural person and not an aggregate." 132 F.2d 408, 411, page 697 of 145 A.L.R. It then went on to state that "It is not altogether clear a priori how to attribute location to a collective venture even after one has called it a jural person." 132 F.2d 408, 411, page 697 of 145 A.L.R. Then, "It does not violate common understanding to think of a common venture or enterprise as having spatial position wherever any part of those activities take place by which it is realized. That is a practicable test and it is really the only practicable test. To say that it exists wher-

ever any of its members are is plainly untenable, for they all have their individual activities which are altogether alien to the enterprise. To say that the enterprise exists wherever and whenever any of the members think about it would be childish." 132 F.2d 408, 411, page 698 of 145 A.L.R. The court then went on to determine of what district the association is an inhabitant. Pointing out that "inhabitant" has the same meaning as "resident" and that as to a corporation such words mean its principal place of business, it then holds that as an unincorporated association is a jural entity, a suit under section 109 above-mentioned must be brought either at its principal place of business or at any of the regular and established places of its business where it may have infringed a patent.

[5] Plaintiff contends that the entity theory with respect to unincorporated associations has not been extended to all matters. The cases cited by plaintiff on this point follow. In *Ginsberg Tile Co. v. Faraone*, 99 Cal.App. 381, 278 P. 866, it was held that section 388 does not permit an action to be instituted by a partnership in the common name. See also *Kadota Fig Ass'n v. Case-Swayne Co.*, 73 Cal.App.2d 797, 167 P.2d 529 where the trial court found plaintiff to be a partnership, while the reviewing court stated the record was not clear on the subject. In *Reed v. Industrial Acc. Comm.*, 10 Cal.2d 191, 73 P.2d 1212, 114 A.L.R. 720, it was held that as to a workmen's compensation insurance policy issued to one of the members of the partnership and covering employees of the partnership, the latter was not a distinct unit separated from its members. The court stated that apart from exceptional situations, a partnership is not considered an entity but an association of individuals. These cases were referring to partnerships and not to unincorporated associations. In *Grand Grove U. A. O. D. of California v. Garibaldi Grove*, 130 Cal. 116, at page 119, 62 P. 486, 487, an action concerning the regularity of a resolution of the Grand Grove dissolving the subordinate Grove, the court stated: "Associations of this

1. "Inhabitant" is used here in the same sense as "resident" in our venue statutes.

character are not bodies politic or corporations, nor are they recognized by the law as persons. They are mere aggregates of individuals, called for convenience, like partnerships, by a common name." The court was not considering a question at all similar to the one in the case at bar. Moreover, it must be pointed out that there is a vast difference in resemblance to a corporation between a labor union and a fraternal organization. While there is authority to the effect that the law relating to labor unions is the law applicable to social and fraternal orders, *Greenwood v. Building Trades Council*, 71 Cal.App. 159, 233 P. 823, that rule by no means is always applicable. This traditional view grew up when labor unions were small unimportant organizations, and is no longer in accordance with the facts. When the tremendous growth of labor unions in recent years is considered, together with their growth in importance and power, it would seem that in many respects labor unions more nearly resemble corporations than they do voluntary social or fraternal orders, or partnerships. In fact, as early as 1888 it was recognized in this state that "Courts will interfere for the purpose of protecting property rights of members of unincorporated associations in all proper cases, and, when they take jurisdiction, will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character." *Otto v. Journeymen Tailors' P. & B. Union*, 75 Cal. 308, 17 P. 217, 219. It is obvious that such organizations are no longer comparable to voluntary fraternal orders or partnerships; that they are sui generis, and approximate corporations in their methods of operation and powers. This being so, at the procedural level at any rate, wherever it can be done without violation of some rule of law, the ends of justice will be more properly served if the courts apply to such organizations the rules applicable to corporations rather than the rules applicable to voluntary fraternal orders or partnerships. While there may be associations which are more similar to partnerships than corporations, as the *Venice Road Race Association* was held to be in *Leake v. City of Venice*, 50 Cal.App. 462, 195 P. 440, the modern

labor union is far more similar to a corporation than to a partnership. To consider such organizations under present day conditions as mere social or fraternal orders or partnerships is to close one's eyes to the realities now existing.

Cases like *Old Rivers Farms Co. v. Roscoe Haegelin Co.*, 98 Cal.App., 331, 276 P. 1047, in which, in an action brought against the company and also its individual members, the court held that a voluntary unincorporated association doing business under a written agreement of trust as a stock corporation, but which had not organized under the laws as to corporations, was not a corporation within the meaning of certain sections of the Constitution defining corporations and providing proportionate liability for stockholders; and *Stitzinger v. Truitt*, 81 Cal.App. 502, 253 P. 971, where the court found that a so-called "syndicate" which purported to be a trust was in fact a copartnership, are obviously not in point.

In *Scott v. Donahue*, 93 Cal.App. 126, 269 P. 455, an action was brought by the plaintiff on behalf of himself and some two hundred associates to recover Liberty bonds, the property of a local lodge of the Brotherhood of Railroad Trainmen. The parent organization was brought in as a defendant. The parent organization had revoked the charter of the local and the action was to determine who was entitled to the bonds originally belonging to the local. In discussing the ownership of the bonds the court quoted the language hereinbefore quoted from *Grand Grove U. A. O. D. of California v. Garibaldi Grove*. This language, plaintiff contends, supports its position. No question of procedure, or question similar to the one here was presented in that case. Obviously, as between the unincorporated association and its members, it has no being apart from its members, but that does not mean that in its relationship to others it may not have a legal entity.

[6] While section 16 is susceptible to the construction that the second clause purposely omitted associations, such a construction is not compelled, and a more liberal construction is entirely reasonable

and more in accord with present day needs. In any event, a reasonable application of section 395 providing venue in the residence of a defendant, is that the residence of a labor union unincorporated association is at its principal place of business rather than at the residence of its individual members.

The order is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.



103 Cal.App.2d 331

BENJAMIN v. STANISLAUS TITLE CO.
MURRAY v. BENJAMIN et al.

Civ. 7837.

District Court of Appeal, Third District,
California.

April 9, 1951.

Lloyd G. Benjamin brought action against Stanislaus Title Company to recover real estate commission being held in escrow by defendant, wherein the defendant filed its affidavit of interpleader and to have William H. Murray and another, copartners, doing business under the firm name and style of Murray-Huffman, substituted as defendant, and thereafter the partnership appeared and filed a cross-complaint against the plaintiff and another. From a judgment of the Superior Court, Stanislaus County, B. C. Hawkins, J., in favor of the substituted defendants and cross-complainants, plaintiff and other person who was named with plaintiff as cross-defendants appealed. The District Court of Appeal, Peek, J., held that evidence established plaintiff's right to recover the real estate commission being held in escrow.

Judgment reversed and cause remanded with instructions.

Brokers ◀86(1)

Evidence established plaintiff's right to recover real estate commission being held in escrow and that cross-complainants

established no right to any part of the commission on ground that sale of real estate was consummated while prior listing of real estate with cross-complainants was still in effect.

Rodin & Nelson, Turlock, for appellant.

Cleary & Zeff, Modesto, for respondent.

PEEK, Justice.

This is an appeal by plaintiff from a judgment in favor of defendants and cross-complainants Murray and Huffman who were substituted in place of Stanislaus County Title Company in the action filed by plaintiff against said defendant for the recovery of certain real estate commission then held in an escrow by said defendant.

Following the institution of said action by plaintiff, the title company, through its president, filed its affidavit for "Interpleader of Third Persons" wherein it was averred that it held the sum of \$940.00 in an escrow; that certain realtors, doing business under the name of Murray-Huffman, were claiming said sum as a commission for the sale of real property belonging to one Peterson and prayed that the court order said sum deposited with the court and that said partnership be substituted as defendant in the place of said title company. Thereafter the partnership appeared and alleged by cross-complaint that on November 20, 1946, it had taken a listing contract for the sale of a ranch belonging to said Peterson; that the partnership was a member of Modesto Multiple Listing Service, an organization whose members agreed that in the event of the sale of property listed with the service the broker procuring the listing is entitled to forty per cent of the commission and the balance thereof goes to the broker effecting the sale subject to a small percentage which is deducted for the expenses incident to the operation of the service; that Mary Benjamin, while employed as a saleswoman for one Goodin, a member of the listing service, obtained information concerning Peterson's listing with Murray-Huffman; that while said

listing was still in full force and effect she obtained another listing from Peterson for her son, a realtor not a member of the listing service, and thereafter sold the property as saleswoman for her son, plaintiff herein. Attached to the cross-complaint as a part thereof is a copy of the Murray-Huffman listing which shows that it was irrevocable for the first sixty days and thereafter revocable on five days written notice until the expiration of four months after which it was automatically canceled. Following the order of the court overruling plaintiff's general and special demurrer to the cross-complaint appellants answered denying any right of respondents to the sum in question; denied that respondents' listing was in effect at the time of the sale or that she knew of the listing while working for Goodin and alleged that the listing in question was not obtained until approximately a month after commencing work with her son. At the conclusion of the trial the court, over appellants' objection, granted respondents' motion to amend to conform to proof. The amendment consisted of the allegation that at the time the listing was obtained from Peterson by Mary Benjamin it was agreed between them that the second listing was subject to the prior rights of the parties under the first listing until that document was canceled by the previously mentioned five day written notice. In other words in the event of a sale while that listing was still in effect appellants would recognize respondents' superior rights to a commission.

The findings of fact in general follow the allegations of the cross-complaint and amendment. The judgment, however, appears to have been based largely on the finding concerning the agreement between Mary Benjamin and Peterson.

Our examination of the record leads to the conclusion that said finding is completely without support. The evidence most favorable to respondents is the testimony of their own witness, E. W. Peterson.

The only other testimony concerning the execution of the second listing was that of Mary Benjamin who stated that Peterson

told her of the Murray-Huffman listing, but she denied that he also told her that his listing with her "could not take effect" until the five day period provided for in the first listing had expired.

Upon re-direct examination by counsel for respondents, Peterson testified as follows:

"Q. What I am trying to inquire into is this, Mr. Peterson: At the time you executed these agreements you knew and so told Mrs. Benjamin that until the five days was up no agreement would be effective that would cut out a commission of Murray-Huffman? A. There was *nothing* said about *any commission* on the release, *we never discussed that at all.* (Emphasis added.)

* * * * *

"Q. In talking to her, Mr. Peterson, did you point out the fact that if a sale was concluded before the end of the five day notice, that Murray-Huffman would be entitled to their part of the commission and that your papers, therefore, could not become effective until after that five days?

"Mr. Nelson: Your Honor, he answered that, in effect, when he said he did not discuss the matter of commission to Murray-Huffman with Mrs. Benjamin.

"The Court: Well, you can answer it if you remember.

"A. Well, the only discussion on the matter was, there was still five days to elapse before we could consummate a deal; that was the whole discussion, because under the terms of the agreement already, Murray and Huffman was covered."

In other words it clearly shows that plaintiff and cross-defendants pleaded and proved an agency agreement with Peterson and a sale pursuant to that agreement, by which they became entitled to a commission of five per cent of the purchase price, \$940.00 of which remains unpaid, which sum has been deposited in court by the Stanislaus Title Company. Respondents and cross-complainants established no right whatsoever to any part of the Benjamins' commission. The sum total of the evidence introduced by them proved nothing more

than a prior exclusive agency agreement with Peterson, under which they were entitled to a commission of five per cent of the selling price of the ranch in the event the same was sold during the life of the agreement, no matter by whom the sale was effected.

The judgment is reversed and the cause is remanded with instructions to the trial court to enter judgment in favor of plaintiff and cross-defendants.

ADAMS, P. J., and VAN DYKE, J.,
concur.



HOGAN v. INGOLD et al.

Civ. 18306.

District Court of Appeal, Second District,
Division 2, California.

April 5, 1951.

Rehearing Denied April 16, 1951.

Hearing Granted May 31, 1951.*

Stockholders' derivative action by Clarence C. Hogan, against R. F. Ingold, and others, in behalf of the Washington Holding Company, a California corporation. After death of plaintiff during pendency of action, Gladys Hogan, as executrix of plaintiff's estate, was substituted as plaintiff. The Superior Court of Los Angeles County, Arnold Praeger, J., entered an order dismissing complaint and plaintiff appealed. The District Court of Appeal, McComb, J., held that where stockholder's derivative action had been filed after the effective date of the statute requiring the stockholder in a derivative suit to provide security for costs, but effective date of statute was after the acts of alleged fraud had taken place, requiring plaintiff to post security did not transgress the due process clause or contract clause of the federal constitution.

Affirmed.

1. Corporations $\S$ 320(4)

The statute requiring that a stockholder in a stockholder's derivative suit allege that he was a shareholder at the time of the occurrence of the wrongs complained

of precludes a shareholder from suing for wrongs occurring before he became shareholder. Corporations Code, $\S$ 834, and (a) (1, 2), (b).

2. Constitutional law $\S$ 185, 317 Corporations $\S$ 320(12)

Where stockholder's derivative action was filed after the effective date of the statute requiring a stockholder to provide security for costs in derivative action, but statute became effective after the acts of alleged fraud had taken place, requiring stockholder to provide security as required by statute did not transgress the due process clause or contract clause of the federal constitution. Corporations Code, $\S$ 834; U.S. C.A.Const. art. 1, $\S$ 10; Amend. 14.

McLaughlin & Casey, Los Angeles, by James A. McLaughlin, Los Angeles, for appellant.

Flint & MacKay, William R. Flint, and Roscoe C. Andrews, all of Los Angeles, for respondent R. F. Ingold.

J. D. Willard, Los Angeles, for respondents, Neal A. Shoor, Herbert E. Tanner, Otto N. Powell and James M. Hunt.

Hunter & Liljestrom, Los Angeles, for respondent R. B. Jenkins.

McCOMB, Justice.

This is an appeal from an order dismissing as to six defendants a stockholder's derivative suit which was filed in behalf of Washington Holding Company, a California corporation. The six defendants, as to whom the dismissal was ordered, were officers and directors of that corporation who were alleged to have participated in the acts of mismanagement and fraud as charged in the complaint.

The action was filed on December 9, 1949, by appellant's husband, Clarence C. Hogan, who died on January 26, 1950. Thereafter on March 10, 1950, appellant as executrix of plaintiff's estate was substituted as plaintiff.

In the meantime respondents had filed motions that plaintiff be required to furnish security as a condition to the maintenance of the action in accordance with the provisions of section 834 of the Corporations

* Subsequent opinion 243 P.2d 1.

Code which provides in substance as follows:

[1] 1. It requires that such stockholder allege that he was a shareholder at the time of the occurrence of the wrongs complained of. This in effect precludes a shareholder from suing for wrongs occurring before he became such shareholder. (Sec. 834(a)(1).)

2. It requires the shareholder to allege his efforts to secure action by the board of directors on account of such wrongs. This is substantially the same as the case law existing prior to the enactment of such statute, except that it requires that such directors be given a copy of the proposed complaint before it is filed, or that the pleadings explain why this was not done. (Sec. 834(a)(2).)

3. After the complaint is filed, it permits the defendants to move for security as a condition to proceeding with the action, and it provides that if the hearing on such motion indicates that there is no reasonable probability of the action's benefiting the corporation, then the plaintiff shareholder shall be required to provide security to reimburse such defendants for their cost and attorneys' fees in defending the action. (Sec. 834(b).) If the security is not furnished as required by the court, the action shall be dismissed. (Sec. 834(b).)

It also provides that when a motion for security is filed all other proceedings shall be stayed until the motion is determined.

This section had become effective slightly more than a month prior to the filing of the present action and after the acts of alleged fraud had taken place.

The trial court granted the motion ordering plaintiff to furnish security and upon failure of plaintiff to do so dismissed the action.

[2] *Question: Do the provisions of section 834 of the Corporations Code, requiring appellant to provide security to reimburse respondents for their costs and attorney's fees in defending this stockholders' derivative action, apply to appellant?*

Yes. Appellant contends that to construe section 834 of the Corporations Code retroactively would constitute a violation of her constitutional rights in that it transgresses the due process clause and contract clause of the Constitution of the United States. Const. art. 1, § 10; Amend. 14.

Such contention is devoid of merit in view of the decision of the United States Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528, wherein such court held a similar statute of the State of New Jersey valid and not subject to the constitutional objections which appellant makes. Mr. Justice Jackson, speaking for the Supreme Court, 337 U.S. at page 551, et seq., 69 S.Ct. at pages 1228, 1229, says:

"It is said that this statute transgresses the Due Process Clause, Amend. 14, by being 'arbitrary, capricious and unreasonable; the Equal Protection Clause by singling out small stockholders to burden most heavily; that it violates the Contract Clause, art. 1, § 10, cl. 1, and that its application to pending litigation renders it unconstitutionally retroactive.

"The contention that this statute violates the Contract Clause of the Constitution is one in which we see not the slightest merit. Plaintiff's suit is entertained by equity largely because he had no contract rights on which to base an action at law, and hence none which is impaired by this legislation.

"In considering whether the statute offends the Due Process Clause we can judge it only by its own terms, for it has had no interpretation or application as yet. It imposes liability and requires security for 'the reasonable expenses, including counsel fees which may be incurred' (emphasis supplied) by the corporation and by other parties defendant. The amount of security is subject to increase if the progress of the litigation reveals that it is inadequate or to decrease if it is proved to be excessive. A state may set the terms on which it will permit litigations in its courts. No type of litigation is more susceptible of regulation than that of a fiduciary nature. And it cannot seriously be said that a state makes such

unreasonable use of its power as to violate the Constitution when it provides liability and security for payment of *reasonable* expenses if a litigation of this character is adjudged to be unsustainable. It is urged that such a requirement will foreclose resort by most stockholders to the only available judicial remedy for the protection of their rights. Of course, to require security for the payment of any kind of costs or the necessity for bearing any kind of expense of litigation has a deterring effect. But we deal with power, not wisdom; and we think, notwithstanding this tendency, it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met. * * *

"The contention also is made that the provision which applies this statute to actions pending upon its enactment, in which no final judgment has been entered, renders it void under the Due Process Clause for retroactivity. While by its terms the statute applies to pending cases, it does not provide the manner of application; nor do the New Jersey courts appear to have settled what its effect is to be. Its terms do not appear to require an interpretation that it creates new liability against the plaintiff for expenses incurred by the defense previous to its enactment. The statute would admit of a construction that plaintiff's liability begins only from the time when the Act was passed or perhaps when the corporation's application for security is granted and that security for expenses and counsel fees which 'may be incurred' does not include those which have been incurred before one or the other of these periods. We would not, for the purpose of considering constitutionality, construe the statute in absence of a state decision to impose liability for events before its enactment. On this basis its alleged retroactivity amounts only to a stay of further proceedings unless and until security is furnished for expense incurred in the future, and does not extend either to destruction of an existing cause of action or to creation of a new liability for past events.

"The mere fact that a statute applies to a civil action retrospectively does not render it unconstitutional. *Blount v. Wind-*

ley, 95 U.S. 173, 180, 24 L.Ed. 424 [426]; *Western Union Tel. Co. v. Louisville & N. R. Co.*, 258 U.S. 13, 42 S.Ct. 258, 66 L.Ed. 437; *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628. Looking upon the statute as we have indicated, its retroactive effect, if any, is certainly less drastic and prejudicial than that held not to be unconstitutional in these decisions. We do not find in the bare statute any such retroactive effect as renders it unconstitutional under the Due Process Clause, and of course we express no opinion as to the effect of an application other than we have indicated."

In view of the foregoing opinion the trial judge was correct in requiring security pursuant to the provisions of section 834 of the Corporations Code.

Affirmed.

MOORE, P. J., and WILSON, J., concur.



103 Cal.App.2d 250

BARTLETT et al. v. ROGERS et al.

Civ. 17823.

District Court of Appeal, Second District,
Division 1, California.

April 3, 1951.

Rehearing Denied April 23, 1951.

Hearing Denied May 28, 1951.

Action by Clara Blum Bartlett and another against Melville E. Rogers and another for specific performance of contract to disclaim any interest in country club and assets of a water company, purchased pursuant to a previous written contract between the parties, and for an injunction restraining defendants from interfering with subject matter of contract. The Superior Court of Los Angeles County, David Coleman, J., rendered a judgment for plaintiffs and from such judgment and order denying motion for new trial, defendants appealed. The District Court of Appeal, Hanson, J., pro tem, held that action was not one to recover possession of or quiet title to realty within constitutional provision requiring actions affecting realty

to be brought in county in which realty is situated and that complaint stated a cause of action.

Judgment affirmed and appeal from order dismissed.

1. Venue ⇨5(3)

Action for specific performance of contract to disclaim any interest in realty and to enjoin defendants from interfering with the subject matter of contract was not an action to recover possession of or quiet title to realty within constitutional provision requiring actions affecting realty to be brought in county in which realty is situated. Const.art. 6, § 5.

2. Public service commissions ⇨6.11

The Public Utilities Commission has power to refuse to approve a sale or transfer of assets of a public utility as between a seller and buyer, but such power is not exclusive of or equal to that of the courts.

3. Public service commissions ⇨6.11

A transfer or sale of assets of a public utility is void as between buyer and seller unless and until Public Utilities Commission issues its order of approval, but such fact does not bar parties from entering into contracts for the sale or transfer of assets of a public utility.

4. Public service commissions ⇨6.11

The rights, duties and liabilities that accrue from a contract for sale or transfer of assets of a public utility are questions for the courts and not the Public Utilities Commission to determine.

5. Public service commissions ⇨19½

In action for specific performance of contract to disclaim any interest in assets of a public utility, court had jurisdiction to order defendants to execute documents to transfer assets of utility to the extent of their interest therein and, if such transfer due to absence of approval of Public Utilities Commission, should be ineffective to vest plaintiffs with title, it was a matter of no concern to defendants.

6. Injunction ⇨118(1)

Specific performance ⇨114(2)

Complaint setting up written contract for purchase and operation of a country

club and water company by plaintiffs and defendants and alleging that the parties had thereafter entered into a new contract, whereby defendants agreed to disclaim any interest in the property stated a cause of action for specific performance of new contract and for an injunction restraining defendants from interfering with subject matter of contract.

7. Contracts ⇨22(2)

One is bound by a written contract which he has not signed, if by signed letter he expressly refers to and adopts such contract.

8. Injunction ⇨128

Specific performance ⇨121(3)

In action for specific performance of written contract to disclaim any interest in country club and water company and for an injunction restraining defendants from interfering with subject matter of contract, evidence sustained findings in favor of plaintiffs.

9. Specific performance ⇨121(8)

Usury ⇨117

In action for specific performance of written contract to disclaim any interest in country club and water company, evidence failed to sustain contentions that original agreement between the parties for purchase and operation of the property was tainted with usury and that plaintiffs had practiced duress, coercion and compulsion upon defendants.

10. Appeal and error ⇨110

Order denying a new trial was not appealable.

Geo. W. Rochester, Los Angeles, for appellants.

Steiner A. Larsen and Garvin F. Shallenberger, Los Angeles, for respondents.

HANSON, Justice pro tem.

This is an unmeritorious appeal from a judgment rendered in an action seeking specific performance of a contract and to enjoin the appellants from interfering with its subject matter.

The facts which are here material deduced from the evidence most favorable to the respondents are readily stated. Early in 1948 or late in 1947 the defendant-appellant Melville Rogers learned that the Los Serranos Country Club and the property of a water company which supplied water to it could be purchased as a unit for approximately \$150,000. As neither appellant Melville Rogers nor his wife Consuelo were possessed of any capital whatsoever he sought to interest his brother Kenneth A. Rogers, a plaintiff-respondent, in purchasing the property. Kenneth, unlike his brother, was possessed of considerable financial means. Moreover, he was a golfer of some renown and retired from business and hence was attracted by the possibilities of the property. However, as the down cash payment required was about \$90,000 and Kenneth could not raise more than half that sum without unduly sacrificing some of his assets, Melville sought and found in plaintiff-respondent Bartlett a person who was willing to supply one half the funds needed. Before the purchase was consummated the plaintiffs and the defendant Melville agreed that the latter should be employed by the plaintiffs to manage the country club at a salary of \$6,000.00 annually for his services and that of his wife plus 20% of the net annual profits in excess of \$10,000.00 and free living quarters; that the balance of the net profits should be paid to the plaintiffs until such time as the moneys invested in the project by plaintiffs was repaid to them with interest at 5%; that when this was accomplished the two plaintiffs and the defendant Melville were to own the properties in equal shares. At the suggestion of a third party—one McCormick, a recent arrival from Europe who posed as a doctor, but had no such degree, and was employed by the plaintiff Bartlett as her "investment counselor," the parties concluded that the defendant Melville should execute a note to the plaintiffs in the sum of \$90,000 to evidence the investment of the plaintiffs and that it should be payable only out of the net profits of the country club operation; that title should be vested of record in

Melville; that the latter should execute and deliver grant deeds of the property to the plaintiffs so that they could record them at any time they chose to do so. To carry out this agreement Melville, who was not an attorney, drafted an ambiguous contract that was supposed to carry out the terms thus agreed upon. The contract, as drafted, was executed by all the parties and is known in the record as Exhibit "A." After the properties were acquired and documents had been executed and delivered as contemplated by the contract, the defendant Melville took over the management of the property. The anticipated profits did not materialize and the plaintiffs being dissatisfied with the manner in which Melville managed the property demanded that he leave it; that he accept \$2,000.00 for all his right, title and interest in the property and for all his claims against the plaintiffs under a threat by the plaintiffs that unless he did so they would institute actions in court against him. As a result of letters passing between the parties they reached an agreement that the defendant would leave the country club and disclaim any rights he had therein or against the plaintiffs on June 6, 1949, upon the payment of \$2,000 unless in the meantime he was able to pay to plaintiffs what they had invested in the properties. If he did so he was to be invested with all the rights plaintiffs had in the properties. As the defendant Melville failed in his endeavors, the plaintiffs tendered to him the sum of \$2,000, recorded the deeds the defendant had originally executed to them, and demanded the disclaimers. The defendant refused to accept the \$2,000 or otherwise comply with the demands of the plaintiffs. Accordingly, they instituted the instant action in the court below resulting in the judgment heretofore narrated.

The appellants challenge the judgment upon several grounds, which we shall discuss briefly in the order they are made.

[1] Appellants' first contention that as the real estate involved was located in San Bernardino County the suit should have been instituted in that county and hence

that the court was without jurisdiction, is without merit. The action was for specific performance and for injunction and hence did not fall within the inhibitions of Section 5 of Article VI of the Constitution. *Cohen v. Hellman Commercial T. & S. Bank*, 133 Cal.App. 758, 24 P.2d 960.

[2-5] Appellants next contend that the court was without jurisdiction to order Melville to execute documents which would transfer from him to the plaintiffs the title to the assets of the water company, because it was a public utility and, so the argument runs, within the exclusive jurisdiction of the Public Utilities Commission. Unquestionably that body has power to refuse to approve a sale or transfer as between a seller and a buyer, but its power is not exclusive of or equal to that of the courts. As between individuals or other entities such as corporations a transfer or sale of the assets of a public utility is void unless and until the Public Utility Commission issues its order of approval. However, that fact does not bar parties from entering into contracts for the sale or transfer of the assets of a public utility. Moreover, the rights, duties and liabilities that accrue from such a contract is for the courts to determine and not the commission. The court was vested with the power to order the defendants to execute documents to transfer the assets of the utility to the extent of their interest therein. If any such transfer proved ineffective to vest the respondents with title, for lack of an order by the Public Utilities Commission, it is a matter of no concern to appellants. In *Hanlon v. Eshleman*, 169 Cal. 200, 146 P. 656, 657, the court said: "With the rights of an intending purchaser the commission has nothing to do. Nor has it power to determine whether a valid contract of sale exists, or whether either party has a legal claim against the other under such contract. These are questions for the courts, and not for the railroad commission, which is merely authorized to prevent an owner of a public utility from disposing of it where such disposition

would not safeguard the interests of the public."

Accordingly, it is plain the court was vested with jurisdiction to make the order it did and it was not necessary for the plaintiffs to allege any fact pertaining to the commission's jurisdiction.

[6,7] The next contention urged by appellants is that no cause of action is stated. We find no merit in the contention. The complaint avers that the parties originally entered into a written contract (Exhibit "A"); that thereafter the plaintiffs declined to carry out the terms of that contract and proposed in lieu thereof to enter into a new contract; that the parties through the medium of letters set forth as exhibits to the complaint entered into a new contract the terms of which were embodied in a formal written contract, modified in certain particulars by letters dispatched after the formal written contract was signed; that while the formal written contract was executed by the plaintiffs alone and not by the defendants the latter nevertheless in a letter expressly referred to and adopted said contract. The complaint then goes on to aver compliance with the contract on the part of the plaintiffs and sets forth the breaches thereof by the defendants. Other facts alleged in the complaint need not be detailed. Plainly a good cause of action was stated. One is bound by a written contract which he has not signed when by a signed letter he expressly refers to and adopts it.

[8] The next contention is that the findings are not supported by the evidence. That the findings are amply sustained by the evidence as set forth in the engrossed settled statement is, in our opinion, not open to question. Accordingly, we see no point in going into any further detail.

[9] The further contentions that the original agreement "was tainted with usury"; that the "respondents practiced duress, coercion and compulsion upon appellants" are, likewise under the facts, entirely devoid of merit.

[10] As in our view the trial court committed no error and entered a correct

judgment, the judgment is affirmed. The appeal from the order denying a new trial is dismissed for the reason that no appeal lies from such an order.

WHITE, P. J., and DRAPEAU, J., concur.



103 Cal.App.2d 301

**COUNTY SANITATION DIST. NO. 1 OF
ORANGE COUNTY et al. v.
HUMESTON et al.**

Civ. 4192.

District Court of Appeal, Fourth District,
California.

April 6, 1951.

Original proceeding in mandamus by County Sanitation District Number 1 and others, all of Orange County, to compel Vincent L. Humeston, as Chairman of the Board of Directors of the County Sanitation District Number Seven, and others to sign certain bonds of their respective districts. The District Court of Appeal, Barnard, P. J., held that where the voters were repeatedly notified in the bond election proceedings that in voting upon the proposition submitted they were referred for further particulars both to the engineer's report and to provisions of the County Sanitation District Act, the voters were in no position to claim that they relied on an incidental and unauthorized statement in the engineer's report concerning how the money was to be raised, since the statute provided the particulars for the raising of money.

Writ issued.

1. Health ↪4

The provisions of a declaration of policy entered into by members of a county sanitation advisory committee, were mere recommendations which could have no legal effect unless they could be and were made a part of a bond election proceedings as to become a part of the contract with the taxpayers.

2. Health ↪4

Seven county sanitation districts organized under the County Sanitation District Act were subject to provisions of the statute. Health and Safety Code, §§ 4700 to 4856.

3. Health ↪4

Under the County Sanitation District Act, the act of the district board in approving the report of the district engineer did not necessarily approve and adopt all incidental matters therein which were not within the scope of the report as authorized by statute and as set forth in the resolution employing the engineer. Health and Safety Code, § 4750.

4. Health ↪4

Where electors in a bond election were advised as to the scope of the county sanitation district engineer's report under the County Sanitation District Act, the electors were chargeable with knowledge that they were referred to the engineer's report for what was properly included therein and with knowledge that the matter of raising money to pay the proposed bonds was controlled by statute and not by the engineer's report. Health and Safety Code, § 4750.

5. Health ↪4

Assuming that a district board under the County Sanitation District Act could legally limit their taxing power, it would be necessary that a clear, express and definite expression on the part of the board limiting its taxing powers be included in submitting such to voters in a bond election. Health and Safety Code, §§ 4700 to 4856.

6. Health ↪4

In absence of any clear expression by the district board of a county sanitation district in submitting a bond issue to the voters that district intended to limit its taxing power, an intent to limit taxing power could not be presumed from the mere adoption of a long report by district engineer on other matters which happened to contain an incidental statement on a matter not within scope of report, with which it had nothing to do, concerning which the district engineer had not been authorized

either to act or to report on. Health and Safety Code, §§ 4700 to 4856.

7. Contracts ⇨167

In determining the extent and limitations of a contract, the terms of the statute under which the proceedings were taken must be taken into consideration and the provisions of the statute must be held to have been personally known to every elector whose approval was sought and registered at the election.

8. Health ⇨4

Where the voters were repeatedly notified in bond election proceedings, including the ballot itself, that in voting upon the proposition submitted they were referred for further particulars both to the engineer's report and to provisions of the County Sanitation District Act, the voters were in no position to claim that they relied on an incidental and unauthorized statement in the engineer's report in regard to as to how the money was to be raised to pay for improvements since the County Sanitation District Act expressly provided the particulars as to how the money was to be raised. Health and Safety Code, §§ 4740, 4741, 4747, 4748, 4750, 4780, 4781, 4785.

9. Health ⇨4

Where voters were repeatedly notified in bond election proceedings including the ballot itself, that in voting upon the proposition submitted they were referred for further particulars both to the district engineer's report and to the provisions of the County Sanitation District Act, and the statute provided for particulars as to how the money was to be raised for project, the reference to a limited tax rate in the engineer's report did not become a part of the contract between the district and the voters or taxpayers and there was no limitation upon the amount of taxes which could be levied. Health and Safety Code, §§ 4740, 4741, 4747, 4748, 4750, 4780, 4781, 4785.

C. Arthur Nisson, Jr., E. J. Marks and Adrian Marks, all of Santa Ana, for petitioners.

O'Melveny & Myers, James L. Beebe and Ray H. Lindman, all of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an original proceeding in mandamus to compel the respondents to sign certain bonds of their respective districts.

Each of the petitioners is a county sanitation district organized and existing under the provisions of the "County Sanitation District Act", sections 4700 to 4856 of the Health and Safety Code, which will be referred to as the Act. They are all situated in Orange County and were organized on June 9, 1948. They are cooperating in a common plan for sewage treatment and disposal, and intend to proceed under a "Joint Construction and Operation Agreement," as permitted by section 4742 of the Act.

Prior to the formation of these districts a "Declaration of Policy regarding the proposed formation of Sanitary Districts 2, 3 and 7" was signed by the members of the Orange County Sanitation Advisory Committee, and by the members of a number of other committees, the boards of directors of several organizations, the governing boards of certain cities and sanitary districts within the county, and the board of supervisors. This declaration of policy recited the necessity for providing additional facilities without delay since the existing facilities for sewage disposal were overtaxed to the extent that the public health is threatened. It referred to the County Sanitation District Act, and proposed that Districts 2, 3 and 7 be formed "under the existing act, under a modified plan", and to this end the signers agreed "as a declaration of policy that Orange County Sanitation Districts 2, 3 and 7 shall be established on the following bases:

"1. that participation by these districts shall be limited to the construction and acquisition of certain facilities, to wit: the ocean outfall, treatment plant units, and major trunk sewers generally extending inland from the ocean.

"2. that the tax rate shall not exceed 10 cents in District #2, 12 cents in District

#3 and 10 cents in District #7, per \$100 of assessed valuation for 40 years, and that such structures shall be built or participated in by these districts as can be financed without exceeding these tax rates, and that no bond issue shall be proposed for a vote of the people which would require higher tax rates than aforesaid."

Those three districts were formed under the provisions of the Act, and not under any "modified plan." After the seven districts were formed the board of directors of each took the steps leading up to the bond issues here in question, in accordance with the provisions of the Act. The same engineer was employed for all the districts and, so far as material here, the reports, resolutions and proceedings were the same in each district and will be referred to as though only one district was involved. The engineer was, by resolution, directed to prepare and file with the district board a report setting forth the things required by section 4748 of the Act, in the exact language of the statute. The engineer filed his report on December 22, 1948, setting forth the things thus required. The board of directors fixed the time and place for hearing objections to the report and to doing the work suggested, or any part thereof, and published notice of the hearing as required by the statute. After a hearing the board of directors approved and adopted the report.

After setting forth what he was authorized to do, as stated in section 4748 of the Act and in the resolution, the engineer's report submitted for consideration a two-fold plan for the construction of certain new sewage works and for the acquisition of certain existing sewage works which could be utilized "in the proposed comprehensive sewage system." It then referred to a report by a board of consulting engineers, submitted in 1947, and to the "Declaration of Policy" above referred to. It then stated that in accordance with this Declaration of Policy "the plan proposed herein includes participation by District No. 7 in joint construction of only those certain sewerage facilities to wit: the ocean outfall and appurtenant structures, treatment plant units, and major trunk sew-

ers generally extending inland from the ocean to Ellis Avenue, which can be financed by a tax rate which will not exceed 10 cents per \$100 of assessed valuation of real property within the District." Among other things, the report set forth a description of the new construction proposed to be done jointly with the other sanitation districts, and a general description of the property proposed to be acquired or damaged in carrying out the entire plan. In connection with the latter, it was proposed that County Sanitation District No. 7 should purchase from the owners of "Section 1 of the Orange County Joint Outfall Sewer" certain named percentage interests in several existing structures. After describing the structures in which it was proposed to acquire such interests the report departed from its authorized scope and made the following suggestion or proposal:

"This Engineer's Report does not propose that District No. 7 issue, or propose the issuance of bonds, to finance the purchase from the owners of Section 1 of the Orange County Joint Outfall Sewer the interests in the existing structures as listed above. Rather, it is proposed that when these interests are sold to District No. 7 that the contract or sale documents will establish a schedule of payments by District No. 7, which payments will be made out of any surplus funds which are created by the limiting tax rate of 10 cents per \$100 of assessed valuation on real property, but such payments shall be made only after having fulfilled the annual principal and semi-annual interest requirements on any and all outstanding bonds of the District. This method of payment for capacity rights in Section 1 existing structures by District No. 7 was established in the formulation of the 'limited participation' plan for Districts Nos. 2, 3 and 7 by the County Sanitation Advisory Committee."

After approving the engineer's report the board of directors adopted a resolution calling a special election for the purpose of submitting the question of a bond issue to the voters of the district, which resolution and notice was duly published. Among other things, this resolution and notice stat-

ed that it was the duty of the board, after the approval and adoption of the engineer's report, to submit to the voters of the district the proposition of incurring a bonded indebtedness to obtain funds with which to acquire the property and do the work set forth in the report; it ordered that a special election be held on February 28, 1949, to pass upon a bond issue in a certain amount and for the purposes set forth in the engineer's report, approved and adopted by the board, to which reference was made; it set forth these general objects and purposes and provided that the proposition to be submitted at said election should be:

"Proposition: Shall County Sanitation District No. 7 of Orange County, California, incur a bonded debt in the principal sum of \$488,000.00 for the following purposes, to-wit:

"(a) the acquisition and construction by said District No. 7, together with other sanitation districts of said county, of (1) a sewage treatment plant to be located near the mouth of the Santa Ana River, (2) an ocean outfall from said sewage treatment plant to and into the Pacific Ocean, and (3) certain trunk sewers leading into said sewage treatment plant;

"all in accordance with the report of Vinton W. Bacon, Sanitation Engineer of said District No. 7, filed with the Board of Directors of said district on December 22, 1948, approved and adopted by said Board of January 26, 1949, and on file in the office of the Secretary of said Board, reference to which report is hereby made for further particulars, and in accordance with the provisions of the County Sanitation District Act?";

and it then provided for the form of the ballot and that the ballot should contain the proposition in the exact language just quoted.

The election was held on February 28, 1949; the ballots contained the proposition in that exact language; and the bonds were carried by more than the required two-thirds majority.

On February 28, 1951, the board of directors passed a resolution directing the issuance of the bonds as authorized at the

election, and directing the chairman of the board of directors to sign said bonds. On the same day, February 28, 1951, a contract of purchase and sale was executed by which the seven petitioners agreed to purchase from the owners, and the owners agreed to sell, the respective interests in the existing sewage treatment and disposal facilities which were to be acquired under the plan proposed in the engineer's report. Among other things, this contract provided, with respect to the payments to be made by Districts Nos. 2, 3 and 7, the only ones which are in question here, that the agreed prices should be paid in certain installments and at certain times, and that the buyer districts agreed to levy sufficient taxes to pay their respective amounts within said periods.

The respondents have refused to sign the bonds for their districts, respectively, on the ground that under the bond proceedings taken there is a limiting tax rate of 10 cents per \$100 of assessed valuation of real property within Districts 7 and 2, and a limiting tax rate of 12 cents on each \$100 of assessed valuation of the real property within District No. 3; that this limited rate will not produce sufficient revenue to make the payments to become due on the bonds, and to pay the purchase price of the existing facilities and the other expenses of the districts; that preceding the organization of these districts, and also preceding the bond election, the voters were told that the tax rate would be thus limited, "except in case of an emergency"; and that each respondent believes that this "gentleman's agreement" is binding upon him and should be kept.

The petitioners state that an effort will be made to keep the tax rate within the limits mentioned in the "Declaration of Policy" and assert their belief that this can be done, giving the reasons therefor. They state, however, that the bond buyers will not bid on these bonds unless they are assured that this limited tax rate is not applicable and controlling in connection with the payment of the bonds here in question. In support of the petition it is argued that the "Declaration of Policy" could have no binding effect on the future

action of the boards of directors of these districts, that the language used in the engineer's report does not have the effect of establishing such a limited tax rate, and that the voters at the bond election had knowledge that this language in the report could not have that effect, since their attention was specifically called to the provisions of the statute which authorize no such limitation.

The respondents have demurred to the petition. They argue that the bond proposition submitted to and approved by the electors constitutes a contract which cannot be violated; that the "Declaration of Policy", with respect to the limited tax rates, is a part of that contract; that the issuance of bonds payable from taxes unlimited as to rate would violate that contract; that the contract for the acquisition of the existing facilities between the sanitation districts and the owners of those facilities is in violation of the contract with the electors; and that there would be a completely invalid change of purpose if Districts Nos. 2, 3 and 7 were to seek to use the proceeds of the sale of the bonds for the construction of new facilities without acquiring the existing facilities.

[1,2] The provisions of the "Declaration of Policy" were mere recommendations which could have no legal effect unless they could be and were so made a part of the bond election proceedings as to become a part of the contract with the taxpayers. All of these districts were organized under the County Sanitation District Act and were subject to its provisions. Section 4747 provides that the district may levy taxes "sufficient to meet" its bonds and "all other expenses incidental to the exercise" of its powers. These powers include the construction of "a sewerage system and sewage disposal or treatment plant" (Sec. 4741), and the acquiring of property necessary or convenient for the "operation of a sewerage system and sewage disposal or treatment plant" (Sec. 4740). The act contains no tax limitation for the obvious reason that any such limitation would be inconsistent with, and might well defeat, the purpose of the act, and thus endanger

the health and well-being of the people in such a district. The act provides for an engineer's report and what shall be set forth therein (Sec. 4748). When this report is filed it must not only be satisfactory to the board of directors but must comply with the provisions of the act (Sec. 4750). This report is to cover a general description of the work to be done and how it is to be done but, so far as the statute is concerned, it has nothing to do with how the proposed work shall be paid for. After the engineer's report is approved and adopted, the district board is directed to submit the question of a bond issue to the voters for the purpose of obtaining funds with which to acquire the property and do the work set forth in the report (Sec. 4780). It is provided that the resolution calling the election shall state the general objects and purposes for which the proposed bond shall be used and refer to the engineer's report for particulars, and shall give certain information with respect to the amount of the bonds, the time of payment and the rate of interest (Sec. 4781). This resolution must be published (Sec. 4785). There is nothing in any of these provisions calling for or authorizing the submission to the voters of any question of tax limitation, or as to how the money to pay the bonds shall be raised.

The district board here complied with the provisions of the act throughout the entire proceedings. The main question here is whether the rate of taxation in three districts has been limited by a reference to a limited tax rate contained in the engineer's report, which report was adopted by the board and referred to in the proposition as submitted to the voters. In other words, whether this limited tax rate, as referred to in the report, has become a part of the contract.

[3,4] The engineer's report, as provided for by the statute, was for certain specific things covering the work to be done and how it was to be done, but it had nothing to do with how the money to pay for the work was to be raised. In approving the report the board did not necessarily approve and adopt all incidental matters

therein which were not within the scope of the report as authorized by the statute and as set forth in the resolution employing the engineer. That the board did not intend to adopt these portions of the report is indicated by the fact that by fixing a time and place for hearing objections to the report it impliedly found that it complied with the provisions of the act (Sec. 4750). In the bond election proceedings the board not only called attention to the engineer's report but repeatedly called attention to the provisions of the act. Having their attention thus called to the statutory provisions the electors were advised as to the scope of the engineer's report under the statute, and are chargeable with knowledge that they were referred to the engineer's report for what was properly included therein, the nature and description of the work proposed to be done, and with knowledge that the matter of raising money to pay the bonds was controlled by the statute and not by the engineer's report.

[5, 6] In view of the purpose for which these districts are organized it might well be questioned whether they could legally limit their taxing power if they directly and clearly attempted to do so. If it be assumed that this could legally be done it would require a clear, express and definite expression on the part of the board in submitting such a bond election to the voters, indicating such a purpose and intent. In the absence of any clear expression thereof, such an intent should not be presumed from the mere adoption of a long report on other matters which happened to contain an incidental statement on a matter not within the scope of the report, with which it had nothing to do, and concerning which the engineer had not been authorized either to act or to report. As was said in *Golden Gate Bridge, etc., Dist. v. Felt*, 214 Cal. 308, at page 328, 5 P.2d 585, at page 595, where the engineer's report contained a brief declaration that taxes might be levied only for certain purposes, "It seems too plain for argument that this statement, part of a lengthy report on other subjects, cannot be deemed to be an official interpretation by the district of the legal effect of

the act. In any event, it has no efficacy when in conflict with the law itself." In the bond election proceedings here, the voters were repeatedly referred not only to the engineer's report, but to the statute itself.

The language of this engineer's report, in reference to a tax limitation, is somewhat ambiguous and uncertain, if not inconsistent. The report sets forth, under one heading, a general description of the new construction work proposed to be done in carrying out the purpose sought in connection with the over-all plan. Under a separate heading, it gives a general description of the existing facilities which it was proposed to acquire as a part of the project as a whole. Early in the report it is stated that in accordance with the "Declaration of Policy" the proposed plan included participation by District No. 7 in the "construction" of only certain named facilities which "can be financed" by a tax rate not exceeding 10 cents per \$100. Much later in the report it is stated that it was proposed to acquire certain existing facilities, under some future contract with the owners, to be paid for out of any surplus funds "created" by the limited tax rate, and then only after any and all bond payments were taken care of; and that this method of payment for the existing facilities had been established by the "Declaration of Policy." The "Declaration of Policy" had made no distinction between paying for new construction and for existing facilities. The report seems somewhat inconsistent in first providing for new construction up to the full amount of the limited tax rate, and later suggesting that the existing facilities should be purchased under a future contract in which the owners would agree to accept payment out of any surplus created by the limited tax rate. There might well be no such surplus, and the entire suggestion as to a limited tax rate is not only unauthorized but so uncertain and indefinite, if not inconsistent, that it could not reasonably have been relied upon by the voters, in the manner and for the purpose here claimed. The voters were repeatedly notified in the bond election proceedings, including the

ballot itself, that in voting upon the proposition submitted they were referred for further particulars both to the engineer's report and to the provisions of the act. Under the circumstances, the voters should and must have understood that they were referred to the engineer's report for particulars as to the work to be done, including the acquisition of existing facilities, and to the statute for particulars as to how the money was to be raised to pay for these things.

[7, 8] The voters were referred directly to the statute itself, which provides that the district may levy taxes sufficient to meet all its permitted obligations and this without any limitation on the tax rate. As was said in *Los Angeles County Flood Control Dist. v. Wright*, 213 Cal. 335, 2 P.2d 168, 173, "In determining the extent and limitations of the contract, the terms of the statute under which the proceedings were taken must be taken into consideration. The provisions of the statute were a part of the contract and must be held to have been personally known to every elector whose approval was sought and registered at the election." In that case the ballot did not refer to the statute. Here, the attention of the voters was directly called to the statute in the resolution calling the election, in the published notice of election, and in the ballot. Under such circumstances the provisions of the statute cannot be ignored, and the voters would be in no position to claim that they relied on an incidental and unauthorized statement in the engineer's report, in disregard of the plain provisions of the statute to which their attention was also repeatedly called.

[9] Under the facts here appearing, it must be held that the reference to a limited tax rate in the engineer's report did not become a part of the contract between the district and the voters or taxpayers, that the provisions of the statute must prevail, and that there is no limitation upon the amount of taxes which may be levied insofar as the bonds here in question are concerned. There being no merit to any of the objections raised to the issuance of

these bonds, it is the duty of the respondents to sign them as directed by their respective districts.

The demurrer is overruled.

Let the peremptory writ issue as prayed.

GRIFFIN and MUSSELL, JJ., concur.



103 Cal.App.2d 322

PEOPLE v. PETERMAN.

Cr. 4548.

District Court of Appeal, Second District,
Division 3, California.

April 9, 1951.

Russell G. Peterman was convicted in the Superior Court of Los Angeles County, Thomas J. Cunningham, J., of rape and two counts of sex perversion, and he appealed. The District Court of Appeals, Parker Wood, J., held that there was sufficient evidence from which it could be reasonably inferred that prosecutrix submitted to acts constituting offense under threat of great and immediate bodily harm accompanied by an apparent power of execution.

Judgment affirmed.

1. Criminal law ☞1144(19)

Where appeal from conviction of rape and two counts of sex perversion stated that it was an appeal from the judgment, appellate court would assume that appeal was from each of the three judgments. Pen.Code, § 288a.

2. Rape ☞51(4)

In prosecution for rape, evidence was sufficient to sustain finding that prosecutrix submitted to act of sexual intercourse under threat of great and immediate bodily harm accompanied by apparent power of execution.

3. Sodomy ☞6

In prosecution for sex perversion it is not necessary that testimony of prose-

cuting witness be corroborated where offense was committed without consent of such witness. Pen.Code, § 288a.

4. Criminal law ⚡507(7)

A person who participates in an act in violation of statute prohibiting sex perversion solely because such person had been threatened with and is in fear of great bodily harm is not an accomplice. Pen. Code, § 288a.

5. Sodomy ⚡6

In prosecution for sex perversion, evidence sustained finding that prosecutrix submitted to acts of sex perversion under threat of great and immediate bodily harm accompanied by apparent power of execution. Pen.Code, § 288a.

Gladys Towles Root, Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

[1] Defendant was accused of rape and two counts of violation of section 288a of the Penal Code. Trial by jury was waived. He was convicted on the three counts. Although his notice of appeal states that he appeals from "the judgment," it will be assumed that he appeals from each of the three judgments. His contention is that the evidence was insufficient.

On February 10, 1950, the defendant and the prosecutrix, who is a widow 63 years of age, became acquainted at a public dance hall. On that day it was agreed that defendant would go to her home the next day. He arrived there the next day at about 5 p. m., and after he had been there a short while they went, at his suggestion, for a ride in his sedan automobile. Defendant drove to a place which was on a dirt road, about 200 yards off the main road, and was near two oil wells. The nearest house was about 1½ blocks away. According to testimony of the prosecutrix, after defendant stopped the automobile at that place he pulled her pants off without

her consent and told her that he was going to kill her if she did not let him have sexual intercourse with her; then he pushed her over the front seat to the back seat and, without her consent and against her will, he had sexual intercourse with her; then they returned to the front seat, and she "wanted" him to take her home but he said, "No"; after a short while he went to the back seat again and told her he would take her home if she would come to the back seat with him; she went to the back seat because she wanted to go home and she was afraid that he would kill her if she did not get in the back seat; then he had another act of sexual intercourse with her. Also, in her testimony, she related facts which were legally sufficient to prove that defendant then committed two separate violations of section 288a of the Penal Code, and that such acts were committed without the consent and against the will of the prosecutrix and by putting her in fear of great bodily harm. She testified further that thereafter he said he would take her home if she would let him stay all night; after she replied that she would let him stay, he took her to her home; while they were standing by his automobile, after returning home, her son and her son's wife drove up to their house which is two houses from the home of prosecutrix; the prosecutrix introduced defendant to her son (who was 33 years of age), but she did not say anything to the son regarding the occurrences at the oil field; within a few minutes thereafter, about 6:15 p. m., defendant left, stating that he would return about 9 p. m.; after he been gone about 15 minutes, he returned; and while he was gone she called the police.

A police officer testified that, while he and defendant were in front of the home of prosecutrix and were preparing to go to the police station, he asked the defendant if he had had intercourse with the prosecutrix, and the defendant replied, "No, nothing like that happened"; that a few minutes later he asked that question again, and defendant said that there had been intercourse and it was voluntary; that as they were driving to the station the defendant said to the prosecutrix, "Minerva

[her first name], don't do this to me"; he told the officer that he loved that woman and he wanted to marry her; the officer asked him if he knew her last name, and he replied that he did not know it.

Defendant testified that the prosecutrix removed her underwear and allowed and encouraged him to have intercourse with her, and he had intercourse with her one time; he did not touch her in any way except of her own free will; he did not make any threat, and he did not use any force, against or upon her. He denied the statements made by her concerning violations of section 288a of the Penal Code.

[2] Appellant contends, as above stated, that the evidence was insufficient to support the conviction of rape. He argues that it was incumbent upon the prosecution to prove that the prosecutrix was prevented from resisting the act of intercourse by a threat of great and immediate bodily harm accompanied by an apparent power of execution. In support of his argument that such proof was not made, he refers to her testimony that she did not strike him, she did not cry for help, she did not tell her son when she introduced defendant, and defendant did not strike her or display a weapon. It could be inferred reasonably from the evidence herein that the prosecutrix was in fear of great bodily harm, that such fear prevented her from making more resistance, and that defendant had apparent power to execute his threat to do bodily harm. There was evidence that she resisted him before he threatened her with such harm; that he pulled her underwear off against her will and resistance, and in pulling it off he tore it; that he threatened to kill her if she did not have intercourse with him; that prior to the first act, he pushed her over the back of the front seat of the automobile into the back seat; that he said, "I could kill for this"; he acted like a crazy man; that in the opinion of a physician, who examined her at the receiving hospital, a normal act of intercourse would not result in the bruises

which he found at the orifice of the vagina. As to the apparent power of execution of the threats, there was evidence that defendant weighed 180 pounds and was 43 years of age, and that she weighed 110 pounds and was 63 years of age. In *People v. Cassandras*, 83 Cal.App.2d 272, 188 P.2d 546, the evidence regarding resistance was similar to the evidence herein regarding resistance. The threats in that case were that defendant would call the police and have the children of the prosecutrix taken from her, he would not let her out of the room, and she should keep still if she did not want to get hurt. In that case, in holding that the evidence was sufficient to support the conviction, it was stated, 83 Cal.App.2d at page 279, 188 P.2d 546, that submission induced by the fear specified in section 261 of the Penal Code is not consent. The fear specified in that section is fear of great and immediate bodily harm, accompanied by apparent power of execution.

[3-5] Appellant contends also that, even if it be assumed that there was a violation of said section 288a, the prosecutrix was an accomplice as to such violation, and there was not sufficient corroboration of her testimony. It could be inferred reasonably that she did not consent to the performance of such acts and that those acts were committed when she was in the same fear as that which was referred to in discussing the charge of rape. Where a violation of said section 288a is committed without the consent of the prosecuting witness, it is not necessary that the testimony of such witness be corroborated. *People v. Battilana*, 52 Cal.App.2d 685, 695, 126 P.2d 923. A person who participates in an act in violation of said section solely because such person has been threatened with, and is in fear of, great bodily harm is not an accomplice. *People v. Battilana*, supra, 52 Cal.App.2d at page 697, 126 P.2d 923.

The judgments are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

TOLMAN et al. v. UNDERHILL et al.

Civ. 7946.

District Court of Appeal, Third District,
California.

April 6, 1951.

Rehearing Denied May 3, 1951.

Hearing Granted May 31, 1951.*

Original proceedings by Edward C. Tolman and others against Robert M. Underhill, as secretary and treasurer of the regents of the University of California, and others for a writ of mandate to compel the regents and the secretary and treasurer to issue to petitioners letters of appointment to positions as members of the faculty of the University of California. The District Court of Appeal, Peek, J., held that "Loyalty Oath" required of members of the faculty was invalid as being in violation of the constitution.

Writ issued.

1. Colleges and universities ⇨7

In view of the broad powers given by the constitution to the regents of the University of California, the District Court of Appeals may not inquire lightly into the affairs of the regents, and should exercise jurisdiction only where the regents have acted without power in contravention of law. Const. art. 9, §§ 1, 9.

2. Officers ⇨18, 24

In view of constitutional provision prescribing form of oath for all officers, executive and judicial, and providing that no other oath, declaration, or test shall be required as a qualification for any office or public trust, one cannot be subjected, as a condition to holding office, to any test of political or religious belief other than his pledge to support the state and federal Constitutions. Const. art. 20, § 3.

3. Constitutional law ⇨15

The meaning of any particular provision of the Constitution is to be ascertained by considering the Constitution as a whole.

4. Constitutional law ⇨15

Court, in interpreting the Constitution, has the duty to harmonize all of its provisions.

5. Colleges and universities ⇨8

The "Loyalty Oath" required by the regents of the University of California of members of the faculty, and containing

statement that members of the faculty were not members of the Communist Party or any other organization advocating overthrow of the government by force or violence, is invalid as violating provision of the Constitution which prescribes the form of oath for all officers, executive and judicial, and provides that no other oath, declaration, or test shall be required as a qualification for any office or public trust and constitutional provision that university shall be entirely independent of all political or sectarian influence. Const. art. 9, § 9; art. 20, § 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Loyalty Oath".

6. Colleges and universities ⇨8

Subject to such reasonable rules of tenure as the regents of the University of California may adopt, appointment and dismissal of professional personnel of the university is a matter largely within discretion of the regents, but, in event of proof of an abuse of discretion, court may interfere. Const. art. 9, §§ 1, 9.

7. Colleges and universities ⇨8

The regents of the University of California may require members of the faculty to execute constitutional oath. Const. art. 9, § 9; art. 20, § 3.

Stanley A. Weigel, San Francisco, for petitioners.

Pillsbury, Madison & Sutro, Eugene M. Prince, and Francis R. Kirkham, all of San Francisco, for respondents.

PEEK, Justice.

This is an original proceeding for a writ of mandate to compel the Board of Regents of the University of California and Robert M. Underhill, as Secretary and Treasurer thereof, to issue to petitioners herein letters of appointment to positions as members of the faculty of the University for the academic year of July 1, 1950 to June 30, 1951.

The petition alleges that petitioners are members of the faculty of the University of California of Academic Senate rank;

* Subsequent opinion 249 P.2d 280.

that respondents are each members of a public corporation known as the Regents of the University of California; that the Regents, in accordance with authority granted to them by the State Constitution, have established an Academic Senate vested with certain powers relating to appointment, tenure and dismissal of faculty members; that the Regents on April 21, 1950, adopted a resolution (more particularly set forth hereinafter) carrying out certain recommendations of the California Alumni Association relative to the signing of a so-called "Loyalty Oath" by the faculty of the University; that each of the petitioners (all of whom are non-signers thereof), pursuant to the resolution, petitioned the President of the University for a review of his case by the Committee on Privilege and Tenure of the Academic Senate; that each petitioner appeared before the said committee which, after full investigation, recommended the appointment of each petitioner to his regular post on the faculty of the University; that on July 21, 1950, upon the recommendation of the President of the University, the Regents by resolution appointed each of the petitioners to his respective post; that notwithstanding their appointments, respondent Underhill refused to transmit letters of appointment to petitioners; that subsequently on August 25, 1950, the Regents refused to recognize the appointment of petitioners; that if respondent Underhill is not ordered by this court to transmit the letters of appointment, irreparable injury to both petitioners and the people of the State of California will result; that petitioners have no plain, speedy or adequate remedy at law.

To this petition respondents filed their general and special demurrer and answer. This court on September 1, 1950, ordered that respondents take no action to enforce any resolution with respect to the non-appointment of petitioners or termination of their posts and that the ten day period granted petitioners by respondents should not expire until ten days following any further order of this court specifying that such period shall commence to run.

Before discussing the facts of the dispute which culminated in the filing of this peti-

tion it is important to note by way of background, that the Regents of the University in 1920 by resolution provided "that appointment as associate or full professor carries with it the security of tenure in the full academic sense." At no time prior to the present controversy was that resolution superseded or modified. It further appears that since 1920 the Regents and the faculty of the University have considered professors of the designated rank as not subject to arbitrary dismissal and entitled to all the incidents of tenure as it is commonly understood in American Universities.

The record further discloses that for approximately a year and a half prior to April 21, 1950, the Regents, the faculty and the Alumni Association had considered the question of ways and means to implement the stated policy of the Regents of barring members of the Communist Party from employment at the University by means of a "Loyalty Oath". These discussions culminated in a meeting held on April 21, 1950, at which the Regents passed a resolution providing that after July 1, 1950, the beginning date of the new academic year, conditions precedent to employment or renewal of employment at the University would be (1) execution of the constitutional oath required of public officials of the State of California, and (2) acceptance of appointment by a letter which contained the following provision: "Having taken the constitutional oath of office required of public officials of the State of California, I hereby formally acknowledge my acceptance of the position and salary named, and also state that I am not a member of the Communist Party or any other organization which advocates the overthrow of the government by force or violence, and that I have no commitments in conflict with my responsibilities with respect to impartial scholarship and free pursuit of truth. I understand that the foregoing statement is a condition of my employment and a consideration of payment of my salary."

The resolution further provided that, "In the event that a member of the faculty fails to comply with any foregoing re-

quirement applicable to him he shall have the right to petition the President of the University for a review of his case by the Committee on Privilege and Tenure of the Academic Senate, including an investigation of and full hearing on the reasons for his failure so to do. Final action shall not be taken by the Board of Regents until the Committee on Privilege and Tenure, after such investigation and hearing, shall have had an opportunity to submit to the Board, through the President of the University, its findings and recommendations. It is recognized that final determination in each case is the prerogative of the Regents."

Some thirty-nine professors at the University who refused to sign the affirmation set forth in the Regents' resolution accepted what they apparently believed to be the alternative to the signing of the oath as set forth in the resolution and petitioned the President of the University for a hearing before the Committee on Privilege and Tenure of the Academic Senate. The hearing resulted in favorable findings and recommendations by that committee as to each of the professors. On July 21, 1950, the Regents met and by a vote of 10 to 9 accepted those recommendations and appointed the non-signing professors to the faculty for the coming academic year. Following the passage of the resolution one of the Regents gave notice that he would change his vote from "No" to "Aye" and move to reconsider at the next meeting. At the next meeting of the Regents, on August 25, 1950, a motion to reconsider the matter of the appointments was passed by a vote of twelve to ten (one absent member stated by telegram that he would vote "no" if he were present), and the resolution adopting the recommendations of the Committee on Privilege and Tenure and appointing the professors to the faculty was defeated by a like vote of twelve to ten. Following this a motion was unanimously carried granting the non-signing professors ten days in which to comply by signing the statement prescribed in the resolution of April 21.

Petitioners herein were among those professors who refused to sign the so-

called "loyalty" statement. All of the petitioners are scholars of recognized ability and achievement in their respective fields. Additionally it should be noted that it is conceded that none of the petitioners has been charged with being a member of the Communist Party or in any way subversive or disloyal.

Article IX of the Constitution which declares the policy of this state as to education provides at the outset in Section 1 thereof that education is "essential to the preservation of the rights and liberties of the people * * *." Section 9 of that article establishes the University of California as a "public trust, to be administered by the existing corporation known as 'The regents of the University of California,' with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the university and the security of its funds." Thereafter follow detailed provisions relating to the membership of the Board of Regents and their powers and duties. The section concludes with this provision: "The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs * * *."

[1] It is evident therefrom that the Constitution has conferred upon the Regents broad powers with respect to the government of the University, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the University and the security of its funds. *Hamilton v. Regents of the University of California*, 219 Cal. 663, 28 P.2d 355; *Wall v. Board of Regents*, 38 Cal.App.2d 698, 102 P.2d 533. It follows that this court may not inquire lightly into the affairs of the Regents, and should exercise jurisdiction only where the Regents have acted without power in contravention of law.

The validity of the action taken by the Regents on August 25, 1950 is first challenged by petitioners on the ground that the affirmative statement demanded as a

condition to their continued employment is a violation of Section 3 of Article XX of the Constitution which prescribes the form of oath for all officers, executive and judicial, and concludes with the prohibition that "no other oath, declaration, or test, shall be required as a qualification for any office or public trust."

Respondents' answer to this argument is that the constitutional provision is not here applicable because members of the faculty of the University do not hold office or positions of public trust. In support of their position respondents place great reliance on *Leymel v. Johnson*, 105 Cal.App. 694, 288 P. 858. There it was held that Section 19 of Article IV of the Constitution, which provides that "No Senator or member of Assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this State; provided, that this provision shall not apply to any office filled by election by the people", did not preclude a member of the legislature from also holding a position as a teacher in the public schools of the city of Fresno. The court's holding was that the position of instructor in a public high school was not an "office, trust, or employment under this State", as those terms are used in Section 19 of Article IV of the Constitution.

That the decision is limited to the particular provision of the Constitution there in question is indicated by the fact that the court gave serious consideration to the purposes of the people in adopting that section of the Constitution, citing *Chenoweth v. Chambers*, 33 Cal.App. 104, 164 P. 428, 429, where this court held that the intent and purpose of said section was that "those who execute the laws should not be the same individuals as those who make the laws".

There is nothing either in the *Leymel* case or any other case cited by respondents which is conclusive of the status of petitioners with respect to the constitutional oath of office as set forth in Section 3 of Article XX. Furthermore it is necessary in this case, as it was in the *Leymel* case,

in dealing with another provision of the Constitution, to consider the purposes and intent of the people of California in adopting said Section 3 of Article XX. While the courts of this state have had no occasion in the past to discuss specifically the purposes behind this section, the history of the English and American peoples in their struggle for political and religious freedom offers ample testimony to the aims which motivated the adoption of the provision.

A similar provision is found in Clause 3 of Article 6 of the Federal Constitution where it is stated that all legislative, executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support the Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States. Speaking of this provision, Mr. Chief Justice Hughes, in his dissenting opinion in *United States v. Macintosh*, 283 U.S. 605, 631, 51 S.Ct. 570, 577, 75 L.Ed. 1302, 1313, which views were later upheld in *Girouard v. United States*, 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 1084, said: "I think that the requirement of the oath of office should be read in the light of our regard from the beginning for freedom of conscience * * *. To conclude that the general oath of office is to be interpreted as disregarding the religious scruples of these citizens and as disqualifying them for office because they could not take the oath with such an interpretation would, I believe, be generally regarded as contrary not only to the specific intent of the Congress but as repugnant to the fundamental principle of representative government."

Again, in the case of *United States v. Schwimmer*, 279 U.S. 644, at page 654, 49 S.Ct. 448, 451, 73 L.Ed. 889, Mr. Justice Holmes, whose dissenting views were likewise upheld in the *Girouard* case, said, "* * * if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."

In the Girouard case, which was the last in this line of cases involving aliens who had been barred from naturalization because their then religious beliefs would not permit them to bear arms to defend the country, Mr. Justice Douglas, speaking for the court in approving the views expressed by Hughes and Holmes and holding that such aliens were not barred from citizenship, succinctly stated in 328 U.S. at page 69, 66 S.Ct. at page 829: "The test oath is abhorrent to our tradition."

This basic principle was also discussed by Mr. Justice Jackson in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, at page 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628, the last of the "flag salute" cases where, in speaking for the court he said:

"But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

[2] At this late date it is hardly open to question but that the people of California in adopting Section 3 of Article XX also meant to include in our state Constitution that fundamental concept of what Mr. Chief Justice Hughes referred to as "freedom of conscience" and Mr. Justice Holmes called the "principle of free thought". Paraphrasing their words we conclude that the people of California intended, at least, that no one could be subjected, as a condition to holding office, to any test of political or religious belief other than his pledge to support the Constitutions of this state and of the United States; that that pledge is the highest loyalty that can be demonstrated by any citizen, and that the exacting of any other test of loyalty would be antithetical to our fundamental concept of freedom. Any

other conclusion would be to approve that which from the beginning of our government has been denounced as the most effective means by which one special brand of political or economic philosophy can entrench and perpetuate itself to the eventual exclusion of all others; the imposition of any more inclusive test would be the forerunner of tyranny and oppression.

[3,4] It is a well established principle of constitutional interpretation that the meaning of any particular provision is to be ascertained by considering the Constitution as a whole and that the duty of the court in interpreting the Constitution is to harmonize all its provisions. In *re Oliverez*, 21 Cal. 415; *Edler v. Hollopeter*, 214 Cal. 427, 6 P.2d 245. A strikingly analogous application of this principle of construction is found in *West Virginia State Board of Education v. Barnette*, supra, where Mr. Justice Jackson said 319 U.S. at page 639, 63 S.Ct. at page 1186 "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. *Much of the vagueness of the due process clause disappears when the specific prohibition of the First become its standard.*" (Emphasis ours.)

In the problem of interpretation with which we are presently confronted, we find in the specific mandate of Section 9 of Article IX of our Constitution, providing that the University shall be entirely independent of all political or sectarian influence, a standard by which to decide the question of whether or not the petitioners herein are to be included within the term "office or public trust" as used in Section 3 of Article XX. It goes without saying that in the practical conduct of the affairs of the University the burden of so preserving it free from

sectarian and political influence must be borne by the faculty as well as by the Regents. Hence, if the faculty of the University can be subjected to any more narrow test of loyalty than the constitutional oath, the constitutional mandate in Section 9 of Article IX would be effectively frustrated, and our great institution now dedicated to learning and the search for truth reduced to an organ for the propagation of the ephemeral political, religious, social and economic philosophies, whatever they may be, of the majority of the Board of Regents of that moment.

It must be concluded that the members of the faculty of the University, in carrying out this most important task, fall within the class of persons to whom the framers of the Constitution intended to extend the protection of Section 3 of Article XX.

While this court is mindful of the fact that the action of the Regents was at the outset undoubtedly motivated by a desire to protect the University from the influences of subversive elements dedicated to the overthrow of our constitutional government and the abolition of our civil liberties, we are also keenly aware that equal to the danger of subversion from without by means of force and violence is the danger of subversion from within by the gradual whittling away and the resulting disintegration of the very pillars of our freedom.

[5] It necessarily follows that the requirement that petitioners sign the form of contract prescribed in the Regents' resolution of April 21, 1950, was and is invalid, being in violation both of Section 3 of Article XX and Section 9 of Article IX of the Constitution of the State of California, and that petitioners cannot be denied reappointment to their posts solely because of their failure to comply with the invalid condition therein set forth.

[6] Subject to such reasonable rules of tenure as the Regents may adopt, the appointment and dismissal of professional

personnel of the University is a matter largely within the discretion of the Regents. *Wall v. Board of Regents*, supra. Nevertheless, in the event of proof of an abuse of discretion the "propriety of the remedy * * * is clear." *Landsborough v. Kelly*, 1 Cal.2d 739, 37 P.2d 93, 95, 96 A.L.R. 707. Thus in the present case the imposition of the oath in question being violative of the applicable constitutional provisions, the abuse of discretion is clear, and hence this court may compel the reinstatement of petitioners to their respective positions. See also *Inglis v. Hoppin*, 156 Cal. 483, 105 P. 582.

In view of the foregoing it is unnecessary to consider the further contentions of petitioners that the resolution of July 21, 1950 constituted an irrevocable appointment of the petitioners, and that the action of the Regents constituted an arbitrary dismissal in violation of petitioners' tenure rights.

[7] Therefore, since the letters of appointment issued to petitioners following the Regents' resolution of April 21, 1950 were subject to the condition that the petitioners sign letters of acceptance of appointment containing the affirmative statement, the requirement of which we have held to be invalid, it is the order of this court that the writ issue directing respondents by their secretary, respondent Underhill, to issue to each of the petitioners a letter of appointment to his regular post on the faculty of the University, which appointment shall not be subject to the aforementioned invalid condition. Provided that, if any of petitioners has not yet executed the constitutional oath of office as provided in the said resolution of April 21, 1950, the respondents may require that such petitioner, as a condition precedent to his appointment, execute said constitutional oath.

Let the writ issue.

ADAMS, P. J., and VAN DYKE, J., concur.

CESENA v. CESENA.

Civ. 14530, 14554.

District Court of Appeal, First District,
Division 2, California.

April 2, 1951.

Hearing Denied May 28, 1951.

Divorce action by Madeline I. Cesena, etc., against Earl Cesena, etc. The Superior Court in and for the City and County of San Francisco, Theresa Meikle, and Edward Molkenbuhr, JJ., entered an order refusing to vacate the final decree or to hold the defendant in contempt of court for an alleged failure to comply with terms of interlocutory decree, denied plaintiff counsel fees in connection with hearing of order to show cause, and entered an order denying counsel fees to plaintiff for prosecuting an appeal, and the plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that the trial court did not abuse its discretion in denying counsel fees.

Orders affirmed.

1. Divorce ⇨177, 280

Order refusing to vacate final divorce decree or to hold defendant in contempt of court for an alleged failure to comply with terms of interlocutory decree was final and conclusive and not appealable. Code Civ.Proc. § 1222.

2. Divorce ⇨177

Appeal from order denying motion to abate final divorce decree was frivolous since property rights of parties were settled in interlocutory decree, and hence court could not by setting aside final decree, re-adjudicate rights of parties in community property.

3. Divorce ⇨288

Granting counsel fees to plaintiff in connection with hearing on order to show cause in matter of defendant's alleged contempt for alleged failure to comply with terms of interlocutory divorce decree, was within trial court's discretion.

4. Divorce ⇨288

Where final divorce decree was granted July 20, 1948, and order to show cause why defendant should not be held in contempt for alleged failure to comply with interlocutory decree was filed by plaintiff

on December 18, 1948, trial court did not abuse its discretion in denying counsel fees to plaintiff for hearing on order, in view of fact that contempt proceedings were not founded on any justiciable ground.

5. Costs ⇨224, 252

Awarding of counsel fees and costs on appeal is within discretion of trial court.

6. Divorce ⇨288

Where plaintiff appealed from an order refusing to vacate a final decree or to hold defendant in contempt of court for alleged failure to comply with terms of interlocutory decree, and denying counsel fees to plaintiff in connection with hearing of order to show cause, and from an order denying counsel fees to plaintiff for prosecuting such appeal, trial court did not abuse its discretion in denying counsel fees and costs on appeal.

Crabbe & Streiff, San Francisco, for plaintiff-appellant.

J. Thaddeus Cline, San Francisco, for respondent.

NOURSE, Presiding Justice.

The plaintiff in an action for a divorce brings two appeals—the first from an order refusing to vacate the final decree and to hold the defendant in contempt of court for an alleged failure to comply with the terms of the interlocutory decree, and denying plaintiff counsel fees in connection with the hearing of the order to show cause; the second from an order denying counsel fees to plaintiff for prosecuting such appeal. The only debatable question raised is whether the trial court abused its discretion in denying plaintiff counsel fees in relation to the hearing on the order to show cause in re contempt.

[1,2] The main appeal from the order refusing to adjudge defendant guilty of contempt is not open to debate since section 1222 of the Code of Civil Procedure makes such judgment, or order, "final and conclusive." 5 Cal.Jur.Contempt, § 49, p. 954; Thomas v. Thomas, 4 Cal.App.2d 317, 40 P.2d 581. Insofar as that appeal

relates to the denial of the motion to abate the final decree it is frivolous since the property rights of the parties were settled in the interlocutory decree. Hence the trial court could not, by setting aside the final decree, re-adjudicate the rights of the parties in the community property. In re Estate of Hughes, 80 Cal.App.2d 550, 555, 182 P.2d 253.

[3,4] However, the notice of appeal also designates the refusal of the trial court to award to plaintiff fees "in connection therewith", i. e., the hearing on the order to show cause in re contempt. The final decree of divorce was granted July 20, 1948. The order to show cause in re contempt was filed December 18, 1948. Assuming for the purpose of the decision only that the trial court had jurisdiction to award counsel fees when no "action for divorce is pending" (sec. 137, Civil Code) it must be conceded that the power to grant such fees rests in the discretion of the trial court. Kellett v. Kellett, 2 Cal.2d 45, 39 P.2d 203; Perry v. Perry, 93 Cal. App.2d 720, 728, 209 P.2d 847. There is no showing here that the trial court abused that discretion since the contempt proceedings were not founded on any justifiable ground.

[5,6] On the second appeal where appellant seeks counsel fees and costs on the appeal little need be said. Since the portion of the appeal relating to the contempt order was from a nonappealable order and the portion seeking to abate the final decree was frivolous, no counsel fees should have been allowed. If appellant had limited her appeal to the only portion of the order appealable—the denial of counsel fees—the costs and expenses of prosecuting the appeal would have been greatly limited. The awarding of counsel fees and costs on appeal is within the discretion of the trial court. Argabrite v. Argabrite, 56 Cal. App. 650, 206 P. 81; Rozzi v. Rozzi, 86 Cal.App.2d 535, 195 P.2d 464. We find no abuse of discretion.

Both orders are affirmed.

DOOLING, J., and SCHOTTKY, Justice pro tem., concur.

103 Cal.App.2d 228

LEGG v. UNITED BEN. LIFE INS. CO.

Civ. 18050.

District Court of Appeal, Second District,
Division 2, California.

April 2, 1951.

Hearing Denied May 28, 1951.

Leona Ethel Legg sued United Benefit Life Insurance Co., to recover disability benefits on a health and accident policy. The Superior Court, Los Angeles County, Robert H. Scott, Judge, entered a judgment for defendant and the plaintiff appealed. The District Court of Appeal, Wilson, J., held that where plaintiff had not denied making a settlement with transit company for accident in which disability arose evidence of the settlement and amount thereof was not admissible to impeach plaintiff and should have been excluded as immaterial.

Reversed.

1. Witnesses ⇨389

In action for benefits under a disability policy, where plaintiff had not denied making a settlement with the transit company of her claim for injuries which resulted in such disability, there could be no impeachment of plaintiff by asking if she had made any such settlement.

2. Evidence ⇨200

An "admission" is a statement made by a party to a proceeding suggesting an inference as to any fact in dispute or relevant to any such fact, and to be admissible must tend to prove or have a material bearing on the issues in the case.

See publication Words and Phrases, for other judicial constructions and definitions of "Admission".

3. Evidence ⇨200

A declaration which does not under any reasonable construction appear to admit or acknowledge the fact which was sought to be proved by it is not competent as an admission.

4. Witnesses ⇨383

Where sole point of contention between insured and insurer in action for disability benefits under health and accident policy was nature and extent of injuries, insured could not be impeached by evidence relating to the immaterial matters of settlement

of her personal injury claim against third party tort-feasor and the amount she received.

Albert C. Garber and B. W. Minsky, Los Angeles, for appellant.

J. Edward Haley, Los Angeles, for respondent.

WILSON, Justice.

From a judgment in favor of defendant in an action to recover disability benefits on a policy of health and accident insurance, plaintiff appeals.¹

The only question for determination is whether the trial court committed prejudicial error in permitting defendant to introduce testimony of a compromise settlement between plaintiff and a third party, which compromise and settlement arose out of the same accident that was the basis of plaintiff's claim for disability benefits against defendant.

Plaintiff was injured as she was attempting to board a streetcar. The policy upon which she seeks recovery provides for monthly payments of \$100 for total disability. Defendant admitted that she received injuries while the policy was in force and paid her \$100 for one month's total disability. The nature and extent of plaintiff's injuries was the basis of the controversy between the parties which led to the instant action.

Defendant introduced into evidence without objection two documents signed by plaintiff which were statements to the transit company relating to her injuries. Plaintiff concedes this evidence was admissible for impeachment purposes and as an admission against interest. She raises no question with regard to the introduction of those documents but contends the jury was prejudiced by the following testimony which was admitted over her objection:

"Q. You later settled your controversy with the L. A. Transit Company, did you not? A. I did, yes. * * *

"Q. Will you tell the court and the jury

just how much you received in payment of that claim you had for damages? A. I received a thousand dollars."

The evidence as to the extent of plaintiff's injuries is conflicting and it is her contention that from the above testimony the jury could have inferred (1) she was trying to collect twice for the same accident, and (2) if there had been a disability, it must have ended at the time of the settlement. Defendant agrees the evidence may have been prejudicial but asserts it was admissible for the purposes of impeachment and as an admission against interest.

[1-4] Since plaintiff had not denied she had made a settlement with the transit company there could be no impeachment by asking if she had made any such settlement. An admission is a statement made by a party to a proceeding suggesting an inference as to any fact in dispute or relevant to any such fact and to be admissible must tend to prove or have a material bearing on the issues in the case. A declaration which does not under any reasonable construction appear to admit or acknowledge the fact which is sought to be proved by it is not competent as an admission. *Pendell v. Westland Life Ins. Co.*, 95 Cal.App.2d 766, 776, 214 P.2d 392. The instant action is on a contract of insurance and the sole point of contention between the parties is the nature and extent of plaintiff's injuries. Any claim for damages which she might have had against the transit company would have been for personal injuries and in any action on such claim liability as well as injuries sustained would have to be established before plaintiff could recover. Therefore, the fact that she settled her claim against the transit company or the amount she received in any such settlement would not tend to prove the extent of plaintiff's injuries and would not have a material bearing on the issues in this case. The testimony was inadmissible.

Judgment reversed. Purported appeal from order denying new trial dismissed.

MOORE, P. J., and McCOMB, J., concur.

1. She has also purportedly appealed from the order denying her motion for new trial, a non-appealable order.

MILLS v. HUNTER.
Civ. 14514.

District Court of Appeal, First District,
Division 1, California.

April 10, 1951.

Rehearing Denied May 10, 1951.

Hearing Denied June 7, 1951.

Action by D. Mills against Catherine E. Hunter to recover a commission for selling real estate. The Superior Court in and for the City and County of San Francisco, Theresa Meikle, J., entered judgment for plaintiff, and the defendant appealed. The District Court of Appeal, Peters, P. J., held that where plaintiff produced a purchaser ready, able and willing to buy at a price and defendant sold at that price to that purchaser within ninety days after term of contract, plaintiff was entitled to commission under provision of contract that plaintiff would be entitled to commission if defendant sold property, within ninety days after expiration of term, to any person with whom broker had been negotiating during term.

Judgment affirmed.

1. Brokers ⇨86(1, 7)

In real estate broker's action to recover commission, evidence was sufficient to support findings that vendor had signed brokers agreement, that her signature was not induced by false or fraudulent representations of broker's employees, that employees did not induce or prevent vendor from reading agreement, that provision obligating vendor to pay commission if she sold property within 90 days after expiration of term to any person with whom broker had been negotiating, was in agreement, and that broker was entitled to commission on basis set forth in agreement.

2. Appeal and error ⇨1008(1)

In real estate broker's action to recover commission, whether vendor read contract and whether broker's employees told her to read printed portions thereof, was for trial court.

3. Appeal and error ⇨1010(1)

In real estate broker's action to recover commission, where findings negating fraud by employees of broker were amply

supported by evidence, appellate court had no power to disturb such findings.

4. Brokers ⇨53

Where broker's contract contains a general authorization to sell, in order to be entitled to a commission, broker must be effective, efficient and procuring cause of sale.

5. Brokers ⇨56(3)

Where exclusive authorization contract between real estate broker and vendor expressly provided that even though broker did not sell property it would be entitled to commission if vendor sold property within 90 days after expiration of term to any person with whom broker had been negotiating during term, while such clause might not have been applicable had broker merely shown property to prospective purchaser and failed to receive an offer from him, it was applicable where broker produced a purchaser ready, able and willing to buy at fixed price and vendor sold at such price to that purchaser within 90-day period after termination of contract.

6. Contracts ⇨155

Printed contracts must be interpreted most strongly against party preparing the form.

7. Brokers ⇨57(2)

Where broker had exclusive ten day listing to sell property for \$75,000 only, and contract further provided that even though broker did not sell property it would be entitled to commission if vendor sold property within 90 days after expiration of term to any person with whom broker had been negotiating during term, where broker secured a purchaser at a price of \$71,500 within term, and vendor refused to accept such offer, but within ninety days after termination of contract sold to such purchaser for same price, fact that property sold for less than \$75,000 did not limit broker's right to a commission.

J. W. Ehrlich, Roy A. Sharff, San Francisco (Howard Iverson, San Francisco, of counsel), for appellant.

Theodore M. Monell, San Francisco, for respondent.

PETERS, Presiding Justice.

Defendant owned a hotel in San Francisco. On December 7, 1948, she gave Milton Meyer & Co., a licensed real estate broker, a written exclusive authorization to sell such property for seventy-five thousand dollars for a period of ten days. In the contract, which was partially printed and partially handwritten, appears this printed clause: "In the event of a sale hereunder by the undersigned or by Milton Meyer & Co. during the term specified in this authorization, or any extension thereof (or within ninety days after the expiration of said term to any person with whom said Milton Meyer & Co. has been negotiating during the term hereof), the undersigned agrees to pay on demand to said Milton Meyer & Co., as commission, five per cent on the first \$50,000—plus two and one-half per cent of the balance of the purchase price." Well within the ten-day period specified in the exclusive agency, Milton Meyer & Co. secured from one Phillip Langsam a written offer to buy the hotel for \$71,500, and submitted this offer to defendant. The offer was rejected. On January 3, 1949, defendant sold the property to Langsam for \$71,500 through another broker, and refused to pay Milton Meyer & Co. a commission. That company assigned its claim to plaintiff and she brought this action to recover the commission under the 90-day clause above quoted. In her answer defendant admitted that she signed the authorization but averred that her signature was obtained through the fraud, deceit and misrepresentation of the employees of Milton Meyer & Co.; that she never read the 90-day clause and did not know that it was in the agreement; that she was induced not to read the clause by the agent of the broker who represented that the exclusive was only good for ten days and that he had a client who was ready, able and willing to pay \$75,000 for the property. The cross-complaint contains substantially the same allegations except that it is there averred that the agent of the broker expressly agreed that if the broker did not effect a sale within the ten-

day period for the sum of \$75,000, all rights of the broker would cease. She prays that the authorization be reformed to conform to the agreement as pleaded.

On these issues the cause proceeded to trial. The court found that defendant had signed the agreement; that her signature was not induced by any false or fraudulent representations of the employees of the broker, nor did they induce or prevent her from reading the agreement; that the 90-day provision was in the agreement, and defendant had full opportunity to read it; that the allegations of the cross-complaint in reference to an alleged agreement between defendant and the broker are untrue; that the broker and its agents did not know that defendant had not read the 90-day provision; that defendant should have known of this provision, and had full opportunity to read it. The court thereupon entered judgment for plaintiff in the sum of \$3,037.50, the amount of the commission as set forth in the agreement. Defendant appeals.

[1] Although the evidence is somewhat conflicting on the vital factual issues, there is ample and substantial evidence to support the findings of the trial court. The record shows the following:

Appellant owned the Edgeworth Hotel in San Francisco. In June of 1948 she listed the hotel for sale with the Lambert Realty Company. In October or November of 1948 Lambert showed the property to one Phillip Langsam who offered \$69,000 for it. This offer appellant rejected, but she then became aware of the fact that Langsam was interested in the hotel. In November of 1948 appellant listed the property with Milton Meyer & Co. for sale at \$75,000, the listing being a non-exclusive open listing. This listing was secured by Kay, an employee of Milton Meyer & Co. On December 6, 1948, Phillip Langsam came into the office of Milton Meyer & Co. and talked to one Miron. Langsam inquired about available hotel properties, whereupon Miron, after securing the open listing on the Edgeworth Hotel from Kay, told Langsam about that hotel. Langsam told Miron that he knew about that property, had another

broker on it, and had been unable to get it for \$69,000. He did not disclose the fact that the other broker was Lambert.

On December 7, 1948, Kay and Miron called upon appellant to request from her an exclusive listing for their firm. There is some conflict as to what then occurred. Appellant testified that she was told that Milton Meyer & Co. had a prospective unnamed purchaser willing to pay \$75,000 for the hotel, and that the broker wanted an exclusive to close the deal. Miron testified that he told appellant that if she would give him an exclusive listing he would "try to get" \$75,000 for the property. Appellant agreed to give Milton Meyer & Co. a 10-day exclusive, and admittedly signed the so-called authorization to sell. This is a printed form with pertinent portions written in. The first part of the agreement gives the broker an exclusive right to sell the property for 10 days for "Seventy Five Thousand only." This is immediately followed by a handwritten general description of the property, the terms of the proposed sale, and a statement about the receipts of the hotel. This is followed, in the same size print as the rest of the portions of the agreement that are printed, by the 90-day clause quoted above. This is followed by certain handwritten matter placed in the agreement at the insistence of appellant. The signatures of Miron and appellant appear just below the second handwritten portion of the contract which follows the printed 90-day clause. The agreement is not a long complicated one. There is no "small print." The 90-day provision is in the same size print as the other printed provisions of the contract. The form is on one sheet of normal letter size paper, the two basic printed parts covering about three inches of the sheet, and the two written portions covering about the same area. The printed 90-day provision appears between the two portions of the agreement that are handwritten. Two separate copies of the agreement were executed. Appellant kept one and Miron the other.

Miron testified that appellant put on her glasses and read the agreement before she signed it, taking about five minutes for the process. This was corroborated by Kay.

During the time appellant was reading the agreement neither talked to her.

Appellant admitted signing the agreement but claimed that she did not read all of it because Miron "said it wasn't necessary," but just to read "what he had written in longhand." She further testified that she did not read the printed 90-day clause, did not know that it was in the agreement, and would never have signed the contract had she known the 90-day provision was in it. Miron denied telling appellant not to read the printed portions of the contract, or to sign it without reading it.

After the authorization was signed on December 7, 1948, on that very same day Miron obtained from Langsam a \$1,000 deposit and a written signed offer to buy the hotel for \$70,000. This offer was presented to appellant, but it is not clear whether this was done personally or by telephone. Appellant promptly rejected the offer. Thereupon, Miron went back to Langsam and got him to raise his written offer to \$71,500. This was done by crossing out the figure \$70,000 on the original offer and raising it to \$71,500. This offer specifically stated that it was to remain open for only two days. Miron and Kay testified that Kay immediately presented this written offer to appellant. It was, of course, signed by Langsam, so that appellant then knew, if she did not know before, the person with whom Miron was negotiating. Miron testified that appellant read the offer, and both Miron and Kay testified that she firmly rejected it. Appellant denied that Miron ever presented a written offer to buy at \$71,500, but this conflict was for the trial court. Langsam testified that he had made the two offers in the manner described by Miron.

After the rejection of the \$71,500 offer, which occurred on December 8th or 9th, Miron tried to get Langsam to increase his offer, but was unsuccessful. He thereupon returned the \$1,000 deposit, and made no further efforts to sell the hotel.

Toward the end of December, Langsam again got in touch with the Lambert Realty Company, the broker with whom he had first dealt, and after some negotiations

again offered to buy the hotel for \$71,500. This offer was accepted on January 3, 1949—less than a month after appellant's negotiations with Milton Meyer & Co.—and the sale was consummated through Lambert Realty Company. Appellant testified that she had changed her mind about accepting \$71,500 for the property because she wanted to enter another transaction that first came to her attention about December 18th.

[2, 3] Appellant urges that the evidence conclusively demonstrates that her signature was secured by means of the fraud and deceit of Miron and Kay. She points to her testimony that she did not read the 90-day clause, and to her assertions that Miron told her that he had a buyer willing to pay \$75,000 for the property, and that the agreement was a ten-day exclusive only, and claims that she never would have signed the agreement had these representations not been made. This testimony, however, was not believed by the trial court, and is contradicted by other witnesses. Miron testified that he would "try" to get her \$75,000, and that he did so try is amply shown. There is a sharp conflict over whether appellant read the contract and over whether Miron told her not to read the printed portions. These conflicts were for the trial court. It saw and heard the witnesses and chose to believe Miron and Kay. The findings negating fraud are amply supported. This being so, this court has no power to disturb the findings.

[4-6] Appellant next urges that the broker, to be entitled to a commission, must be the effective, efficient and procuring cause of the sale. That is undoubtedly the law as to the general authorization to sell. *McCoy v. Zahn Corporation*, 183 Cal. 191, 191 P. 20; *Sessions v. Pacific Improvement Co.*, 57 Cal.App. 1, 206 P. 653. But we are not here concerned with the rights of the broker under the general authorization to sell. We are here concerned with a specific provision of the contract which expressly provided that even though the broker did not sell the property he would be entitled to a commission if appellant sold it "within ninety days after the expiration of said

term to any person with whom said Milton Meyer & Co. has been negotiating during the term hereof." Under the findings, which are supported, the broker negotiated with Langsam during the 10-day term of the contract, secured a written offer from him for \$71,500, communicated this offer and the name of the purchaser to appellant, and then appellant, within less than three weeks from the expiration of the 10-day term of the contract, through another broker, sold the property to Langsam for \$71,500, the identical price first offered through Milton Meyer & Co. While the clause might not be applicable had the broker merely shown the property to a prospective purchaser and failed to receive an offer from him, if it is to have any meaning at all it must be held that it applies where the broker has produced a purchaser ready, able and willing to buy at a fixed price and the owner sells at that price to that purchaser within the 90-day period. We are well aware of the rule that printed contracts must be interpreted most strongly against the party preparing the form, but that rule is of no assistance to appellant. Here the provision in question is clear, concise and unambiguous.

Appellant places her greatest reliance on the case of *Wright & Kimbrough v. De-wees*, 52 Cal.App. 42, 197 P. 957. In that case the broker had a 60-day contract to sell defendant's property for \$18,000. The contract contained this clause 52 Cal.App. at page 43, 197 P. at page 957: "The said 'seller' agrees should a sale or exchange of said above-described property upon said or any satisfactory terms be effected during the period of time hereinafter named, by either party to this agreement, or any other party, or after termination of this contract, if sold to a party to whose attention said property was brought through the agency of the said 'agent,' that the said 'agent' shall receive out of the first payment made on said property 5 per cent. of the price for which said property was sold as a commission for promoting said sale."

Before this contract was executed the owners of the property had shown it to the Mulls, who were the ultimate purchasers,

but had been unsuccessful in securing from them an offer to buy. The owners told the broker, after the listing contract was signed, that the Mulls were prospective purchasers. The broker showed the property to the Mulls but was unsuccessful in securing an offer from them. The broker informed the owners that the Mulls were no longer interested "and to forget about them as prospective purchasers". 52 Cal.App. at page 44, 197 P. at page 957. On March 31, 1916, the owners cancelled the agency relationship with the broker in the manner provided in the agency contract. Thereafter, the owners again tried to interest the Mulls in the property, and, in January, 1917, about nine months after the agency contract was cancelled, sold the property to them for \$12,000. The broker had nothing to do with this sale. The broker sued for a commission under the clause quoted above. At page 46 of 52 Cal.App., at page 958 of 197 P. the court stated: "There is nothing in the language of this contract which takes it out of the general rule requiring the broker to be the procuring or efficient cause of the sale in order to entitle him to commissions." In referring to the purpose of the quoted provision, the court, quoting from another case, stated 52 Cal.App. at page 47, 197 P. at page 959: "The only valid purpose of the stipulation in question must be to protect the broker from loss of compensation for successful efforts in procuring a purchaser, culminating in a sale on the stipulated terms after the broker's authority to effect a sale has terminated. It is a shield to protect the agent, not a sword to injure his principal."

The court pointed out that the broker was entitled to a commission, under the terms of the contract, "for promoting said sale", and held that the negotiations involved did not amount to "promoting" the sale. In this connection the court stated in 52 Cal. App. at page 46, 197 P. at page 958: "This language imports an obligation on the part of the broker, to entitle him to commissions, to do something more than merely show the property and make unsuccessful efforts wholly unconnected with and to no extent traceable to the subsequent sale. His com-

missions depended entirely upon results accomplished—for 'promoting' or procuring the sale. There is nothing in the language of this contract which takes it out of the general rule requiring the broker to be the procuring or efficient cause of the sale in order to entitle him to commissions."

This case has no application here. There, the broker was totally unsuccessful in getting the Mulls to make an offer. Here, the broker secured from Langsam a written offer to buy at \$71,500, the very price at which the property was sold.

Hobson v. Hunt, 59 Cal.App. 679, 211 P. 242, another case relied upon by appellant, is also not in point. In that case the broker was granted an exclusive right to sell for two months, and thereafter, until 10 days' written notice of the cancellation. The agreement contained the following clause 59 Cal.App. at page 680, 211 P. at page 242: "* * * and in the event of the said property being sold or exchanged by the owner, after the termination of this right to sell, to or by any party introduced or whose name in writing has been given the owner, as a prospective purchaser, by the agent, the owner agrees to pay the agent, as a commission, the above-mentioned rate of commission on whatever price is accepted for the said property."

The agency contract was later cancelled, but, prior to the effective date of such cancellation, the broker sent the owner a list of the names of eleven prospective purchasers, including the name of the person who became the ultimate purchaser. This purchaser testified that the broker had tried to interest him in the property, but at that time he was not interested in the terms and at the price quoted. The court, in holding that the broker was not entitled to a commission, stated that the reasonable interpretation of the clause prevented such a recovery. In this connection the court held 59 Cal.App. at page 682, 211 P. at page 243: "The clause in question was doubtless intended to protect the agent in the event of a sale made after the termination of the contract, to a person whom the agent had interested in the land during the life of the contract to the extent that such person had

become a prospective purchaser; that is, one to whom there was at least some probability of making a sale within a reasonable time. To construe the contract otherwise would be to hold that the agent in such a case might give the owner any number of names of persons as prospective purchasers, regardless of whether or not they were such in fact, and then, in the event of a sale to any one of them, claim the commission. It would be highly unreasonable to hold that such was the intention of the parties to the contract. It would tend to make a real estate dealer a procurer of names, rather than a procurer of purchasers."

In the instant case, unlike the Hunt case, the broker, during the life of the contract, produced a purchaser ready, able and willing to purchase for \$71,500. The contract provided that, if within 90 days the owner sold to anyone with whom the broker "has been negotiating", a commission would be paid. Certainly, Milton Meyer & Co. had been "negotiating" with Langsam during the ten-day period of the exclusive, regardless of how limited a definition is given to the term. This being so, the broker is entitled to the commission. See, generally, *Kimmell v. Skelly*, 130 Cal. 555, 62 P. 1067; *Lowe v. Loyd*, 93 Cal.App.2d 684, 209 P.2d 851.

[7] The last contention of appellant is that she was obligated to pay a commission only if the broker effectuated a sale for \$75,000. In the instant case the exclusive ten-day listing was to sell the property for "Seventy Five Thousand only." Of course, if during that 10-day period the broker produced a purchaser for less than \$75,000, the owner was not obligated to sell or to pay a commission. But if appellant had accepted the original offer of Langsam of \$71,500 procured by Milton Meyer & Co., she certainly would have been obligated to pay a commission even though \$75,000 had not been secured. The 90-day provision contains no limitation as to price. It constitutes a promise to pay a commission if the owner, within 90 days, sells to anyone with whom the broker "has been negotiating." Here, the sale was within that period to Langsam for the very price that Mil-

ton Meyer & Co. induced Langsam to offer. Under such circumstances the \$75,000 price does not limit the broker's rights.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



103 Cal.App.2d 347

MACAL IMP. CO. v. HOSKINS et al.

Civ. 7890.

District Court of Appeal, Third District,
California.

April 9, 1951.

The Macal Improvement Company, a corporation, brought action against Roy Hoskins and wife to recover for rental of tractor which plaintiff had rented to a contractor for performance of work on realty of defendants. The Superior Court of Solano County, Joseph M. Raines, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Adams, P. J., held that evidence sustained finding that there had never been any agreement on part of defendants to pay plaintiff any rental.

Judgment affirmed.

1. Appeal and error ⇐1011(1)

A judgment will not be reversed because evidence is conflicting.

2. Appeal and error ⇐1002, 1011(1)

An appellate court will not disturb a verdict of a jury or findings of a trial court when there is substantial conflict of evidence on material points and when there is some evidence to support verdict or findings.

3. Bailment ⇐20

In action by owner of tractor against owners of realty to recover rental for tractor which owner had rented to a contractor for work done on realty, on ground that when contractor discovered that contractor was not financially responsible, owner of tractor threatened to take it off the work,

and that owners of realty then agreed to be responsible for rental of tractor, evidence sustained finding that there was no agreement by owners of realty to pay rental.

Yates F. Hamm and Richard E. Arnason, Antioch, Hoey, Hoey, & Fenstermacher, Pittsburg, for appellant.

Sinclair M. Dobbins and Walter W. Weir, Jr., Vacaville, for respondents.

ADAMS, Presiding Justice.

Plaintiff brought this action against Roy Hoskins and his wife, Ruth, seeking a money judgment for \$1195.25 for rental of a tractor from it, and other expenses incidental to the use of same. Defendants denied the allegations of the complaint, and the case was tried by the court sitting without a jury. Findings in favor of defendants were made and judgment entered accordingly. From that judgment this appeal has been taken.

The evidence shows that on January 24, 1947, Mr. Hoskins entered into a written agreement with one K. C. McGee by which McGee agreed to move earth for a dam to be constructed upon land belonging to Mrs. Hoskins, for the cost of construction of which the federal government had agreed to contribute \$1412.20. In order to undertake the work for which he was employed McGee rented the tractor in controversy from plaintiff, agreeing to pay a rental of \$5 an hour for every hour the equipment was used, and to pay the operating expenses of same. McGee employed Floyd Greiner, who had previously been in the employ of plaintiff, to operate the tractor, and the work was commenced. After Greiner had been at work for a few days or weeks, McGee gave him two checks for his services, both of which checks were dishonored, and made good by appellant. It appeared that McGee was then out on bail after having been arrested for issuance of a check to another person without funds to cover same, and, in short, was in such financial trouble that defendants became concerned for fear the dam would not be completed on time. McGee, however, continued to use the tractor which he

had rented from plaintiff until it became disabled and plaintiff took it off the job. In the meantime, Mr. Hoskins paid Greiner his wages and also paid for gas and oil furnished for the tractor, his intention, as he testified, being that what he paid for gas and oil would be deducted from the sum due on McGee's contract.

McGee having failed to pay to plaintiff the rental due it under his contract, plaintiff sued defendants, alleging that they had entered into an oral contract with it for rental of the tractor and had agreed, in addition, to reimburse plaintiff for moneys which it had paid to Greiner, and had also agreed to pay additional expenses incurred to keep the equipment in good repair, and for transportation of same to Antioch when the tractor became disabled.

The trial court found that the allegations of plaintiff's complaint were not true and that defendants were not indebted to plaintiff in any sum whatsoever.

On this appeal plaintiff contends that the trial court erred in its application of the law to the facts, that plaintiff should recover on an implied promise or quasi contractual obligation to pay it, since defendants enjoyed benefits from the work done by the tractor upon their land, and also contends that the evidence entitled it to judgment.

There is a definite conflict between the evidence adduced by plaintiff and the testimony of Mr. Hoskins in behalf of his wife and himself. Louis H. Roberts, president and superintendent of appellant, stated that he told Mr. Hoskins that they had not been paid rental due upon the tractor and wanted to know how they were going to be paid; that Mr. Hoskins stated that he did not believe that McGee was responsible, but that he was capable, and that if appellant would not "pull the machine off the job" before the job was completed he would pay the rental; that he would also pay the operator and would pay the fuel bills as they became due; and that Hoskins further agreed that he would pay appellant the amount which it had paid Greiner in lieu of the dishonored McGee checks. He also testified that Hoskins had said that the job would have to be approved by the

Bureau of Reclamation before he got any money, and that as soon as he did he would call plaintiff and pay it before any other bill was paid; that Hoskins said that other parties had put liens against the property but that he thought that after the lien claimants were paid there would be something left, and that plaintiff would get whatever was left.

Greiner, to some extent, corroborated the testimony of Roberts, as he stated that Hoskins agreed to pay him and did so thereafter; that he heard a conversation between Roberts and Hoskins during which Mr. Hoskins said: "I will see—I will see that you get your money on the job." He also testified that Hoskins paid for the oil, gas, fuel and maintenance of the equipment while it was on the job, and paid him (Greiner) his wages; that McGee, when he was there, supervised the work, and when he was not, sometimes Hoskins supervised it. There was some other testimony which tended to show that Hoskins had assumed liability to appellant in order to get the job on the dam completed, and to take care of other creditors.

As opposed to the testimony of appellant's witnesses, respondent Hoskins testified that Mr. Roberts had come to see him and said he was worried over the deal, and that when a check given him by McGee came back and there was no payment he then told Roberts that he could give him \$750 to pay those bills, but that "I said the only possible thing I could do under the contract, I could not give him another nickel, that I would go ahead and pay the gas bills and the repairs and have the blacksmith and tractor drivers [paid], and what money was left, I would hold until the completion of the job, and so he could get what was left." He stated that Roberts told him he was satisfied; that at no time did he agree to hire this tractor and pay rental for it, nor for the repairs (after being broken down) or the transportation, and that he knew nothing about it. He also testified that Mr. Roberts said he was taking the tractor away; that McGee had been talking to him on the 'phone and had rented another tractor which was more reasonable, and that Roberts had agreed that he might

have a better deal on a cheaper rent; that Mr. Roberts "wanted to know if I would give him any money, and I told him, no, I would not pay out another nickel until the job was cleared up and everything was settled." He stated that at no time did he ever receive a bill from appellant for rental, and that he never told Roberts he would guarantee the payments due from McGee to appellant, and that Greiner never told him that appellant was going to remove the tractor; that he never guaranteed Macal a nickel.

The record shows that after the testimony in the case was first closed and findings and judgment entered in favor of defendants, and after about a year had elapsed and the job had been completed, the case was reopened and additional testimony taken. At that time Hoskins testified that when plaintiff's equipment came on the job he (Hoskins) did not know that it belonged to appellant but thought it was owned by McGee; that he was dealing with McGee and that all he was interested in was getting the dam completed, because his contract was with McGee, not Roberts. He stated that the government agency paid him about \$1412.-20, the total amount that it had contracted to pay, and there was no more money coming from the government; that the total amount due McGee was \$2211.84, from which was deductible \$1571.51 which he had paid out for McGee, and that \$640.33 was due McGee on his contract; that McGee had procured another man to finish the job and he (Hoskins) had paid that man.

[1-3] From the foregoing it is apparent that there is a direct conflict between the testimony of Roberts, Greiner and McGee and the testimony of Hoskins. It is equally apparent that there is ample evidence to support the finding of the trial court in favor of defendants. It is said in 2 Cal. Jur., sec. 543, p. 921, that: "A judgment will not be reversed because the evidence is conflicting. On the contrary, the rule is established by a host of decisions that an appellate court will not disturb a verdict of a jury or findings of a trial court when there is a substantial conflict of evidence on material points and when there

is some evidence to support the verdict or findings." Also see 1 Cal.Jur. 10-Yr. Supp., page 563 et seq., for a multitude of additional authorities to the same effect, and 1 Cal.Jur. 10-Yr.Supp., 1950 Pocket Part, pages 236 and 237. Under the foregoing rule this court may not disturb the findings of the trial court which heard the witnesses, observed their manner of testifying, and elected to accept the testimony of Mr. Hoskins. Also see *Ahern v. S. H. Kress & Co.*, 97 Cal.App.2d 691, 692, 218 P.2d 108, 109, hearing in Supreme Court denied, in which it is said: "It is a rule too well established to require the citation of authorities that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence it must appear from the record that, accepting the full force of the evidence adduced together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering a judgment. The evidence must be construed most strongly against the losing party. Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party."

We are bound by the foregoing rule.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.



103 Cal.App.2d 275

COHEN v. COHEN.

Civ. 18324.

District Court of Appeal, Second District,
Division 1, California.

April 5, 1951.

Divorce action by Bertha Cohen against Julian Cohen. From that portion of interlocutory judgment of divorce awarding cer-

tain community property to defendant, order denying a new trial, and order *nunc pro tunc* reducing the award for attorney's fees as set forth in judgment, the plaintiff appealed, and the defendant moved to dismiss the appeal. The District Court of Appeal, Hanson, Justice pro tem., held that where a second motion by respondent to dismiss appeal was taken after District Court of Appeal had declined to dismiss the appeal on respondent's first motion because grounds therein set forth were inadequate to warrant the dismissal set forth a new and distinct ground which was known by respondent and available to him at time he filed his first motion, and respondent offered no excuse for not presenting in first motion the ground he was now relying upon in his present motion, the second motion would also be denied.

Motion to dismiss denied.

Appeal and error ⇐795(3)

Where respondent's second motion to dismiss appeal after District Court of Appeal had declined to dismiss appeal on first motion because grounds therein set forth were inadequate to warrant the dismissal set forth a new and distinct ground which was known by respondent and available to him at time he filed his first motion, and respondent offered no excuse for not presenting in the first motion the ground he was now relying upon in his present motion, respondent's second motion would also be denied.

Jones & Wiener, Norman Soibelman and Irvin G. Freeman, Los Angeles, for appellant.

Paul Gordon, Los Angeles, for respondent.

HANSON, Justice pro tem.

This is a second motion by the respondent to dismiss the appeal taken in this case. On the first motion we declined to dismiss the appeal because the grounds therein set forth were inadequate to warrant the dismissal. Cal.App., 228 P.2d 54. The motion now before us sets forth a new and distinct ground which was known by the respondent and available to him at the time he filed his first motion. Respondent offers no excuse for not presenting in the

first motion the ground he now relies upon in his present motion. We do not view with favor this piecemeal method employed by respondent which has unnecessarily required an additional hearing and an additional opinion. That such a procedure is not to be tolerated is indicated by a host of cases, see 42 C.J. 521, 60 C.J.S., Motions and Orders, § 45.

The motion to dismiss is denied.

DORAN, Acting P. J., and DRAPEAU, J., concur.



103 Cal.App.2d 395

BARBA v. BARBA.

Civ. 18268.

District Court of Appeal, Second District,
Division 2, California.

April 11, 1951.

Divorce action by Antonia Barba against Tomas N. Barba. The Superior Court, Los Angeles County, Ralph McGee, J., rendered a judgment for the plaintiff, and from that part of the judgment granting to plaintiff exclusive control of realty held in joint tenancy, the defendant appealed. The District Court of Appeal, Moore, P. J., held that the court was without power to assign defendant's interest in the property to his wife.

Portion of judgment particularly appealed from ordered stricken.

1. Husband and wife ⇨14(3)

The taking of title in name of husband and wife as joint tenants was equivalent of a valid and binding contract that property should thereafter be held in joint tenancy with all characteristics of such an estate, although purchase price was largely attributable to separate estate of wife.

2. Husband and wife ⇨14(3)

Joint tenancy of husband and wife is one estate, and rights of spouses are identical and coextensive.

229 P.2d—30

3. Husband and wife ⇨14(3)

Where realty is held by husband and wife as joint tenants, each is owner of undivided one half interest therein in his and her separate right.

4. Divorce ⇨249(3)

In matrimonial controversy resulting in divorce decree in favor of one of the parties, court cannot assign separate property of one spouse to the other.

5. Partition ⇨13

If, after divorce of spouses has been decreed, termination of joint tenancy is deemed necessary, either may commence appropriate action to effect a partition.

6. Divorce ⇨249(3)

Where wife was granted interlocutory divorce decree, court had no power to adjudge that wife retain exclusive possession and control of joint tenancy realty during her lifetime.

J. Widoff, Los Angeles, for appellant.

David C. Marcus, Los Angeles, for respondent.

MOORE, Presiding Justice.

In an action for divorce plaintiff was awarded an interlocutory decree and it was adjudged that the real property in dispute "is the joint tenancy property of the parties hereto; *that the plaintiff shall have and retain the exclusive possession and control of said real property during her lifetime, and that the defendant shall move and vacate therefrom on or before the 10th day of August, 1950, and deliver the exclusive possession thereof to plaintiff.*"

The defendant has appealed from that part of the judgment above italicized and demands a reversal on the ground that the court did not have power to deprive him of his rights and interests in and to his real property or to exclude him from the use and benefits of any part thereof by the award made.

[1, 2] While it is true that the purchase price of the little cottage was largely paid from the separate substance of respondent,

yet the taking of title in the name of the parties as joint tenants was tantamount to a valid and binding contract that the property should thereafter be held in joint tenancy with all the characteristics of such an estate. "A joint tenancy is one estate, and in it the rights of the spouses are identical and coextensive." *Siberell v. Siberell*, 214 Cal. 767, 773, 7 P.2d 1003, 1005.

[3-6] By virtue of the nature of the title by which the property is held by the parties, each is the owner of an undivided one-half interest therein in his separate right. In a matrimonial controversy resulting in a decree of divorce in favor of one of the parties, the court is without power to assign the separate property of one spouse to the other. *Fox v. Fox*, 18 Cal.2d 645, 646, 117 P.2d 325. If, after a divorce of spouses has been decreed, the termination of their joint tenancy title to a property is deemed necessary, either may commence an appropriate action to effect a partition.

In support of her contention that the court below had the authority to assign appellant's interest in the property to respondent she cites a number of decisions. None of them is authority for respondent's contention. In *Schell v. Schell*, 74 Cal.App.2d 785, 169 P.2d 654, the judgment for divorce awarding the wife possession of the home held in joint tenancy was not appealed. Five months after the divorce decree the defendant filed a petition for accounting in which he showed that his wife had changed the form of the family home into a partial rooming house on a business basis and demanded that she account for the rentals received. The right of the wife to the exclusive use of the family dwelling was never made a direct issue on appeal. The entire decision deals solely with the right of the husband to an accounting for rents and profits.

In *Fairchild v. Clark*, 87 Cal.App.2d 172, 196 P.2d 60, a joint tenancy estate was not involved. The property in controversy there was community in character. The case is therefore not authority for the issues here under consideration. In *Tompkins v. Tompkins*, 83 Cal.App.2d 71, 187 P.2d 840, while the title to the real property

involved did stand in the names of the parties as joint tenants, the pleadings conclusively determined that it was community property. The case of *Black v. Black*, 91 Cal.App.2d 328, 204 P.2d 950, is equally impertinent to the controversy at bar.

It is ordered that the portion of the judgment particularly appealed from be stricken.

McCOMB, and WILSON, JJ., concur.



103 Cal.App.2d 385

LOS ANGELES COUNTY v. BITTER et al.
Civ. 17782.

District Court of Appeal, Second District,
Division 1, California.

April 11, 1951.

The County of Los Angeles instituted proceedings against Ben Bitter, Burney M. Starksen and Sue H. Starksen and others to condemn for a public use, certain real property. The Superior Court of Los Angeles County, Paul Nourse, J., vacated judgment entered and granted motion for new trial, and the defendants Burney M. Starksen and Sue H. Starksen sought to appeal both from order vacating judgment and granting new trial and from the vacated judgment. The District Court of Appeal, Hanson, J., pro tem., held that evidence failed to show that trial court abused its discretion in granting a new trial because it considered that damages as fixed by jury were too high.

Appeal from vacated judgment dismissed, and order vacating judgment and granting new trial affirmed.

1. Appeal and error ☞66

An appellate court may not undertake a piecemeal review of a case.

2. Appeal and error ☞13, 76(2)

Rules of trial court in advance of, or at, trial below were interlocutory in character and unappealable before entry of

judgment and they became of like character after trial court vacated the judgment and granted new trial.

3. New trial ⇨76(1)

Trial judge has duty to grant a new trial upon issue of damages if he is of considered opinion that the damages as assessed by jury are too high.

4. Eminent domain ⇨224

In proceeding by county to condemn 80-acre tract, evidence failed to establish that trial court abused its discretion in vacating judgment and ordering new trial upon defendants refusing to consent that judgment be reduced to \$10,000 after jury had returned verdict in sum of \$22,052.25.

Stewart, Shaw & Murphey, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, and Roy W. Dowds, Asst. County Counsel, and John B. Anson, Deputy County Counsel, all of Los Angeles, for respondent.

HANSON, Justice pro tem.

The case below was instituted by plaintiff-respondent County of Los Angeles to condemn, for a public use, a real property consisting of 80 acres owned by defendant-appellants. The jury returned a verdict for the defendants in the sum of \$22,052.25, upon which judgment was entered. The highest value ascribed to the property on the part of witnesses for the plaintiff was \$5,600; on the part of witnesses for the defendants it was \$44,000.00. The defendants having refused to consent that the judgment be reduced to \$10,000.00, the trial court vacated the judgment and ordered a new trial on the sole ground that the damages, awarded by the verdict, were not sustained by the evidence.

[1] The appeal in this case by the defendant-appellants is both unusual and unique in that it purports to be not only (1) an appeal from the order vacating the judgment and granting a new trial, based upon the motion of the plaintiffs, but (2) an appeal from the *vacated* judgment rendered in favor of the defendants. Accordingly, if we were to reverse both the

order granting a new trial and the judgment, as defendants request, the case in any event would have to be tried anew, which is exactly what the trial judge ordered. Evidently the procedure taken by the defendant-appellants was based on the hope that we would not only sustain the appeal *in toto*, but would, in advance of the new trial, which concededly must now be had, express our opinion on the rulings of the court below, which are here assigned as error. This we may not do as it has long been established as an unquestioned rule that an appellate court may not undertake a piecemeal review of a case. *West v. Spencer*, 238 Mo. 65, 141 S.W. 586.

[2] The rulings below, of which complaint is here made, occurred in advance of, or at, the trial below and so were in every instance interlocutory in character and hence not appealable. As the rulings were interlocutory before the judgment was entered they are of like character now that the judgment has been vacated. As the judgment itself was vacated and thus became nonexistent the attempt to appeal therefrom was entirely ineffectual. *Carpenter v. Hamilton*, 18 Cal.App.2d 69, 62 P.2d 1397; 4 C.J.S., Appeal and Error, § 106, p. 203, note 80. If, in the instant case, a new trial had not been ordered and the defendant had appealed from the judgment as originally entered, we would then be under a duty, if we reversed the judgment, to point out the errors in the court's rulings to the extent they had been assigned and were of a character that could have affected the verdict or findings upon which the judgment was entered. We have no such comparable situation here.

There remains then for our consideration on the merits only the appeal from the order granting a new trial.

[3,4] Under well-established rules of law the trial judge was vested, not only with the power, but also with the duty to grant a new trial upon the issue of damages if he was of the considered opinion that the damages as assessed by the jury were too high. In this case he thus exercised his discretion and we may not review it, unless it be shown he abused it. There is in

this record not the least suggestion of any such abuse.

The appeal from the judgment is dismissed. The order vacating the judgment and granting a new trial is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



103 Cal.App.2d 361

In re BJORS' ESTATE.

**BJORSES et al. v. CROCKER FIRST
NAT. BANK OF SAN FRAN-
CISCO et al.**
Civ. 14661.

District Court of Appeal, First District,
Division 1, California.
April 10, 1951.

Rehearing Denied May 10, 1951.

Hearing Denied June 7, 1951.

Proceeding in the matter of the estate of Victor Bjors, also known as Johann Victor Bjorses and Victor Bjorses, deceased. The Superior Court of the State of California in and for the City and County of San Francisco, Timothy I. Fitzpatrick, J., entered a decree of final distribution, and Edward Bjorses and others appealed from a portion of the decree of final distribution, opposed by Crocker First National Bank of San Francisco, as executor of the last will and testament of Victor Bjors, deceased, and Otto Sigfred Edwards, individually, and as guardian of Harry Gordon Edwardson, a minor. The District Court of Appeal, Fred B. Wood, J., held that provision in codicil for termination of testamentary trust upon death of nephew at which time such portion of trust estate should vest in nephew's child or children, in equal shares, then living, would be construed as meaning that trust terminated only as to the two-fifths of the income allocated to nephew during his life time.

Decree reversed with instructions.

1. Wills ⚡686(1)

Where testator by codicil allocated one-fifth of income of trust to testator's

brother during his lifetime, with direction for distribution to brother's lineal descendants per stirpes upon his death, two-fifths of the income to children of two sisters of testator who had predeceased him, and two-fifths of the income to a nephew, who was a son of testator's brother, provision in codicil that trust should terminate upon death of nephew at which time "said portion" of trust estate should vest in nephew's child or children, in equal shares, then living, intended that trust terminate only as to the two-fifths of the income allocated to the nephew, and testator died intestate as to the two-fifths of the corpus remaining after death of children of his two predeceased sisters.

2. Wills ⚡439

Statutory rules of interpretation are to be followed in so far as they aid in determining intention of testator, but they are all subject to the fundamental rule that intention as shown by the will must prevail. Probate Code, §§ 101, 105.

3. Courts ⚡89

In construction of wills each case depends upon its own peculiar facts, and precedents have comparatively small value. Probate Code, §§ 101, 105.

4. Wills ⚡470

The will and entire scheme of disposition of testator's property should be viewed as a whole in construing will, and the words used should be considered in reference to the context and construed according to their surroundings. Probate Code, §§ 101, 105.

5. Life estate ⚡3

It is not necessary to creation of a life estate or interest that donor, trustor, or testator express in words the period of its duration, nor is it necessary that he provide for disposition of the property upon termination of a life estate or interest.

Henry B. Lister, San Francisco, for appellants.

Theodore M. Monell, San Francisco, for respondent Crocker First Nat. Bank of San Francisco as executor.

Hilary H. Crawford, San Francisco, for respondent Otto Sigfred Edwardson individually and as guardian of Harry Gordon Edwardson.

FRED B. WOOD, Justice.

This is an appeal from a portion of the decree of final distribution in the Estate of Victor Bjors, an appeal taken by Victor's sole surviving brother, Edward, by the son of Victor's predeceased sister, Ida, and by children and grandchildren of his predeceased sister, Wilhelmina. The appeal is from all of the decree except the portion thereof which distributed a \$5,000 legacy to a friend of the testator.

Victor died January 7, 1947, a resident of the city and county of San Francisco. He was a man of advanced years and left an estate of the appraised value of \$433,-482.92. His will, executed June 18, 1946, and a codicil thereto, executed September 18, 1946, were proved January 27, 1947.

In his will, Victor recited that he was single and without issue; that his parents were no longer living; that one brother had died without issue; that his sisters Ida and Wilhelmina had died leaving children surviving them; that Edward was his only living brother; and that all of these relatives lived in Finland.

After making these recitals, he gave all of his estate in trust to Crocker First National Bank of San Francisco, specifying first the general and the specific powers of the trustee in the handling of the trust property and funds. Then followed the dispositive provisions, in two parts: Paragraph III, headed "Beneficiaries," relating, principally, to payment of income to the persons and groups of persons designated therein; and paragraph IV, headed "Termination," relating to disposition of the corpus upon termination of the trust, or of the several trusts, for payment of income.

By his codicil, after giving \$5,000 to a friend, Victor amended his will by making specific additions to and deletions from various portions of paragraphs III and IV of the will. He then ratified, approved, confirmed and adopted all of the provisions

of the will as thus modified. It is one of these modifications that presents the problem upon this appeal.

The will (prior to modification) directed the payment of one-third of the income to the brother Edward during his lifetime (and upon Edward's death, distribution to his lineal descendants per stirpes), and two-thirds of the income to the children of the two sisters, Ida and Wilhelmina. By the codicil he reapportioned the income, allocating one-fifth to Edward, two-fifths to the children of Ida and Wilhelmina, and two-fifths to Otto Sigfred Edwardson, a son of Edward and a resident and citizen of the Dominion of Canada. The codicil supplemented this redistribution of income by inserting in the "Termination" paragraph the following clause: "(c-1) This trust shall terminate as to the remainder of my estate upon the death of my said nephew, Otto Sigfred Edwardson, at which time said portion of my trust estate shall go, vest in and be delivered to his child or children, in equal shares, then living."

Does this clause mean that upon the death of Otto the trust terminates as to four-fifths thereof (the income payable to Otto and the income payable to the children of Ida and Wilhelmina) and that four-fifths of the corpus goes to the child or children of Otto, or that the trust then terminates only as to the two-fifths of the income allocated to Otto and that his children then take but two-fifths of the corpus? The decree of distribution gives four-fifths of the corpus to the children of Otto, upon the death of Otto.

This termination clause can best be interpreted by reading it in its context. Paragraph III, relating to payment of income, and paragraph IV, relating to termination, as amended by the codicil,¹ read as follows:

"(III) Beneficiaries:

"(a) I hereby direct my said Trustee to pay ~~one-third~~ *one-fifth* of the income from my said estate to my brother, Edward Bjorses, heretofore mentioned, in monthly instalments, or at less frequent intervals (not less frequently than annually); provided, how-

1. In the quoted portion which follows, words stricken from the will by the

codicil appear in strike-out type; words inserted, in italics.

ever, that said Trustee may, in its absolute discretion, pay such additional amounts to my brother as may be necessary for his maintenance and support, or for the maintenance, support, education and comfort of any of his children, or to cover any emergency or unexpected contingency which said Trustee deems it proper to pay hereunder. If necessary, said Trustee is authorized to advance to my said brother such amounts as may be required, in order to carry out the intentions hereof, from the principal or corpus of said trust estate;

"(b) I hereby direct my said Trustee to pay the balance *two-fifths* of the income from my said estate to the children of my sisters, Wilhelmina Bjorses Philajamaki, also known as Wilhelmina Bjorses, above mentioned and of my sister Ida Bjorses Doli, above mentioned, in equal shares, per capita and not per stirpes, in monthly instalments, or at less frequent intervals (not less frequently than annually); provided, however, that said Trustee may, in its absolute discretion, pay such additional amounts, to or for any of said children as may be necessary for the maintenance, support and education of any of said children or to cover any emergency or unexpected contingency which said Trustee may deem it proper to pay. If necessary, said Trustee is authorized to advance to any beneficiary hereunder such amounts as may be required, to carry out the intentions hereof, from the principal or corpus of said trust estate. Any advances so made shall be offset against the interest of any beneficiary hereunder, in order to equalize a fair division of said portion of my estate bequeathed for the benefit of said children of my two sisters.

"(b-1) I hereby direct my said Trustee to pay the balance of the income from my said estate to my nephew Otto Sigfred Edwardson (now residing in New Westminster, B. C., Canada, but intending to come to San Francisco in the very near future), so long as he shall live.

"(c) In the event that, by reason of any law of the State of California, or of

the United States, the income hereinbefore provided to be paid to any beneficiary hereunder shall be subject to forfeiture, or if, under the laws of any country of which any beneficiary hereunder should be a resident or citizen (excepting the United States of America), any taxes levied or assessed against said trust estate, or the income therefrom, should be in excess of sixty percent of the amount of said trust estate, or of such income, respectively, or, in the event that any beneficiary hereunder cannot be located within five (5) years after my death, and in the further event that none of the children of my brother can be so located, in any and all of such events the provisions hereof, so far as any beneficiary hereunder and the children of my brother are concerned, shall lapse, and the effect thereof shall be to increase the shares going to the persons not so affected as hereinafter provided;

"(d) It is my intention and desire that all the beneficiaries hereunder shall remove from any foreign country (the residence in which would invoke a forfeiture hereunder) to the United States of America, or to any friendly, foreign country, the laws of which will permit him or her to take as beneficiary under the provisions herein set forth; and, if any beneficiary should be located within five (5) years after my death in some foreign country the laws of which would require a forfeiture or lapsing under the provisions hereof, such beneficiary shall have a period of two (2) years, after being so located, or remove from such country to the United States of America, or to some friendly, foreign country where such forfeiture or lapse would not occur;

"(e) It is my further intention and desire that all the beneficiaries hereunder shall come to the United States of America and there shall be no forfeiture or lapsing of any provisions hereof should they, or any of them, come to this country, regardless of the extent of the taxes, assessments or charges against said trust or the income thereof.²

2. In respect to the subject matter of subparagraphs (c), (d), and (e) of para-

graph III of the will, the parties stipulated and the trial court found that "said

"(IV) Termination:

"(a) This trust shall terminate as to ~~one-third ($\frac{1}{3}$)~~ *one-fifth ($\frac{1}{5}$)* of said estate (1) upon the death of my said brother, Edward Bjorses, or (2) five years after the date of my death if my said brother shall not have been located within said period of time, or (3) two years after the locating of my said brother if he shall not, within said period of two years, be situated in a country the laws of which will permit him to take as beneficiary hereunder;

"(b) Upon such termination, said ~~one-third ($\frac{1}{3}$)~~ *one-fifth ($\frac{1}{5}$)* of said trust estate shall be paid and delivered in equal shares to the children of my said brother, then living, and to the children of any deceased child by right of representation, subject and pursuant to the foregoing provisions hereof.

"(c) This trust shall terminate, as to the ~~remainder two-fifths ($\frac{2}{5}$)~~ of my estate, (1) five years after the date of my death, if none of said children of my said sisters shall have been discovered within said period of time, or (2) two years after discovering said children if they, or any of them, shall not, within said period of two years, be situated in a country the laws of which will permit him or her to take as beneficiary pursuant to the provisions hereof, provided that such termination shall be only pro rata effective as to the interest of any child not so situated within said period of two years, or discovered within five years after my death.³

"(c-1) This trust shall terminate as to the remainder of my estate upon the death of my said nephew, Otto Sigfred Edwardson, at which time said portion of my trust estate shall go, vest in and be delivered to

his child or children, in equal shares, then living.

"(d) Prior to distribution hereunder, my said trustee shall pay to the beneficiaries hereunder (subject to the provisions as to forfeiture and lapsing hereinbefore set forth) the income from said trust estate until the expiration of the period within which the ultimate distributees hereunder may be determined, reserving unto said trustee the power to determine in its discretion the amount of such income to which any beneficiary may be entitled hereunder. Any payment made by said trustee in good faith hereunder shall absolve said trustee from any liability to any person or beneficiary entitled hereunder to become an ultimate distributee of said trust, it being my intention to provide for the beneficiary hereinbefore mentioned, so far as may be possible, the benefits of the income from said trust estate pending the ascertainment of the specific personnel of the ultimate distributees.

"(e) In the event of the lapsing of all of the provisions hereof for the benefit of my said brother and his children and the descendants thereof, and upon termination of said portion of this trust as herein provided, said portion of said trust estate shall be paid, delivered and distributed to my cousin, Ida Pascoe, of San Jose, California.

"(f) In the event of the lapsing of all of the provisions hereof for the benefit of the children of my sisters, and upon termination of said portion of this trust as herein provided, said portion of said trust estate shall be paid, delivered and distributed to my said cousin, Ida Pascoe, of San Jose, California."

parties and their descendants and any and all legatees and devisees under the will of said decedent and any and all persons interested in the estate of said decedent were at the time of his death and are residents and nationals of countries under the laws of which residents and citizens of the United States have and had a reciprocal right to take real and personal property by succession and testamentary disposition upon the same terms and conditions as residents and citizens of said foreign countries."

3. Concerning the pro rata termination as to two-fifths of the estate allocated for income payments to the children of the sisters, Ida and Wilhelmina, upon the contingencies expressed in subparagraph (c) of paragraph IV, the trial court in its decree of final distribution found that "neither of said contingencies [the two-year and the five-year contingencies] has arisen and that said provisions of said will and codicil are accordingly inapplicable."

Here we have a picture of a man advanced in years. He has built up a considerable fortune in the country of his adoption. He gives thought concerning the disposition of these properties upon his death. They consist, principally, of four parcels of land in San Francisco, with a furnished apartment house upon each parcel. He tells us, in his will, that he has no immediate family. His mind turns to his brother and to his nieces and nephews, whom he tells us are in the old country, Finland, and expresses the desire that they, all of them, come to the United States of America, the country of his adoption. He puts all of his properties in trust for the benefit, principally, of these near relatives in Finland.

He directs his trustee to pay "one-third of the income from my said estate" to his brother Edward, with authority to make advancements (par. III-a of the will). He declares, as to this portion, that "this trust shall terminate as to one-third of said estate" upon the death of Edward (par. IV-a), and that "upon such termination, said one-third of said trust estate" shall be delivered to the then living children of Edward and to the children of any deceased child of Edward, they to take by right of representation (par. IV-b). In subparagraphs (c) and (d) of paragraph III he specifies certain events upon the occurrence of which the interest of a beneficiary affected thereby shall lapse; such a lapsing to "increase the shares going to the persons not so affected." In the event of the lapsing of "all of the provisions hereof for the benefit of my said brother and his children and the descendants thereof" and upon termination of "said portion of said trust estate," then "said portion" shall be distributed to his cousin, Ida Pascoe (par. IV-e). Clearly, he has created a separate trust of one-third of the income and one-third of the corpus for the benefit of his brother and his brother's lineal descendants. The fact that the contingencies specified for the gift over to Ida have not occurred does not detract from that picture. Indeed, their very specification (preventing a gift over to the other group of primary benefi-

ciaries upon the occurrence of the events specified) emphasizes and makes doubly clear Victor's intent to create a separate trust of one-third of the corpus and income. By his codicil he made no change at all in this part of his will except to change the amount of this trust from one-third to one-fifth of the whole estate. The codicil continued in effect the separate character of this trust for the brother and his descendants.

Next, in his will, he makes provision for the children of his deceased sisters, Ida and Wilhelmina. He directs his trustee to pay the "balance [necessarily, two-thirds] of the income from my estate" to the children of the sisters, in equal shares, per capita, with authority to pay additional amounts to "any of said children" and to advance to "any beneficiary hereunder" such amounts as may be required, "any advances so made" to be "offset against the interest of any beneficiary hereunder" in order to equalize a fair division of "said portion of my estate bequeathed for the benefit of said children of my two sisters" (par. III-b). He neglects to prescribe the duration period of this portion of the trust, except that, "as to the remainder of my estate" (necessarily meaning two-thirds, the one-third to the brother and his descendants having been separately and completely disposed of), if any of the children of the sisters be not discovered within five years or, if discovered within five years, is in a country whose laws prevent him from taking, and he does not within two years move to a country under whose laws he can take, "this trust shall terminate," but "such termination shall be only pro rata effective as to the interest of" such child (par. IV-c). In paragraph III-c, he declares that an interest so terminating shall serve to "increase the shares [of income] going to the persons not so affected"; in this case, presumably, to increase the shares going to the other children of the sisters. The fact that the contingencies expressed in paragraphs IV-c, III-c, and III-d did not occur does not lessen in the slightest degree the clear indication of Victor's intent to do all within his power to enable each beneficiary to re-

ceive the share allotted him. The same observation is true of Victor's mistaken belief that an alien residing in a country whose laws at the time of the testator's death did not meet the reciprocity requirements of section 259 of our Probate Code could take by moving to a country whose laws met those requirements. Finally, in respect to this group of beneficiaries, the will declared that "in the event of the lapsing of all of the provisions hereof for the benefit of the children of my sisters" and "upon termination of said portion of this trust as herein provided," then "said portion of said trust estate" shall be distributed to Victor's cousin, Ida Pascoe (par. IV-f). Here, equally as in the case of the trust for the brother and his children, the testator demonstrated an intent to create a separate trust (two-thirds of the estate) for the children of the two sisters. The codicil made no change in this part of the will except to change the amount of this trust from two-thirds to two-fifths of the income of the whole estate. He did this by substituting "two-fifths" for "the balance" of the income in paragraph III-b, and "two-fifths" for "the remainder" (of "my estate") in paragraph IV-c. Insofar as these changes are concerned, the codicil continued in effect the separate trust which Victor created for the payment of two-fifths of the income to the children of the two sisters.

Within three months of the making of his will, Victor decided to give a \$5,000 legacy to a friend, and learned or recalled that Otto, a son of his brother Edward, was residing in Canada "but intending to come to San Francisco in the very near future" (par. III-b-1, added by the codicil), —an intention, a plan, a move which Victor contemplated with fond satisfaction in view of his expressed "intention and desire that all the beneficiaries hereunder shall come to the United States of America" (par. III-e).

Accordingly, he wrote and executed the codicil, making the \$5,000 gift to the friend, conveying the "rest, residue and remainder" instead of "all" of the estate to his trustee, cutting from one-third to one-fifth and from two-thirds to two-fifths the por-

tions assigned the two trusts described in the will, and setting aside the remaining two-fifths in trust for Otto and Otto's children. This provision for Otto and his children Victor made by inserting subparagraphs III-b-1 and IV-c-1 at appropriate places in the will.

By his will as amended, he directs his trustee to pay the "balance" of the income (necessarily two-fifths, using the very word that he used originally to designate the two-thirds of income payable to the children of his sisters) to Otto "so long as he shall live" (par. III-b-1). Here is a third separate trust, income for Otto during his lifetime.

[1] He then declares that "this trust shall terminate as to the remainder of my estate" upon the death of Otto, "at which time said portion of my trust estate" shall go to Otto's children, "in equal shares, then living" (par. IV-c-1). "Remainder" is the very word, in a like context, which he used in paragraph IV-c of the will, in the termination clause applicable to the trust for the children of the two sisters, and which in the will clearly meant "two-thirds." This definitely suggests that when using this word in paragraph IV-c-1 he meant "two-fifths" or "the remaining two-fifths." This view is aided by the expression which immediately follows, "said portion of my trust estate." Having planned three trusts, and believing that he had created them, he quite naturally used the words "said portion" when referring to the intended grant of two-fifths of the estate to Otto and his children. Incidentally, Victor used the words "said portion" in paragraph IV-e when referring to the trust for Edward and his children, and in paragraph IV-f when referring to the trust for the children of the two sisters.

[2-4] Even more persuasive of this interpretation is the general scheme or plan of the testator which the will as originally written and as amended abundantly discloses; The creation of three separate trusts for these three groups of relatives, with no gift over from the trust for one group to the trust for another group. "A will is to be construed according to

the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible." Prob.Code, § 101. "The paramount rule in the construction of wills, to which all other rules must yield, is that a will is to be construed according to the intention of the testator as expressed therein, and this intention must be given effect as far as possible. Civ.Code, §§ 1317 and 1318.⁴ Statutory rules of interpretation are to be followed in so far as they aid in determining the intention of the testator, but they are all subject to the fundamental rule that the intention *as shown by the will* must prevail." Estate of Wilson, 184 Cal. 63, 66-67, 193 P. 581, 582. "The primary purpose of all interpretation of wills is, of course, to ascertain the testator's intent, as disclosed by the language he has used. Civ.Code, § 1317.⁴ Of this class of questions, it may be said, with more truth, perhaps, than of any other, that each case depends upon its own peculiar facts, and that precedents have comparatively small value. 'Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills. It seldom happens that two cases can be found precisely alike'—says Washington, J., in Lambert's Lessee v. Paine, 3 Cranch (U.S.) [97] 131, 2 L.Ed. 377." Estate of Henderson, 161 Cal. 353, 357, 119 P. 496, 498. "It is well settled that the will and the entire scheme of disposition of the testator's property should be viewed as a whole, and the words used should be considered in reference to the context and construed according to their surroundings. In re Estate of Franck, 190 Cal. 28, 210 P. 417." Estate of Welch, 83 Cal.App.2d 391, 396, 188 P.2d 797, 799.

It appears, then, that Victor by his will as modified by the codicil made complete disposition of three-fifths of the residue of his estate; one-fifth of the income to Edward for life and upon his death one-fifth of the corpus to the lineal descendants of Edward, two-fifths of the income to

Otto for life and upon his death two-fifths of the corpus to his children.

[5] As to the other two-fifths, he directed payment of the income to the children of the deceased sisters without saying how long, whether for life or for years or other determinable period of time, and said nothing about disposition of that two-fifths of the corpus. It is reasonably inferable from such a disposition that the testator intended that each of these children receive and enjoy for life the income allotted to him, especially when in the same will the testator authorized the trustee to make such advancements to any of the children as might be necessary for the maintenance, support and education of the child, or to cover any emergency or unexpected contingency, and when, in addition, the testator sought to protect these beneficiaries in the enjoyment of income by including a spendthrift clause. It is not necessary to the creation of a life estate or interest that the donor, trustor, or testator express in words the period of its duration, nor is it necessary that he provide for disposition of the property upon termination of a life estate or interest. See In re Reinhardt's Estate, 74 Cal. 365, 16 P. 13; Bekins v. Smith, 37 Cal.App. 222, 174 P. 96; Garland v. Garland, 73 Me. 97; and Schuldt v. Reading Trust Co., 270 Pa. 360, 113 A. 545, and Id., 292 Pa. 327, 141 A. 152.

We do not know and have no means of knowing what disposition Victor intended to make of this two-fifths of the corpus of his estate, nor of that portion of this two-fifths equaling or representing the portion of income given each of this group of beneficiaries, upon the death of each such beneficiary. His will is completely silent upon this question. The conclusion is inescapable that he died intestate in respect to the corpus of this two-fifths of his estate, which therefore goes to his heirs in accordance with the laws of descent and succession of California. The heirs must be ascertained as of the date of Victor's death. They will come into enjoyment of

4. The text of former sections 1317 and 1318 of the Civil Code now appears in

sections 101 and 105, respectively, of the Probate Code.

their respective shares of this two-fifths of the corpus as and when the several members of this group of income beneficiaries die. Upon the death of any such income beneficiary, there will be deliverable to this group of remaindermen a portion of the corpus which bears the same ratio to two-fifths of the corpus as the amount of income receivable by that life tenant bears to two-fifths of the income of the estate. It remains for the trial court to determine who those heirs are and what portions, respectively, they take of the undisposed remainder of two-fifths of the corpus of the estate. In an heirship proceeding brought in the superior court by certain of the heirs and legatees of Victor Bjors, a decree was rendered September 21, 1949, and is a part of the record upon the appeal from the decree of final distribution rendered May 26, 1950. It would appear that the decree of September 21, 1949, had become final. It determined who were the children of the deceased sisters of the testator and what portions they respectively should receive of two-fifths of the income, provisions which were appropriately embodied in the decree of final distribution. However, it also appears that the proceeding to determine heirship did not present the question of determining who inherited, in what shares, property as to which Victor died intestate.

We should add that we do not find the question of severability seriously involved. It is simply a case in which the testator created equitable life interests in two-fifths of the income and failed to make disposition of the remaindermen interests in that two-fifths of the corpus. Such lack of foresight and failure of disposition upon the part of the testator cannot be suffered to have an impairing effect upon the dispositions he did make, when his desire that those dispositions be effectual is so clearly manifested in his will.

Those portions of the decree of distribution which prescribe the period of time during which income is payable to the children of the two deceased sisters of the testator and those which fix the portion of the corpus of the estate which is deliverable to the children of Otto Sigfred Ed-

wardson upon his death, are reversed, and the superior court is instructed to ascertain and determine the persons who inherited that portion of the estate of Victor Bjors not disposed of by his will, and to modify the decree of final distribution in accordance with this decision, including in the modification the court's determination of heirship to the intestate portion of the estate.

PETERS, P. J., and BRAY, J., concur.



103 Cal.App.2d 232

ANDREW JERGENS CO. v. CITY OF LOS ANGELES et al.

Civ. 17765.

District Court of Appeal, Second District,
Division 3, California.

April 2, 1951.

Rehearing Denied April 18, 1951.

As Modified April 23, 1951.

Hearing Denied May 28, 1951.

Action involving disposition of surface waters by the Andrew Jergens Company, a corporation, against the City of Los Angeles, a municipal corporation, and others. Panorama Village, a corporation, intervened. The Superior Court of Los Angeles County, Stanley Mosk, J., rendered judgment, and the plaintiff, being dissatisfied with the relief granted, appealed. The District Court of Appeal, Shinn, P. J., held that the evidence was sufficient to show that the judgment afforded plaintiff no measurable protection against flooding of land by water which would be accumulated at intersection of boulevard and railway and would be delivered to plaintiff's land by city's paving of additional section of boulevard, and judgment in so far as it denied further relief would be reversed and trial court directed to take further proceedings.

Judgment affirmed in part and reversed in part with direction.

1. Waters and water courses ☞ 116, 119(1)

Landowner must bear burden of receiving upon his land the surface water naturally coming upon land above it and

naturally flowing to it therefrom, and he has corresponding right to have surface water naturally coming upon his land flow freely therefrom upon the lower land adjoining, and he has the lawful right to complain of others who by interfering with natural conditions cause such water to be discharged in greater quantity or in a different manner upon his land than would occur under natural conditions.

2. Municipal corporations ⇐835

Landowner's action against city for protection against flooding of land by water which would be accumulated at intersection of boulevard and railway and would be diverted to plaintiff's land by city's paving of additional sections of boulevard was not premature in view of evidence disclosing that when storms occur after proposed paving has been completed large quantities of water that cannot be absorbed will be channeled to the intersection.

3. Municipal corporations ⇐845(6)

Evidence was sufficient to show that judgment afforded plaintiff no measurable protection against flooding of land by water which would be accumulated at intersection of boulevard and railway and would be delivered to plaintiff's land by city's paving of additional section of boulevard, and judgment in so far as it denied further relief would be reversed and trial court directed to take further proceedings.

Frank Mergenthaler and Hill, Farrer & Burrill, all of Los Angeles, Wm. S. Scully, Los Angeles, for appellant.

The City of Los Angeles, Lloyd Aldrich, City Engineer, and L. O. Turner, Deputy City Engineer.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and Charles F. Reiche, Asst. City Atty., all of Los Angeles, for respondents.

C. W. Cornell, Randolph Karr, Los Angeles, for respondents, Southern Pacific Co. and Southern Pacific R. Co.

Pacht, Warne, Ross & Bernhard, Beverly Hills, for intervener.

SHINN, Presiding Justice.

This action involves the disposition of surface waters in a district in the San Fernando Valley section of the city of Los Angeles, lying northerly of the intersection of Van Nuys Boulevard and the coast line of the Southern Pacific Railroad Company. Plaintiff seeks protection against the flooding of its land by water which it alleges will be accumulated at the intersection and diverted to its land by works already established by the city and by the paving of additional sections of the boulevard as planned by the city at the time the action was commenced. It is not the purpose of the action to prevent the contemplated improvement altogether, but only until the city has made provision to carry the expected excessive quantities of water easterly to the Tujunga Wash, a natural and well developed flood control channel.

The area to be considered in the solution of the drainage problem consists of the surface of Van Nuys Boulevard for a distance of about 2½ miles north of the intersection, together with certain areas from which drainage would be toward the boulevard. Due to the slope of the boulevard any water which reaches the paved surface flows south to the intersection. Just north of the intersection water flows into catch basins, which the city has installed underneath the pavement, thence through a culvert designated "C" to and along a ditch in the northerly part of the railroad right of way for a distance of 600 feet, thence underneath the right of way through a culvert ("A") opening to the south toward plaintiff's adjoining land. Along each side of the right of way is a depression extending easterly and westerly but these have not the capacity to hold any considerable amount of water.

At the time the action was instituted the boulevard was paved for a distance of 2,000 feet northerly from the intersection and it was planned to pave it for an additional 4,000 feet. In this area the boulevard is 100 feet wide. A temporary injunction was issued, the effect of which was to cause discontinuance of the work pending a trial of the action. The judg-

ment granted an injunction which affected only about 45 acres from which surface water would drain onto the boulevard. The city was restrained from approving the opening or improving of any streets in this area unless they are graded to drain away from the boulevard from points not more than 15 feet from the east, or the west edge of the boulevard, as the case might be. There was also a provision that would require water collected in alleys in any new subdivisions in the same eastern area to be drained away from the boulevard. Plaintiff, deeming the relief granted to be inadequate, has appealed from the judgment. The respondents are the city and Panorama Village, a corporation which intervened in the action because of its ownership of a large real estate development east of the boulevard.

[1] The legal principle governing the disposition of surface waters is simple and well established. It was stated in *Heier v. Krull*, 160 Cal. 441, 444, 117 P. 530, 531, as follows: "Every landowner must bear the burden of receiving upon his land the surface water naturally falling upon land above it and naturally flowing to it therefrom, and he has the corresponding right to have the surface water naturally falling upon his land or naturally coming upon it, flow freely therefrom upon the lower land adjoining, as it would flow under natural conditions. From these rights and burdens, the principle follows that he has a lawful right to complain of others, who, by interfering with natural conditions, cause such surface water to be discharged in greater quantity or in a different manner upon his land, than would occur under natural conditions. This is the settled law of this state. *Conniff v. San Francisco*, 67 Cal. [45] 49, 7 P. 41; *Ogburn v. Connor*, 46 Cal. [346] 351, 13 Am.Rep. 213; *McDaniel v. Cummings*, 83 Cal. [515] 519, 23 P. 795, 8 L.R.A. 575; *Gray v. McWilliams*, 98 Cal. [157] 162, 32 P. 976, 21 L.R.A. 593, 35 Am.St.Rep. 163; *Stanford v. [City & County of] San Francisco*, 111 Cal. 198, 43 P. 605; *Hicks v. Drew*, 117 Cal. 305, 49 P. 189; *Rudel v. Los Angeles Co[unty]*, 118 Cal. [281] 288, 50 P. 400; *Cushing v. Pires*, 124 Cal. [663] 665, 57

P. 572; [*Town of*] *Cloverdale v. Smith*, 128 Cal. [230] 233, 60 P. 851; *Larrabee v. [Town of] Cloverdale*, 131 Cal. [96] 99, 63 P. 143; *Wood v. Moulton*, 146 Cal. 317, 80 P. 92." Later cases are *Los Angeles Brick Co. v. City of Los Angeles*, 60 Cal.App.2d 478, 141 P.2d 46, *Dick v. City of Los Angeles*, 34 Cal.App. 724, 168 P. 703 and *Farrell v. City of Ontario*, 36 Cal.App. 754, 173 P. 392.

Respondents do not contend for any other principle. They cite *Womar v. City of Long Beach*, 45 Cal.App.2d 643, 114 P.2d 704, *Turner v. Hopper*, 83 Cal.App.2d 215, 188 P.2d 257, *Le Brun v. Richards*, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336, contending that these cases have application to the facts of the instant case. But the facts in the cases they rely on are clearly distinguishable. In all of them the problem of surface water had not been created artificially for the complaining landowner, but had existed before the construction of the works in question. Such is not the present case. Even in times of heavy rainfall surface water has not been drained to plaintiff's land from areas which will drain into the paved boulevard; plaintiff has not in the past had a surface water problem.

Respondents say first that the city has done nothing which would bring the case within the foregoing rule under which plaintiff claims protection; that the grading and paving of the boulevard and the development of a rural community to the north have not "diverted" any storm water so as to cause it to flow in an unnatural manner and, hence, that although storm water, if not controlled, will at some future time be collected in large quantities and discharged upon plaintiff's land, where none has hitherto found its way, plaintiff is bound to receive this water upon its land unless the city shall see fit to dispose of it in some other manner. In order to sustain this position it was incumbent upon respondents to show that the paving of the boulevard would not result in the discharge of excessive quantities of water upon plaintiff's land. As we shall see, all the evidence was to the contrary. The city's own engineers and all the other en-

gineering experts who testified from the charted history of rainfall in the district agreed that storm waters will inevitably be carried to plaintiff's land in flooding quantities. The second contention of the respondents is that this will not happen in the immediate, or foreseeable future, but only when the district is fully "urbanized," and they argue that the present action is prematurely brought. These contentions will be considered together.

The material facts of the case are not in dispute. There was no evidence opposed to or contradictory of that given by plaintiff's expert witnesses. This was evidence of physical facts as to the composition, slope and contour of the land adjacent to the boulevard, and the conclusions of the engineers followed from their mathematical calculations, the history of rainfall and the fact that water runs downhill. Such factual evidence may not be disregarded. From an engineering standpoint the only questions are how soon and how extensively will plaintiff's land be flooded if nothing is done to prevent it.

It is necessary to give a further description of the area in question. Immediately north of the railroad property and east of the boulevard a tract of about 100 acres fronting on the boulevard is occupied by a plant of General Motors. To the north of this area and on the east side of the boulevard the lands are either unimproved or are subdivided and improved for residential and business uses. An older residential area lies on the west side. Roscoe Boulevard intersects Van Nuys Boulevard some 3400 feet north of the railroad property; Parthenia Street east of the boulevard is 2600 feet north of Roscoe; Osborne Street is 1600 feet north of Parthenia. Van Nuys Boulevard is paved north from Osborne a distance of 6000 feet to its intersection with Woodman Avenue. The intervener, Panorama Village, a corporation, has built a large number of residences between Roscoe and Osborne Avenues. There has been a small amount of improvement of the boulevard frontage in this area. Evidence was given by engineers that the land bordering the boulevard on the east, to a depth from the boulevard of some 250

feet, and for a length of about 13,000 feet between the railroad property and the intersection of Van Nuys Boulevard and Woodman slopes toward the boulevard. Beyond the 250 foot line it slopes toward the east. There is also a large area west and northwest which slopes toward the boulevard. The actual tributary area was computed by engineers at approximately 598 acres. General Motors and Panorama Village have constructed control systems of their own which will carry surface water from most of their lands toward the east and south away from the boulevard. After taking all factors into consideration the tributary area was computed by expert witnesses at approximately 500 acres. There was no evidence to the contrary. It is immaterial, however, what the exact tributary area may be, since it was clearly established by the evidence that the existing conditions present a serious drainage problem at the intersection of the boulevard and the railroad property which must be solved if plaintiff's land is to be protected against overflow by surface waters. The problem has been the subject of conferences by the city engineers of Los Angeles and engineers of plaintiff, General Motors, Kaiser Community Homes, Panorama Industrial Development Company, Panorama Ranch, Southern Pacific Company, Technicolor Company and Roy C. Seeley Company. The consensus of these well qualified and well informed men was stated in a letter of February 28, 1946, prepared by L. O. Turner, Deputy City Engineer of the Valley District, and sent under the signature of the City Engineer to Mr. Roy Seeley. The statements and conclusions to be quoted from it were well established by evidence at the trial. After mentioning that as long as the land in question was devoted to agricultural use, the rainfall had been absorbed by the soil, which is sandy and porous, thus obviating any excessive accumulation of water at the railroad right of way, the letter stated: "With the proposed improvement of Van Nuys Blvd. however, this water will be brought directly to the Southern Pacific Coast Line crossing by the impervious street surface of Van Nuys Blvd. without the benefit of any

absorption, and will produce excessive quantities of surface water to be handled at, and immediately northerly of the railroad crossing. Upon the completion of the improvement of Van Nuys Blvd. the quantities of water which may be anticipated at this point may well reach between 200 and 300 cubic feet per second. As the tributary area develops, an increase in runoff may be expected, and these quantities may soon double those now anticipated.

"Since there is no bridge or culvert opening under the Southern Pacific Coast Line tracks between the Pacoima Wash bridge, approximately one-half mile westerly of Van Nuys Blvd. and a small $2\frac{1}{2}' \times 6'$ opening approximately 600 feet easterly of Van Nuys Blvd., it is apparent that the southwesterly corner of the General Motors Plant and the proposed Southern Pacific Yard, as well as the Pacific Motor Transport driveway along the northerly side of the Southern Pacific Yard may be seriously flooded during heavy storm periods.

"The Southern Pacific have attempted to improve this situation by excavating a ditch from the existing culvert under Van Nuys Blvd. immediately northerly of the Coast Line crossing to this structure beneath their tracks, some 600 odd feet easterly of the Van Nuys Blvd. crossing. If this ditch proves at all effective, the accumulated water northerly of the Southern Pacific tracks will be discharged in a concentrated form on to the property of the Andrew Jergens Company, located immediately southerly of the Southern Pacific tracks, and easterly of Van Nuys Blvd. producing, no doubt, a very unsatisfactory condition at this point. Should the Andrew Jergens Company attempt to convey this accumulated surface water across their property in a lined channel or storm drain, then excessive quantities of water would be delivered upon the adjoining private property southerly of the Jergens property which property has not heretofore been subject to such concentration of surface water." It was then pointed out that the only practical solution lay in the installation of a channel along the south side of the railroad right of way easterly to Tujunga Wash. It was also said: "We are satisfied that no

less permanent solution will satisfactorily dispose of the accumulated surface drainage tributary to the crossing of Van Nuys Blvd. and the Southern Pacific Coast Line tracks and that no less expensive solution can be found to minimize the detrimental effect of the drainage upon the industrial development of this area. Furthermore, until this drainage is satisfactorily disposed of, access to the General Motors plant and the use of Van Nuys Blvd. may be seriously impeded during moderate to severe storm periods."

In his opening statement at the trial the City Attorney said: "This will be—and I wouldn't want to mislead anybody—if that area eventually is entirely developed, there is a problem that will result at the intersection of Van Nuys Boulevard and the Southern Pacific tracks, and that will have to be taken care of; but it doesn't have to be taken care of today, this year, or tomorrow, or next year; and there isn't any imminent danger of any damage to this Jergens property as of today or in the immediate future. Again I state that this case is entirely premature and we will show we are continuously working on plans. We haven't got a set plan right now for taking care of that particular condition, as we don't believe it calls for attention right at this moment. But we are in continual negotiation, and we are always taking matters up with the railroad about this and about that, and we are always trying to work out something."

The undisputed expert testimony was that rainfall which, in the light of experience is to be anticipated, namely 1.33 inches in one hour, will deposit 75 cubic feet of water per second at culvert "A" leading to plaintiff's land. This quantity would accumulate irrespective of any increased quantities that might result from the future improvement of the tributary land. It is conceded that as the boulevard frontage and adjacent property is developed, thus minimizing absorption, the volume reaching the boulevard will be greater. According to the testimony full residential and business development of the area would increase the flow by 41 cubic feet per second. With the boulevard paved for 6,000 feet and with-

out further development, one-third of the accumulation of water from a rainfall of 1.33 inches in one hour would cause flooding of plaintiff's land.

The city does not question the correctness of the computations and conclusions of its engineers as to quantities, nor the soundness of their plans for the disposal of storm waters. Intervener does not challenge the accuracy of the expert evidence in any factual respect which would cast doubt upon the ultimate conclusion that there is grave danger of the flooding of plaintiff's land.

The court made no finding as to the acreage that is tributary to Van Nuys Boulevard, nor as to the quantity of water that will be carried to the intersection and thence to plaintiff's land in storms of the intensity of those taken into consideration in the calculations of the engineers. No finding was made as to the minimum rainfall that would cause flooding of plaintiff's land. In brief, no facts were found which would support the contentions of the respondents. We must therefore accept as a basis for our conclusions the uncontradicted calculations of the engineers, among whom were competent and well informed members of the Los Angeles City Engineer's staff. They were, in our opinion, carefully considered and on the conservative side.

The court found that if any surface waters find their way to plaintiff's land, it will be "solely by reason of the urbanization of the drainage area from which said waters naturally flow, and such waters which might reach plaintiff's land will not be increased by reason of the *drainage structure* constructed by the city of Los Angeles under Van Nuys Boulevard *from the catch basins on either side of the roadway to culvert C.*" (Emphasis added.) It has been shown that there is no basis in the evidence for the conclusion that any flooding of plaintiff's land will be occasioned solely by "urbanization" of tributary areas, unless that term is so construed as to include the paved surface of the boulevard, as well as other improvements that will tend to prevent absorption. In arguing that only further "urbanization" will

cause excessive accumulation of water the intervener says: "Reference is here made also to the testimony that assuming no further street improvements are made, and assuming the area were fully urbanized, water might come onto the plaintiff's land. For the paving and widening of Van Nuys Boulevard are bound to be without appreciable effect. All of the paving has been done and is projected *strictly according to grade and to the natural contour of the land.* There will be no abnormal accumulation of surface water as a result of this improvement which, when completed, will total not more than 10 acres of paved surface." The testimony referred to assumed complete development of 1,000 acres adjacent to the boulevard. This testimony does not support the finding in either respect. It only tends to emphasize the growing danger of a condition which is already serious. It is undeniable that 2½ miles of pavement will confine and carry to the intersection large quantities of water that otherwise would be absorbed. The trial court did not find that water would not be channeled south on the boulevard. It found merely that the catch basins and runways would not increase the quantity of water that would reach plaintiff's land. This finding ignores the real source of the danger, namely, the channeling of water to the catch basins. But even the catch basins and culverts are designed to divert water which would otherwise flood areas north of the elevated right of way, and to that extent they place an unnatural burden upon plaintiff's land.

[2] The contention that the action is premature is not supported by the record. Although rainfall of 1.33 inches in one hour is rare in the district, it was shown by rainfall charts in evidence that far greater quantities have fallen within 24 hours at not infrequent intervals. There was undisputed evidence that saturation of the soil and some run off had occurred during these storms; that there had been sufficient absorption before the boulevard was paved to prevent accumulation of water at the intersection, and that when such storms recur after the proposed paving has been com-

pleted large quantities of water that cannot be absorbed will be channeled to the intersection.

The court found: “* * * there is no present or reasonably foreseeable danger of surface water being accumulated, concentrated or discharged upon plaintiff’s land through or by means of Culvert A” etc. The finding is without factual basis in the evidence and there were no physical facts found which justify this general conclusion. As a foundation for denying plaintiff substantial relief it is no more than a prediction that heavy storms which history shows have frequently occurred will hold off until the city has provided means for the disposition of the water.

[3] By the judgment the city and its representatives are enjoined from approving the opening and improvement of any new streets easterly from Van Nuys Boulevard between Parthenia Street on the north and Roscoe Boulevard on the south (about 35 acres) and from approving the opening and improvement of new streets through lands bounded on the north by the intersections of Vesper Avenue and Van Nuys Boulevard, on the east by Van Nuys Boulevard, on the south by Roscoe Boulevard, and on the west by Vesper Avenue (about 15 acres), unless any new streets drain surface water away from the boulevard from points not more than 15 feet from the boulevard. These provisions and the further provision that in any further subdivision of land abutting upon the easterly side of the boulevard between Parthenia Street and Roscoe Boulevard alleys must be provided to drain water away from the boulevard are to remain in operation only until facilities are provided to drain waters accumulated at the intersection of Van Nuys Boulevard and the railroad property easterly to Tujunga Wash. By these injunctive provisions the court gave recognition to the necessity of preventing the installation of further street improvements which would tend to collect and convey water to Van Nuys Boulevard. It is impossible to reconcile the relief

granted with the deduction that “there is no present or reasonable foreseeable danger of surface water being accumulated, concentrated or discharged upon plaintiff’s land through or by means of Culvert A.” If there is no foreseeable danger no injunction was necessary. If there is foreseeable danger adequate relief should have been granted. The boulevard frontage of the land to which the injunctive provisions relate is only about 4,600 feet out of a total of between 15,000 and 20,000 feet of frontage of all the land which was described as tributary to the boulevard. In area it is less than 10 per cent of the tributary lands. The judgment affords plaintiff no measurable protection. Upon the evidence which we have reviewed it is doubtful whether the injunction would be effective even if it were broadened to apply in like terms to the remainder of the tributary area. We do not suggest that any greater relief would be practicable under existing conditions than to extend to all the land that may be found to be tributary to the section of the boulevard in question the same measure of restraint with respect to the opening of new streets as the judgment now grants with respect to a limited area. It is undeniable, however, that any further accumulation of water from newly opened streets in any of the tributary area would increase the danger.

No claim is made by appellant that respondents, Southern Pacific Company and Southern Pacific Railroad Company, are responsible for the conditions which threatened the flooding of its land.

The judgment is affirmed as to the relief which it grants to plaintiff and reversed in so far as it denies further relief. The court is directed to take further proceedings in accordance with the views herein expressed. Plaintiff is awarded costs of appeal against respondents.

PARKER WOOD and VALLÉE, JJ., concur.

103 Cal.App.2d 222

HUNT et al. v. PLAVSA et al.

Civ. 17826.

District Court of Appeal, Second District,
Division 1, California.

April 2, 1951.

Rehearing Denied April 23, 1951.

Hearing Denied May 28, 1951.

Action by Frank R. Hunt, and another, against Richard J. Plavsa, also known as Dick Plavsa, and others, to quiet title to certain real property and for damages for unlawful withholding of possession. The Superior Court, Los Angeles County, Clarence L. Kincaid, J., rendered judgment quieting title in plaintiff to all of the property in question with exception of three parcels to which defendants had acquired title by adverse possession, and defendants appealed. The District Court of Appeal, White, P. J., held that state patent to mineral land granted plaintiff prior to defendant's mining claim was not subject to collateral attack.

Judgment affirmed.

1. Appeal and error ⇨907(3)

On a judgment roll appeal, the appellate court must conclusively presume that the evidence is ample to sustain the findings.

2. Appeal and error ⇨544(3)

On judgment roll appeal, the only questions to be determined are whether complaint states a cause of action, whether findings are within the issues, whether judgment is supported by the findings, and whether reversible error appears upon the face of the record, and the scope of appellate court's review cannot be enlarged by designating for inclusion in clerk's transcript documents not properly a part of judgment roll.

3. Appeal and error ⇨544(3)

On a judgment roll appeal the scope of appellate court's review cannot be enlarged by designating for inclusion in clerk's transcript, documents not properly a part of judgment roll.

4. Public lands ⇨117

Under Act of Congress vesting title to every sixteenth section of land, if not mineral, in state for school purposes, with specific exceptions, determination of whether particular tract is mineral rests

with Secretary of Interior and issuance of patent by him imports a determination of non-mineral character of land conclusive against collateral attack by junior mineral claimant. Act Cong. March 3, 1853, § 7, 10 Stat. 247.

5. Courts ⇨489(5)

Where patent to sixteenth section land was attacked by holder of junior mineral claim, and jurisdiction of trial court was attacked on ground that the mineral character of land was for determination of Secretary of Interior, state court had jurisdiction to determine conflicting claims to realty located within state. Act Cong. March 3, 1853, §§ 6, 7, 10 Stat. 244, 246, 247.

6. Courts ⇨489(1)

State and federal courts have concurrent jurisdiction of suits of a civil nature arising under the constitution and laws of the United States except where jurisdiction has been restricted by congress to federal courts.

7. Appeal and error ⇨907(3)

On clerk's transcript appeal from judgment quieting title to realty in holder under patent as against holder of mineral claim it would be assumed that evidence was insufficient to support collateral attack on patent. Act Cong. March 3, 1853, § 6, 10 Stat. 244, 246.

8. Quieting title ⇨15

Where there was action by holder under patent to school lands against holder of mineral claim to determine adverse claim to such land, and it was asserted by holder of mineral claim that interest in such land was owned by the government, holder of patent was nevertheless entitled to have conflicting claims of immediate parties determined in this action. Act Cong. March 3, 1853, § 6, 10 Stat. 244, 246.

9. Appeal and error ⇨907(3)

Where there was action to determine adverse claim by holder under patent to school lands against holder of mineral claim, and judgment roll appeal was taken from decision in favor of patentee, it would be assumed that evidence sustained finding that land was not known to be

mineral when surveyed and that mineral claim was junior to patent. Act Cong. March 3, 1853, §§ 6, 7, 10 Stat. 244, 246, 247.

10. Public lands ☞117

Where patent to school land was issued prior to location of mining claim on same land, state patent could only be attacked on a direct proceeding to set aside the patent on the ground of fraud or other invalidity. Act Cong. March 3, 1853, §§ 6, 7, 10 Stat. 244, 246, 247.

11. Appeal and error ☞1039(2)

Where defendants were designated in complaint by fictitious names and designation was not changed by amendment of complaint thereafter, but defendants appeared and were properly named in judgment, omission to amend and correct names was not prejudicial.

W. Verne Ahrens, Los Angeles, for appellants.

Marlan Proctor, Walter B. Gieselman, Burbank, for respondents.

WHITE, Presiding Justice.

Defendants have appealed from a judgment quieting the title of plaintiffs to certain real property. The appeal is upon the judgment roll. The complaint was in the usual form to quiet title, alleging that plaintiffs were the owners and entitled to possession of certain described property; that the defendants claimed an interest adverse to plaintiffs, and that such claims were without right. Damages were also sought for the unlawful withholding of possession of a portion of the property by defendants. Defendants by their answers denied the allegations of the complaint, and as a "further defense" alleged that they were and for a long time had been owners and in possession of certain mining claims situate in and a part of the real property.

The trial court found that the plaintiffs were the owners and entitled to possession of all of the property in question with the exception of three described parcels to

which defendants had acquired title by adverse possession.

The contentions of appellants are based on the fact that the land in question, being a portion of section 16, township 5 north, range 12 west, S.B.B. & M., is "school land"—that is, a portion of one of the sections in each township which, *if not mineral* or otherwise disposed of, was granted by Congress to the State of California in aid of public schools by the Act of March 3, 1853, 10 Stats. at L. 244, 246. It is argued that the trial court was without jurisdiction in the matter because the question of the mineral character thereof remained open until determined by the Secretary of the Interior.

[1-3] The present appeal, is here upon the judgment roll. And as is said in *Kompf v. Morrison*, 73 Cal.App.2d 284, 286, 166 P.2d 350, 352, "It is elementary and fundamental that on a clerk's transcript appeal the appellate court must conclusively presume that the evidence is ample to sustain the findings, and that the only questions presented are as to the sufficiency of the pleadings and whether the findings support the judgment." In this type of appeal, since "the evidence is not before this court, we are confined to a determination of the questions as to whether the complaint states a cause of action; whether the findings are within the issues; whether the judgment is supported by the findings and whether reversible error appears upon the face of the record." *Montaldo v. Hires Bottling Co.*, 59 Cal.App.2d 642, 646, 139 P.2d 666, 668. Appellants cannot, by designating for inclusion in the clerk's transcript documents not properly a part of the judgment roll, or by requesting that the exhibits received in evidence be transmitted to the appellate court, enlarge the scope of the appellate court's review. *Estate of Larson*, 92 Cal.App.2d 267, 268, 269, 206 P.2d 852.

Appellants attempt to meet this objection by asserting that the complaint does not state facts sufficient to constitute a cause of action. They argue that every court must take judicial knowledge of the extent and boundaries of the territory within

which it can exercise jurisdiction; that "It is common knowledge that in California every section 16 is a school section"; and hence that any complaint which attempts to quiet title to a parcel of land in any section 16 in this state without alleging that said section 16 was previously found by the Secretary of the Interior of the United States to be not known to be mineral in character is subject to demurrer on the ground of lack of jurisdiction as well as on the ground that it does not state facts sufficient to constitute a cause of action.

[4, 5] The contention that title to every sixteenth section of land within the boundaries of this state vested originally in the state is based upon a false premise. Appellants overlook that the seventh section of the act of Congress excepts from the congressional grant therein every sixteenth section where "any settlement, by the erection of a dwelling house, or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses, *or taken by private claims*, other land shall be selected by the proper authorities of the State in lieu thereof". (Italics supplied.) See also *Bullock v. Rouse*, 81 Cal. 590, 22 P. 919; *Ivanhoe Mining Co. v. Keystone Consol. Mining Co.*, 102 U.S. 167, 175, 26 L.Ed. 126.

Appellants rely primarily upon *West v. Standard Oil Co.*, 278 U.S. 200, 49 S.Ct. 138, 139, 73 L.Ed. 265, and *Ames v. Empire Star Mines Co.*, 17 Cal.2d 213, 110 P.2d 13. The first-cited case involved, however, a suit to enjoin action which had been initiated by the Secretary of the Interior in the local land office to determine whether the particular school land involved was known to be mineral in character when the survey thereof was accepted by the Department of Interior. It was held that the dismissal without formal hearing of an earlier land office proceeding by a predecessor in office of the Secretary of the Interior did not constitute a determination of the *fact* in issue. It was held that under

the Act, "If the land was then known to be mineral" (when the survey thereof was approved in 1903) "the title confessedly did not pass by the act; * * * If it was not then known to be mineral, the legal title passed to the state on that date". The court then held that where, as here, an act granting public lands excludes those known to be mineral, the determination of the fact whether a particular tract is of that character rests with the Secretary of the Interior; that the issuance of a patent by him or other action equivalent thereto imports a determination, conclusive as against collateral attack, of the non-mineral character of the land. The court found, however, that no such determination had been made.

In *Ames v. Empire Star Mines Co.*, 17 Cal.2d 213, 110 P.2d 13, the court was concerned with a claim of extralateral mining rights based upon mining locations which had been established long before the issuance of a patent from the United States under the Railroad Grant Act of 1866, 14 Stats. at Large 239, and even before the enactment of the enabling act itself.

We do not believe that either of the foregoing cases, nor any of the authorities relied upon by appellants support their contention that the state court was without jurisdiction to determine the conflicting claims of the parties to lands within this state. Appellants argue that by virtue of their mineral claims they are "in privity with the United States" and that hence the state court is without jurisdiction to determine a contest between a claimant through a state patentee and a claimant under mineral rights.

[6] That state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts has been the rule of law since the federal constitution was adopted. *Grubb v. Public Utilities Commission*, 281 U.S. 470, 50 S.Ct. 374, 74 L.Ed. 972. There is no such restriction applicable here.

[7] The argument that appellants are "in privity" with the United States serves no purpose, for the respondents are equally in privity through the patent from the state and the act of Congress. The controversy is one between citizens of this state concerning land within the territorial jurisdiction of the state. Whether, under the conflicting authorities, respondents' predecessor's patent was subject to collateral attack, *Brown v. Luddy*, 121 Cal. App. 494, 501, 505, 9 P.2d 326, and cases cited; *People v. Dorr*, 68 Cal.App.2d 792, at page 796, 157 P.2d 859, or was not, *Graham v. Reed*, 83 Cal.App. 516, 526, 257 P. 131, is of no moment, for this court must assume that the evidence was insufficient to support any such attack, either by showing fraud in the issuance of the patent or by showing that the land was mineral in character and therefore never passed to the state. We are inclined to favor the views expressed in *Graham v. Reed*, supra, that such a collateral attack cannot be made by junior claimants (and it must be assumed that appellants are junior claimants).

[8] Whatever the rights or claims of the United States might be in the premises, respondents were entitled to have their title quieted against the adverse claims of appellants. In *Van Ness v. Rooney*, 160 Cal. at page 143, 116 P. 392, it was pointed out that a party who had made a valid mining location was entitled to have his title quieted although he had not obtained a patent from the United States. It was held that he was the equitable owner of the claim, with the legal title in the government, and was entitled to have such equitable title quieted against parties asserting under a railroad patent. Similarly, in *Inyo Consolidated Water Co. v. Jess*, 161 Cal. 516, 119 P. 934, it was held that under section 738 of the Code of Civil Procedure, the person who has an interest in real property may maintain an action to determine the validity of a conflicting claim, and that one who had acquired an incomplete title to appropriate water through diversion works within the forest reserves of the United States, was entitled to quiet his title against adverse claimants,

although his application to the authorized officers of the United States had not yet been granted.

[9, 10] We must assume, on this appeal on the judgment roll, that the evidence would support a finding that the land in question was not known to be mineral when it was surveyed and that the location claims of the defendants were junior to the patent and the survey. In such circumstances, while the question appears not to be free from doubt, we are impressed that the applicable rule is that laid down in *Graham v. Reed*, supra (hearing denied by Supreme Court). There, as here, plaintiff claimed title to school lands under a patent from the State of California and defendant under a subsequent mining location. The trial court gave judgment for the plaintiff although it found that the lands were mineral in fact in 1853 and at the time of the issuance of the patent in 1890, and known to be so. On appeal the judgment was affirmed, upon the ground that plaintiff's title was not subject to collateral attack. The court reviewed the authorities and held, at page 526, of 83 Cal.App., at page 135 of 257 P.: "The principles discussed in the foregoing authorities are deemed decisive in the case at bar. On the authority of these cases we hold that, where the state's patent was issued to plaintiff's predecessor in interest long prior to the location of defendant's mining claim, investigation as to the character of the land is concluded and the state's patent is not subject to collateral attack, but can only be attacked on a direct proceeding to set aside the patent on the ground of fraud or other invalidity."

[11] The point is made that plaintiffs failed to amend their complaint to show the true names of defendants sued under fictitious names. The defendants involved appeared in the action and were named in the judgment. The omission charged is therefore inconsequential.

For the reasons stated, the judgment is affirmed.

DRAPEAU, J., and HANSON, J. pro tem., concur.

103 Cal.App.2d 315

PEOPLE v. HOFFMAN et al.

Cr. 2670.

District Court of Appeal, First District,
Division 2, California.

April 9, 1951.

Rehearing Denied April 24, 1951.

Hearing Denied May 7, 1951.

Malcolm E. Hoffman and Raymond Brandt were convicted in the Superior Court, City and County of San Francisco, Samuel F. Finley, J., of the crimes of conspiracy and abortion. The defendants moved for permission to withdraw their pleas of guilty and proceed to trial on a plea of not guilty. The motions of defendants were denied and defendants then applied for a writ of error coram nobis before another trial judge, and the state appealed from an order for issuance of the writ. The District Court of Appeals, Nourse, P. J., held that granting of the writ of error coram nobis was outside the jurisdiction of the trial court.

Reversed with directions.

1. Criminal law ☞997

Motion to vacate a judgment in the nature of a petition for coram nobis is a remedy of narrow scope, and its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known of it and which, through no negligence or fault of the defendant, was not then known to the court.

2. Criminal law ☞997

Applicant for writ of coram nobis must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ.

3. Criminal law ☞997

Where defendants, convicted of conspiracy and abortion, failed to appeal from the judgment or denial of motion to withdraw their pleas of guilty and substitute a plea of not guilty, and did not move for a new trial or abatement of the judgment, but instead had sought to vacate the judgment of conviction by a writ of error cor-

am nobis, the trial court was without jurisdiction to grant such writ.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., for appellants.

Dannenbrink & Graves and Harold J. Abraham, all of Oakland, for respondent Brandt.

James Martin MacInnis, San Francisco, for respondent Hoffman.

NOURSE, Presiding Justice.

The State appeals from an order for issuance of a writ of error *coram nobis*, the writ having been issued pursuant to an order to show cause on an affidavit and petition for leave to withdraw the pleas of guilty on the assertion that the defendants had been induced to enter such pleas by the false promises and misrepresentations on the part of the trial judge that if they did so he would grant them leniency in the sentence, either by an order of confinement in the county jail or by the granting of probation. The application was heard before another trial judge who concluded that the defendants had been unfairly dealt with and granted the writ.

Three defendants were indicted and charged with the crimes of conspiracy and abortion. All three entered pleas of not guilty and went to trial before a jury. During the course of the trial at the request of their counsel they entered the judge's chambers, accompanied by the deputy district attorney in charge of the trial, particularly to urge leniency for the defendant Zoffel who was an elderly woman suffering from a paralytic stroke and who had had a prior conviction of a felony which debarred her from seeking probation. As a result of the conference the deputy district attorney agreed to amend the indictment as to defendant Zoffel to accept a plea of a lesser offense and to dismiss the other charges against her. This was agreed to and the trial judge cautioned counsel for the other defendants that it had no relation to them.

As to the defendants Hoffman and Brandt the experienced and conscientious trial

judge testified in this hearing that he cautioned counsel for these defendants as follows: "I don't want you men to feel that because we have been discussing this at all, that you men will get probation or that there will be any disposition." I said, 'I don't know anything about these men,' and I said, 'I would have to consider it; I would have to see the reports when they come in. When it is all through, I might send them to San Quentin.' I said, 'I don't know what I will do with them,' but I said, 'I don't want you to leave here feeling that they are going to get probation.'" This statement was corroborated by the deputy district attorney and the counsel for both defendants, Brandt and Hoffman, and is not disputed in any material part. In truth and fact the whole case of defendants is that after their counsel had left the judge's chambers they informed defendants in the Hall of Justice vernacular that they had made a "deal" with the judge to get probation if they would enter their pleas of guilty, and that such pleas were made because of such representations. Judgments on these pleas were duly entered sentencing both defendants to the State penitentiary for the time prescribed by law. Thereupon they moved for permission to withdraw their pleas of guilty and to proceed to trial on a plea of not guilty. These motions were denied. No appeal was taken from the judgments nor from the order denying these motions. No motion for a new trial or abatement of the judgments was made. The only relief from their predicament sought by the defendants was this application for a writ of error *coram nobis*.

[1-3] The writ was outside the jurisdiction of the trial court and the order must be reversed. The rule is clearly stated in *People v. Adamson*, 34 Cal.2d 320, 326, 210 P.2d 13, 15, "In this state a motion to vacate a judgment in the nature of a petition for *coram nobis* is a remedy of narrow scope. (See *People v. Darcy* (1947), 79 Cal.App.2d 683, 693, 180 P.2d 752; *People v. Martinez* (1948), 88 Cal.App.2d 767, 774, 199 P.2d 375.) Its purpose is to

secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court. (*People v. Gilbert* (1944), 25 Cal.2d 422, 442, 154 P.2d 657; *In re Lindley* (1947), 29 Cal.2d 709, 725-726, 177 P.2d 918; *People v. Tuthill* (1948), 32 Cal.2d 819, 821, 198 P.2d 505.) The applicant for the writ 'must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief.' (*People v. Shorts* (1948), 32 Cal.2d 502, 513, 197 P.2d 330, 336.)" (Emphasis ours.)

In the recent case of *People v. Dunlop*, 102 Cal.App.2d 314, 227 P.2d 281, 284, the court said: "Since its [writ of error *coram nobis*] purpose is to secure relief where no other remedy exists it is incumbent upon a convicted person to take advantage of every remedy provided by law to defeat the hated sentence. If the judgments that appellants were habitual criminals were not supported by evidence that fact was known when they presented their motions for new trials. Also, if they were denied the guaranties of the Fourteenth Amendment to the federal constitution they might at least have mentioned such fact on their appeal. Such points having been ignored when they might have been made the theme for an appropriate argument on appeal cannot be reviewable by means of a writ of error *coram nobis*. *People v. James*, 99 Cal. App.2d 476, 222 P.2d 117; *People v. Ellis*, 99 Cal.App.2d 188, 221 P.2d 258; *People v. Baker*, 92 Cal.App.2d 623, 625, 207 P.2d 58."

The order is reversed with directions to enforce the judgments as entered.

DOOLING, J., and SCHOTTKY, Justice pro tem., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

103 Cal.App.2d 185

SCHMIDT et al. v. TOWNSEND.

Civ. 14741.

District Court of Appeal, First District,
Division 1, California.

March 29, 1951.

Weldon A. Schmidt and another brought action against Naomi B. Townsend. From an adverse judgment in the Superior Court of the State of California, in and for the County of San Benito, Thomas P. O'Connell, J., the plaintiffs appealed. On defendant's motion to dismiss the appeal. The District Court of Appeal, Peters, P. J., held that where plaintiffs had seen fit to appeal from non-appealable order denying a jury trial and did not appeal from the judgment, no appeal was pending and the purported appeal from the non-appealable order would be dismissed.

Appeal dismissed.

1. Appeal and error ⇨110, 870(6)

An order denying a jury trial is not appealable, but is reviewable only upon appeal from final judgment. Code Civ.Proc. § 963.

2. Appeal and error ⇨422

Where plaintiffs filed notice of appeal from the nonappealable order denying a jury trial and did not file notice of appeal from the judgment, no appeal was pending and the purported appeal from the nonappealable order would be dismissed. Code Civ.Proc. § 963.

3. Appeal and error ⇨422

Although notices of appeal must be liberally construed to permit, if possible, a hearing on the merits, and no technicality should prevent such a hearing, District Court of Appeal has no power to make appealable an order which is nonappealable.

4. Appeal and error ⇨422

Where plaintiffs appealed from non-appealable order denying jury trial and not from the judgment, District Court of Appeal could not deny motion to dismiss the appeal because counsel for plaintiffs was inexperienced in appellate matters and did not mislead defendant, and intended to appeal from that portion of judgment denying

their motion for jury trial. Code Civ.Proc. § 963.

5. Appeal and error ⇨428(2)

The rule providing that a notice of appeal filed prior to entry of the judgment, but after its rendition, shall be valid and shall be deemed to have been filed immediately after entry was predicated on the concept that a premature appeal from a judgment has been filed. Rules on Appeal, rule 2(c).

6. Appeal and error ⇨428(2)

Rule providing that a notice of appeal filed prior to entry of the judgment, but after its rendition, shall be valid and shall be deemed to have been valid immediately after entry was not applicable to notice of appeal which was filed prior to rendition of judgment. Rules on Appeal, rule 2(c).

Callaghan, Giannini & Anello, San Jose, for appellants.

Richard W. Stevens, Chester E. Ross, Hollister, for respondent.

PETERS, Presiding Justice.

This is a motion to dismiss an appeal on the ground that the order appealed from is not appealable. The pertinent dates are as follows:

June 21, 1950—cause called for trial. The minutes of the court for that day show that the attorney for the plaintiffs "objected to the fact that no jury was in attendance despite his request for one, said objection being made for the record. Motion denied. * * * (The trial then proceeded.) * * *"

July 1, 1950—plaintiffs filed a notice of appeal "from that certain order made and entered by the Court in this action on the 21st day of June, 1950, denying the plaintiffs the right to trial by jury in the above-entitled matter."

July 29, 1950—findings of fact made and judgment entered.

December 7, 1950—defendant and respondent filed his notice of intention to move for a dismissal of the appeal.

January 15, 1951—plaintiffs and appellants filed opposition to the motion to dismiss.

[1,2] No appeal was taken from the judgment of July 29, 1950, and the time to appeal therefrom has long since expired. Respondent urges that the order denying a jury trial is not separately appealable and must be reviewed, if at all, on an appeal from the judgment. This is clearly the law. The order denying a jury trial is not made appealable by section 963 of the Code of Civil Procedure. Such an interlocutory order is therefore not appealable, but is reviewable only upon appeal from the final judgment. In *re Robinson's Estate*, 106 Cal. 493, 39 P. 862; *Stern v. Hillman*, 115 Cal.App. 156, 300 P. 972; *Mutual Bldg. & Loan Ass'n v. Corum*, 220 Cal. 282, 30 P.2d 509; In *re Fife*, 110 Cal. 8, 42 P. 299. Since appellants have seen fit to appeal from the non-appealable order and have not appealed from the judgment, it is apparent that no appeal is pending and the purported appeal from the non-appealable order must be dismissed.

[3,4] Appellants have filed opposition to the motion. They do not urge that the order denying their motion for a jury trial is appealable, but do claim that the motion to dismiss the appeal should be dismissed because counsel for appellants is inexperienced in appellate matters, did not mislead respondent, and intended to appeal from that portion of the judgment denying their motion for a jury trial. While notices of appeal must be liberally construed to permit, if possible, a hearing on the merits, and no technicality should prevent such a hearing, *Holden v. California Emp. Stabilization Comm.*, 101 Cal.App.2d 427, 225 P.2d 634, this court has no power to make appealable an order which is non-appealable. The problem is one of jurisdiction. If appellants appealed from a non-appealable order we cannot remedy the defect. We cannot consider an appeal where none was taken.

[5,6] Appellants seek some solace out of Rule 2(c) of the Rules on Appeal. As that rule read prior to its amendment on January 1, 1951, it provided "A notice of

appeal filed prior to entry of the judgment, but after its rendition, shall be valid and shall be deemed to have been filed immediately after entry." This rule can have no application to the facts here involved for two reasons:

1. The rule is predicated on the concept that a premature appeal from a *judgment* has been filed. Here the appeal was not from the judgment, but from a non-appealable order.

2. By its very terms the rule applies only to a premature filing of a notice of appeal from a judgment "after its rendition." Here the notice of appeal was filed long before findings were filed and therefore was filed prior to rendition of judgment. The January, 1951, amendments to Rule 2(c) are not applicable to this case.

The appeal is dismissed.

BRAY and FRED B. WOOD, JJ., concur.



103 Cal.App.2d 281

Application of SCROGGIN.

Cr. 756.

District Court of Appeal, Fourth District,
California.

April 5, 1951.

Proceeding in the matter of the application of Vernal T. Scroggin, for a writ of habeas corpus to secure release from custody. The District Court of Appeal, Griffin, J., held that the finding that the husband was able to pay "substantial amount" was insufficient to show husband's ability to pay \$1200 to wife procuring interlocutory judgment of divorce and did not warrant confinement of husband for contempt until the payment of the \$1200 to the wife.

Writ granted and petitioner discharged.

1. Divorce ⇄ 269(13)

Finding that husband was able to pay "substantial amount" was insufficient to show husband's ability to pay \$1200 to

wife procuring interlocutory judgment of divorce and did not warrant confinement of husband for contempt until payment of \$1200. Code Civ.Proc. § 1219.

2. Contempt ⚖63(1)

Nothing can be implied in support of an adjudication of contempt.

3. Divorce ⚖269(13)

A finding that husband on November 27, 1950 was possessed of approximately \$1400 in cash and other personal property of value was insufficient to show that husband was possessed of such property on March 19, 1951 and did not warrant confinement of husband on March 19, 1951 for contempt until payment of \$1200 to wife procuring interlocutory judgment of divorce. Code Civ.Proc. § 1219.

4. Contempt ⚖63(4)

A judgment of commitment for contempt may not stand unless the record clearly shows as true all the facts necessary to constitute the contempt. Code Civ.Proc. § 1219.

George R. Baird, San Diego, Milton A. Krug, Los Angeles, for petitioner.

GRIFFIN, Justice.

The petition upon which this writ is issued shows that an order to show cause was issued out of the Superior Court of San Diego County, in an action entitled Cecile G. Scroggin, Plaintiff, vs. Vernal T. Scroggin, Defendant, directing said defendant to appear and show cause why he should not be held in contempt of court for failing to comply with the terms of the interlocutory judgment of divorce in said cause, which decree incorporated the terms of a property settlement agreement between the parties to said action, and which ordered certain payments made by the petitioner under the terms of the property settlement agreement. The petitioner in this proceeding appeared before John A. Hewicker, Judge of the Superior Court, in person and by his counsel.

The allegations contained in the affidavit of plaintiff, filed in support of the order

to show cause, were met by the allegations of affidavits filed by petitioner in which he denied that his failure to comply with the terms of the interlocutory judgment was wilful. He alleged that he had no notice or knowledge of such decree until he was served with said order to show cause. He also alleged that he was wholly unable to comply with the terms of the judgment. After hearing, petitioner was adjudged to be in contempt of court and sentenced to confinement in the county jail until such time as he should purge himself of contempt by paying plaintiff the sum of \$1200.

The judgment holding petitioner in contempt, after setting forth certain findings not material here, makes certain other findings pertinent to the matter at hand. It recites (1) that on the 27th day of November, 1950, the defendant had, and now has "*knowledge*" of the terms of the interlocutory decree of divorce herein; (2) that on said date (Nov. 27, 1950) defendant "was possessed of approximately \$1,400.00 in cash and other personal property of value"; (3) that on said date defendant had, "and now has, the ability to make a *substantial payment* to plaintiff due her under the Interlocutory Decree of Divorce herein"; (4) that defendant wilfully and deliberately failed to comply with said decree.

Section 1219 of the Code of Civil Procedure provides: "When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he *have* performed it, and in that case the act must be specified in the warrant of commitment."

In *In re Wells*, 29 Cal.2d 200, 173 P.2d 811, 812, it was held that a judgment of contempt purporting to confine the contemnor "until he purges himself of said contempt" must specify the act to be performed, and must include a finding that such act is within his power to perform. Otherwise, the judgment is void. (Citing cases.)

[1,2] The findings referred to under subdivisions 2 and 3 are insufficient to sup-

port a contempt commitment under sec. 1219 C.C.P. A finding that one has the ability to pay "a substantial amount" is not a finding of an ability to pay the sum of \$1200, for which petitioner was to stand committed until paid. The word "substantial" is a relative term, the meaning of which is to be gauged by all the circumstances surrounding the transaction in reference to which the expression has been used. It imports a considerable amount of value in opposition to that which is inconsequential or small. *Fuhrman v. American National B. & L. Ass'n*, 126 Cal.App. 202, 211, 14 P.2d 601. Being a relative term, it is not an exact one, and a finding of present ability to pay a "substantial sum" is not a finding of the present ability of petitioner to pay \$1200, or any other definite sum. Such a finding is but a conclusion and is so vague, indefinite, and uncertain as to leave wholly to conjecture the amount which petitioner has the ability to pay, and is not sufficient to support the order of commitment for contempt. Nothing can be implied in support of an adjudication of contempt. *Harlan v. Superior Court*, 94 Cal.App.2d 902, 211 P.2d 942.

[3,4] The finding referred to in subdivision 2, i. e., that petitioner was on November 27, 1950, possessed of approximately \$1400.00 in cash and other personal property of value, is not a finding that he was, on the date he was committed, to wit, March 19, 1951, possessed of said property and on that date had the ability to comply with the court's order to pay \$1200, or any other definite sum. A judgment of commitment for contempt may not stand unless the record clearly shows as true all the facts necessary to constitute the contempt. In *re Meyer*, 131 Cal.App. 41, 20 P.2d 732.

Since the judgment of contempt is void for failure to conform to the above stated requirements, other contentions of petitioner need not be discussed.

The writ is granted and petitioner is discharged.

BARNARD, P. J., and MUSSELL, J.,
concur.

Cal.Rep. 229-230 P.2d-19

102 Cal.App.2d 738

WYMAN v. MUNICIPAL COURT OF CITY
& COUNTY OF SAN FRANCISCO et al.

Civ. 14615.

District Court of Appeal, First District,
Division 2, California.

April 7, 1951.

Hearing Denied May 3, 1951.

Burt Wyman filed petition for writ of prohibition to prevent the Municipal Court of the City and County of San Francisco, and others, from revoking his probation. From a judgment of the Superior Court in and for the City and County of San Francisco, Theresa Meikle, J., granting the writ, respondent appealed. The District Court of Appeal, Dooling, J., 228 P.2d 89, affirmed the judgment. On defendant's petition for rehearing, the District Court of Appeal, Per Curiam, held that record did not support assertion that no trial was had and that petitioner had not been afforded an opportunity to present evidence in addition to exhibit.

Petition denied.

1. Appeal and error ⇄833(4)

On petition for rehearing where petitioner asserted that no trial was had in Superior Court and that petitioner had been afforded no opportunity to present evidence other than two exhibits, burden was on petitioner to present record showing these asserted errors.

2. Appeal and error ⇄833(4)

On petition for rehearing on ground that petitioner had not been afforded opportunity to present further evidence in Superior Court and that no trial had been had, record did not support grounds relied upon for rehearing.

Fred N. Howser, Atty. Gen., B. Abbott
Goldberg, Deputy Atty. Gen., for appellant.

Joseph P. Lacey, Harmon D. Skillin, San
Francisco, for respondent.

PER CURIAM.

[1] In its petition for rehearing appellant asserts that no trial was had in the Superior Court and that no opportunity to present evidence other than the two exhibits was accorded it. The burden is on appellant to present a record showing

these asserted errors. *Vaughn v. Jonas*, 31 Cal.2d 586, 601, 191 P.2d 432; *Palpar, Inc. v. Thayer*, 83 Cal.App.2d 809, 189 P.2d 752.

[2] The appeal was taken on the clerk's transcript and the rough and permanent minutes of the Municipal Court introduced into evidence by respondent on a hearing before the Superior Court held on March 8, 1950. The minutes of the Superior Court for that day as they appear in the clerk's transcript read (omitting the description of the two exhibits):

"In this action with respective counsel present, the counsel for respondents introduced exhibits in evidence as follows:

* * * * *

"Whereupon after discussion of respective counsel, the court ordered the return to the petition for writ of prohibition and to alternative writ of prohibition submitted on briefs."

The judgment recites: "An alternative writ of prohibition * * * having heretofore issued herein, and the same having come regularly before this court for hearing * * * and the matter having been fully presented and submitted to the court for decision * * *."

We find nothing in the record to support the assertion that no trial was had and no opportunity to present further evidence accorded to respondent.

The petition for rehearing is denied.



103 Cal.App.2d Supp. 921

BILICH v. BARNETT et al.

Civ. A. 7573.

Appellate Department, Superior Court,
Los Angeles County, California.

April 2, 1951.

Action by R. A. Bilich, a contractor, against Harold A. Barnett, etc., and others, engineers and surveyors, for damages incurred when plaintiff relied on defendants' negligently prepared grade sheet in con-

structing sewer lines for a trucking company. The Municipal Court of the City of Los Angeles, Lucius P. Green, J., entered judgment for defendants and plaintiff appealed. The Superior Court, Appellate Department, Stephens, J., held that contractor could not maintain the action against defendants in absence of privity of contract between contractor and defendants.

Judgment affirmed.

1. Negligence ⇐27

Where contractor entered into contract with trucking company to install sewer lines, and company agreed to have surveyors prepare grade sheets, and had paid them therefor, and surveyors negligently prepared a grade sheet which was relied on by contractor to his damage, surveyors were not liable to contractor, since there was no privity of contract between them.

2. Contracts ⇐187(1)

Negligence ⇐27

Even if a third party could recover damages suffered by negligent performance of a contract expressly made for his benefit, where contractor entered into a contract with a trucking company to install sewer lines and trucking company agreed to have surveyors prepare grade sheets, and had paid them therefor, contractor was not third party beneficiary of contract with surveyors and could not recover for alleged negligent preparation of a grade sheet.

3. Negligence ⇐108(1)

General demurrer to amended complaint, in action for damages by contractor hired to install sewer lines against surveyors for negligent preparation of grade sheet, was properly sustained for uncertainty, where it failed to reveal connection between contract to construct sewer and the real property named in the amended complaint.

Slane, Mantalica & Davis, Los Angeles, for appellant.

Frederick G. Stoehr, Pasadena, for respondents.

STEPHENS, Judge.

This appeal is from a judgment entered for defendant after plaintiff had failed to

amend his third amended complaint following the sustaining of a general demurrer thereto.

This amended complaint sets forth that plaintiff is a duly licensed and qualified contractor; that "defendants held themselves out as and purported to be civil engineers and land surveyors, licensed and with the ability to prepare properly a grade sheet for the work to be done on the job herein-after mentioned"; that plaintiff entered into a contract with Reliable Trucking Co. (apparently the owner of the real property, though there is no allegation of their status therein), whereby plaintiff agreed to install certain sewer lines for Reliable, and Reliable Trucking Co. agreed that they would have defendants prepare survey lines and grade sheets covering the work that was to be done, by plaintiff for Reliable; that Reliable Trucking Co. paid defendants therefor; that defendants prepared and submitted to plaintiff a certain grade sheet but it was an inaccurate representation of the grade lines on said real property; that such submission was with full knowledge that plaintiff would rely thereon; that said grade sheet was negligently prepared by defendants and did not portray a true representation of the grade sheet as required on the job; that plaintiff relied thereon and "at the finish of the grading plaintiff discovered that the excavation was not as it should be according to the plans and specifications of Reliable Trucking Co."; that as a result thereof plaintiff was required to fill in part of the excavation and incur additional expenditures totaling \$382, to his damage in that amount.

Upon this appeal plaintiff relies upon a statement of the rule as set forth in Restatement of Torts, as follows:

"Information Negligently Supplied
for the Guidance of Others.

"One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if

"(a) he fails to exercise that care and competence in obtaining and communicat-

ing the information which its recipient is justified in expecting, and

"(b) the harm is suffered

"(i) by the person or one of the class of persons for whose guidance the information was supplied, and

"(ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith." Restatement of Torts, Topic 3, sec. 552. He contends, in support of this rule, that it is but an extension of the principle that a manufacturer who negligently constructs chattels to be supplied to the public and which are of such nature as to imminently endanger the lives or safety of persons who may be expected to use them is liable for any damage resulting from such negligent construction to persons using them for the purpose for which they were made, even though no privity of contract exists between such manufacturer and the person injured; citing *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696; *Dahms v. General Elevator Co.*, 1932, 214 Cal. 733, 7 P.2d 1013; *Hall v. Barber Door Co.*, 1933, 218 Cal. 412, 23 P.2d 279; *Kalash v. Los Angeles Ladder Co.*, 1934, 1 Cal.2d 229, 34 P.2d 481. However, the California cases designate this holding as a "well-settled exception" to the general rule requiring privity, *Dahms v. General Elevator Co.*, supra, 214 Cal. at page 738, 7 P.2d at page 1015, and the latter case, after discussing different theories upon which the holding has been placed by different courts, says in 214 Cal. at page 739, 7 P.2d at page 1016: "By still others it is placed upon the ground of the failure of the principal to exercise the ordinary care which is due to everybody, without regard to contract, under the principles announced in sections 1708, 1714, and 3281 of the Civil Code, and *this seems to be the true reason for the rule.*" (Emphasis added.)

The rule as set forth in the Restatement of Torts, hereinabove set forth, also finds support in *Prosser on Torts*, page 736, and both place strong reliance upon *Glanzer v. Shepard*, 1922, 233 N.Y. 236, 135 N.E. 275, 23 A.L.R. 1425. In the case of *Ultramares Corp. v. Touche*, 1931, 255 N.Y. 170, 174 N.

E. 441, 445, 74 A.L.R. 1139, the New York Court of Appeals, in an exhaustive opinion written by Cardozo, Chief Judge (who was also the author of the opinion in *Glanzer v. Shepard*) referred to the latter case as follows: "In *Glanzer v. Shepard*, the seller of beans requested the defendants, public weighers, to make return of the weight and furnish the buyer with a copy. This the defendants did. Their return, which was made out in duplicate, one copy to the seller and the other to the buyer, recites that it was made by order of the former for the use of the latter. The buyer paid the seller on the faith of the certificate which turned out to be erroneous. We held that the weighers were liable at the suit of the buyer for the moneys overpaid. Here was something more than the rendition of a service in the expectation that the one who ordered the certificate would use it thereafter in the operations of his business as occasion might require. Here was a case where the transmission of the certificate to another was not merely one possibility among many, but the 'end and aim of the transaction,' as certain and immediate and deliberately willed as if a husband were to order a gown to be delivered to his wife, or a telegraph company, contracting with the sender of a message, were to telegraph it wrongly to the damage of the person expected to receive it. *Wolfskehl v. Western Union Tel. Co.*, 46 Hun [N.Y.], 542; *De Rutte v. New York, Albany & Buffalo Electro Magnetic Telegraph Co.*, 1 Daly [N.Y.], 547; *Milliken v. Western Union Tel. Co.*, 110 N.Y. 403, 410, 18 N.E. 251, 1 L.R.A. 281."

In the *Ultramares* case the court, while approving the principle above indicated, refused to extend it further to persons generally to whom the information may come and who rely upon it. As the court said in 255 N.Y. 170, 174 N.E. 447, 74 A.L.R. at page 1149: "A change so revolutionary, if expedient, must be wrought by legislation." While this decision is strongly persuasive, it does not appear to reflect the majority rule in this country. On the contrary, the following statement appearing in the text of 34 A.L.R. at page 67, seems to be supported by the authorities cited in the extensive annotation that follows: "It has

frequently been declared a rule of law that no cause of action in tort can arise from the breach of a duty existing by virtue of a contract, unless there be between the parties a privity of contract, so that a plaintiff can show no wrong done himself for the breach of any duty arising out of a contractual relation, unless he can establish himself as a party or privy to the contract. 20 R.C.L. 49, § 44.

"Following this general principle, the courts generally hold that, because of the absence of privity between the parties, a person making a certificate or record, in the absence of collusion or fraud, incurs no liability toward persons, other than the ones by whom he was employed, who rely thereon, for any negligent errors or omissions therein, causing damage."

In 19 Cal.Law Review, in a case note as late as 1930, we find the following statement: "A few jurisdictions recognize a liability of an abstractor to persons with whom there was no privity of contract for negligence in abstracting a title, when he was aware that this party was being served. *Brown v. Sims*, 1899, 22 Ind.App. 317, 53 N.E. 779; *Denton v. Nashville Title Co.*, 1903, 112 Tenn. 320, 79 S.W. 799; *Anderson v. Spriesterbach*, 1912, 69 Wash. 393, 125 P. 166, 42 L.R.A.,N.S., 176. Apart from this type of case only two jurisdictions, New Hampshire, *Cunningham v. C. R. Pease House Furnishing Co.*, 1908, 74 N.H. 435, 69 A. 120, 20 L.R.A.,N.S., 236, and New York, recognize liability for negligent misrepresentations where there is no privity of contract. See *Carpenter, Responsibility for Intentional, Negligent, and Innocent Misrepresentation*, 1930, 9 Ore.L. Rev. 413, (1930), 24 Ill.L.Rev. 749."

[1] In the only case which has come to our attention in which the Supreme Court of California has passed upon the question, the general rule, requiring privity of contract between plaintiff and defendant in order to sustain an action by the former, was followed. In that case, *Buckley v. Gray*, 1895, 110 Cal. 339, 42 P. 900, 31 L.R.A. 862, the court reviewed and quoted with approval from many authorities from other states. The following ex-

cerpts are from pages 343, 344 and 345 of 110 Cal., from page 901 of 42 P., of the opinion: "They [cases previously discussed] show to a demonstration that it is not every one who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, 'the limit of the doctrine relating to actionable negligence,' says Beasley, C. J., 'is that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme.' * * * 'The right of a third party to maintain an action for injuries resulting from a breach of contract between two contracting parties has been denied by the overwhelming weight of authority of the state and federal courts of this country and the courts of England. To hold that such actions could be maintained would not only lead to endless complications in following out cause and effect, but would restrict and embarrass the right to make contracts by burdening them with obligations and liabilities to others, which parties would not voluntarily assume'. * * * 'The only safe rule is to confine the right to recover to those who enter into the contract. If we go one step beyond that, there is no reason why we should not go fifty.' * * * 'If third persons can acquire a right in a contract, in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contracts. Plaintiff, not being a party to the contract, cannot maintain this action on account of injuries resulting from any breach of duty defendant owed Pickle, arising purely out of the terms of the contract between them.'"

In the case of *Kircher v. Hunter*, 1929, 101 Cal.App. 548, 281 P. 1047, it was held that there is no privity of contract between an owner and a subcontractor and, therefore, the former could not maintain an action against the latter for damages consisting of the cost of certain reconstruction work occasioned by defective construction

in the laying of tile in two bathrooms. See also *Diggs v. Pacific Gas & Electric Co.*, 1922, 57 Cal.App. 57, 206 P. 765. We find no other decisions in California involving the question.

[2] If it could successfully be contended that a third party may recover the damages he has suffered by the negligent performance of a contract expressly made for his benefit, a question we do not decide, that proposition would not serve the plaintiff here because he has not alleged facts establishing any such contract.

[3] An added reason for sustaining the judgment is found in the special demurrer for uncertainty (VII(1)). The complaint failed to reveal any connection between plaintiff's agreement with Reliable to construct a sewer and "the real property at the corner of Ransom street and Washington Boulevard."

We conclude that the action of the trial court in sustaining the general demurrer to the third amended complaint was proper.

The judgment is affirmed.

SHAW, P. J., and BISHOP, J., concur.



103 Cal.App.2d Supp. 911

PEOPLE v. ALLINGTON.

Cr. A. 2674.

Appellate Department, Superior Court,
Los Angeles County, California.

March 30, 1951.

Stewart B. Allington was convicted in the Municipal Court of the City of Los Angeles, Byron J. Walters, J., for vagrancy, and he appealed. The Appellate Department of the Superior Court, County of Los Angeles, Bishop, J., held that a defendant who was a peeping Tom on April 25 and who conducted himself in a lewd manner on February 22 could be convicted for vagrancy under an indictment containing two counts but he would be required to serve only one sentence.

Judgment affirmed as modified.

1. Criminal law Ⓒ984**Vagrancy** Ⓒ1

The vagrancy statute enumerating in twelve subdivisions certain acts constituting vagrancy creates but one offense and a defendant convicted under two subdivisions has but one sentence to serve. Pen.Code, § 647.

2. Vagrancy Ⓒ1

A defendant can be prosecuted for vagrancy by being lewd and dissolute even though the necessary proof consists of acts occurring before the arrest. Pen. Code, § 647, subd. 5.

3. Criminal law Ⓒ1167(1)

The variance between the date "on or about April 25" alleged in indictment for vagrancy and the date of February 22 which was proved did not require reversal of judgment convicting defendant of vagrancy. Pen.Code, § 647.

4. Criminal law Ⓒ984

Defendant who was a peeping Tom on April 25 and who conducted himself in a lewd manner on February 22 could be convicted for vagrancy under an indictment containing two counts but he would be required to serve only one sentence. Pen.Code, § 647.

Frederic H. Vercoe, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., Philip E. Grey, Deputy City Atty., of Los Angeles, for respondent.

BISHOP, Judge.

[1] The ultimate question to be answered in this case was whether the defendant had been convicted of one or of two offenses. The answer to that question depended upon the answer to be given to a basic question: does section 647, Penal Code, create one, or a dozen or more, public offenses? We have concluded, not without some misgiving, that but one crime is created, and that the defendant should have but one sentence to serve, although he was convicted under two sub-

divisions of the section. On this appeal, then, from "the judgment of conviction" one of the two judgments imposed is eliminated.

The facts of the case put our conclusion to a severe test. According to the evidence, on April 25, the defendant was captured and arrested by the father of a fourteen year old girl just after the defendant had been seen by her peeping into the window of a room in their garage occupied by her as her bedroom. Count I charged that the defendant was a vagrant because of this peeping incident, alleged to have occurred "on or about April 25." The defendant concedes the legal sufficiency of the evidence to support the conviction as to Count I.

[2] The defendant strenuously contends, however, that this evidence utterly fails to support his conviction under the second count, by which it was charged, again, that he was a vagrant "on or about April 25," this time because he was lewd and dissolute. We are inclined to agree with the defendant as he argues that the facts revealed in connection with the peeping Tom affair were insufficient to show that he was a lewd person. He did peep into the bedroom of a young girl, and his pants were unzipped, when he was arrested, but, without more, it may be this would not be sufficient to substantiate the charge of Count II. But there was more. Two witnesses testified to defendant's actions of a different nature, over a period of some minutes, that took place on February 22 at a different location. The defendant did not attempt at the trial to contradict the testimony, and makes no claim now that the conduct described as having occurred on February 22 did not indisputably stamp him as being a lewd person. He would avoid the effect of the evidence of the events of February 22 by insisting that those events had no place in his trial, because "You must have positive evidence to prove that a man is a dissolute and lewd person at the time of his arrest in order to justify prosecuting him." This, we are satisfied, is not the law. If it were, then the defendant could forever escape arrest and prosecution for his va-

grancy of February 22, because the two women who observed him did not forthwith either themselves arrest him or call an officer to arrest him. We held in *People v. Lund*, 1933, 137 Cal.App.Supp. 781, 27 P.2d 958, that a person could be arrested in Los Angeles city on a charge of being a vagrant, the acts proving the charge having occurred some time previously in a neighboring city. We cited and relied upon *People v. Craig*, 1907, 152 Cal. 42, 91 P. 997, 1000, in which an arrest was held justified of one who was proved to be a vagrant by reason of events preceding the arrest by some three months. It is true that the Supreme Court observed that the person arrested "was comporting himself quite consistently with his usual line of conduct at the moment of his arrest." That, too, can be said of the defendant in this case; his conduct on April 25 was quite consistent with the character he had revealed on February 22; there was no suggestion that he had reformed. In both the *Lund* and *Craig* cases, though, the acts that disclosed the vagrant's nature antedated the arrest, and we conclude that one may be successfully prosecuted on the charge of being a vagrant although the necessary proof consists of acts that occurred sometime before the arrest.

[3] Nor does the variance between the date alleged in Count II "on or about April 25," and that proved, February 22, afford a good reason for reversing the judgment. *People v. Williams*, 1945, 27 Cal.2d 220, 226, 163 P.2d 692, 695. See also *People v. Rice*, 1887, 73 Cal. 220, 221, 14 P. 851; *People v. Fuhrman*, 1933, 130 Cal.App. 267, 268-269, 19 P.2d 821, 822; *People v. Roebing*, 1936, 14 Cal.App.2d 586, 589, 58 P.2d 929, 931.

The conviction on each count is thus seen to be supported, and we have it established that the defendant was a vagrant because he was a peeping Tom on April 25, and a vagrant because he conducted himself in a lewd manner on February 22. May he be charged in one complaint with being twice a vagrant, and upon conviction suffer two periods of imprisonment of 180 days each, to run consecutively? The answer depends upon the intention of the

legislature to be found in section 647, Penal Code, read in the light of the cases which supply governing principles. We quote the section sufficiently to reveal its pattern:

"1. Every person (except a California Indian) without visible means of living who has the physical ability to work, and who does not seek employment, nor labor when employment is offered him; or

"2. Every beggar who solicits alms a. a business, or, * * *

"5. Every idle, or lewd, or dissolute person, or associate of known thieves; or, * * *.

"10. Every common prostitute; or,

"11. Every common drunkard; or,

"12. Every person who loiters, prowls or wanders upon the private property of another, in the nighttime, without visible or lawful business with the owner or occupant thereof; or who while loitering, prowling or wandering upon the private property of another, in the nighttime, peeks in the door or window of any building or structure located thereon and which is inhabited by human beings, without visible or lawful business with the owner or occupant thereof;

"Is a vagrant, and is punishable by a fine of not exceeding five hundred dollars (\$500), or by imprisonment in the county jail not exceeding six months, or by both such fine*and imprisonment."

We would doubtless have reached a conclusion contrary to the one we have expressed had we no guides other than three cases dealing with section 337a of the Penal Code. We refer to *Matter of Roberts*, 1910, 157 Cal. 472, 108 P. 315; *People v. Plath*, 1913, 166 Cal. 227, 135 P. 954; and *People v. Ghio*, 1927, 82 Cal.App. 28, 255 P. 205. As originally adopted, section 337a was one sentence, not broken up by numbers, paragraphs or other indications of a break in the thought more damming than semicolons. We quote just enough to make the cases understandable: "Every person, who engages in poolselling * * *; or who keeps or occupies any room * * *; or who receives, registers, records * * * any * * * bet

* * *; or who * * * becomes the custodian or depository for gain * * * of any money * * *; or who aids * * in any of * * * said acts, * * * is punishable by imprisonment * * *." The first of the three cases (*Ex parte Roberts*) was decided before the section was amended. In an opinion joined in by three of the five Supreme Court Justices who participated in the case, it was said (157 Cal. 474, 108 P. 315): "Although comprising but a single sentence, section 337a of the Penal Code creates many distinct offenses. * * * It is written in the disjunctive throughout, and the several offenses therein described are apparently as distinct and independent of each other as if they had been enacted in separate sections."

No authority was cited in connection with the conclusion just quoted, although, as we shall see, some decisions on the point were available, and the decision seems to us to be inconsistent with the decided cases. Whether it is or not is no longer of consequence, for its conclusion received approval in *People v. Plath*, *supra*, and the last of our three cases, *People v. Ghio*, standing upon the first two, declares, 82 Cal.App. 32, 255 P. 206, that each of the six numbered subdivisions into which section 337a is now divided "constitutes a separate offense, as if it had been enacted in a separate section of the Code." Section 647, too, is now written with numbered paragraphs, and again we state, the three cases dealing with section 337a would be persuasive authorities that section 647 was to be read as though it created twelve or more separate crimes, were it not for a number of other cases.

We quote from two of the earliest of these other cases. In *People v. Shotwell*, 1865, 27 Cal. 394, 400, these words appear, taken from Wharton's Criminal Law (141): "Where a statute makes two or more distinct acts, connected with the same transaction, indictable, each one of which may be considered as representing a stage in the same offense, it has in many cases been ruled, they may be coupled in one count. Thus setting up a gaming table,

it has been said, may be an entire offense; keeping a gaming table and inducing others to bet upon it, may also constitute a distinct offense; for either, unconnected with the other, an indictment will lie. Yet, when both are perpetrated by the same person, at the same time, they constitute but one offense, for which one count is sufficient, and for which but one penalty can be inflicted."

We find the case of *People v. Frank*, 1865, 28 Cal. 507, of particular significance, not only because of its content but even more because of the use that is made of it in later cases. We quote one paragraph, 28 Cal. at page 513: "The indictment is good, whether it be regarded as containing two counts or but one. Where, in defining an offense, a statute enumerates a series of acts, either of which separately, or all together, may constitute the offense, all such acts may be charged in a single count, for the reason that notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense. To illustrate our meaning, take the statute against forgery, under which the indictment in this case was found, where we find several acts enumerated, all of which are declared to be forgery. Thus 'the falsely making,' 'altering,' 'forging,' 'counterfeiting,' 'uttering,' 'publishing,' 'passing,' 'attempting to pass' any of the instruments or things therein mentioned, with the intent specified, is declared to be forgery. Now, each of those acts singly, or all together, if committed with reference to the same instrument, constitute but one offense. Whoever is guilty of either one of these acts is guilty of forgery; but if he is guilty of all of them, in reference to the same instrument, he is not therefore guilty of as many forgeries as there are acts, but of one forgery only. Hence an indictment which charges all the acts enumerated in the statute, with reference to the same instrument, charges but one offense, and the pleader may therefore at his option charge them all in the same count, or each in separate counts, and in either form the indictment will be good. Wharton on Crim. Law, Sec. 390,

5th edition; *People v. Shotwell*, 27 Cal. 394; and *People v. Thompson*, 28 Cal. 214."

It would extend this opinion beyond justifiable limits to review in any detail the cases lined up on the side of *People v. Frank*; that is, finding in the provisions they discuss several crimes, all together amounting to but one. *People v. Harrold*, 1890, 84 Cal. 567, 24 P. 106, *People v. Leyshon*, 1895, 108 Cal. 440, 442-443, 41 P. 480, and *People v. Dole*, 1898, 122 Cal. 486, 55 P. 581, follow *People v. Frank* in holding that while various acts each constitute forgery, all do no more. In *People v. Fisher*, 1911, 16 Cal.App. 271, 273-274, 116 P. 688, 689, it was held that the situation created by the adoption of several sections on embezzlement (sections 503-514, Penal Code) was "no different than it would be where a number of different acts are described in a single section, in which case the commission of any of such acts will constitute the crime," but that one offense is charged if several of the acts are set out in one information. The accusatory statement in *People v. Thompson*, 1896, 111 Cal. 242, 247, 43 P. 748, 749, was held not to charge more than one offense, it having alleged that the defendant had thrown a switch, with intent to derail a passenger train, and had boarded the train to rob it. The statute (section 218, Penal Code) made any one of four acts a felony but if all were committed, the Supreme Court stated, but one crime occurred. In *Bealmear v. Southern California Edison Co.*, 1943, 22 Cal.2d 337, 139 P.2d 20, 22, section 499a, Penal Code, was under scrutiny. The section "defines a single offense," the Supreme Court stated, "and 'enumerates a series of acts, either of which separately, or all together, may constitute the offense.'" In the discussion that followed, the cases, from *People v. Shotwell* and *People v. Frank*, on down, were passed in interesting review.

Were there a case that appealed to us as decisive of the interpretation to be placed upon section 647 with respect to the question under discussion, we would, of course, content ourselves with citing it. We began

to read *Ex parte Salas*, 1934, 3 Cal.App.2d 98, 38 P.2d 806, with hope, for the contention was there made that two sentences should not have been imposed following two convictions based on subdivisions 1 and 5 of section 647. But the appellate court failed to see that the record revealed two judgments based on those two subdivisions, so did not express an opinion on our problem. *Ex parte McCarthy*, 1887, 72 Cal. 384, 14 P. 96, has been cited as though it were a case in point. The petitioner for a writ of habeas corpus had been convicted upon a complaint charging that she was an idle and dissolute person, who wandered and roamed about the city at late and unusual hours. Her contention, in support of her application, was that the words "without visible means of living," appearing in the first paragraph, modified each paragraph, and should be contained in the charge of any of the subdivisions. The Chief Justice, who denied the application, wrote (72 Cal. 386, 14 P. 96-97): "I do not so construe the statute. It enumerates in several groups certain acts which shall constitute vagrancy, and he or she who is guilty of the acts thus enumerated in any one of these groups is liable to the penalty of the statute. *People v. Frank*, 28 Cal. [507] 508. The complaint charges all of the acts specified in one of these groups, and is therefore sufficient. The fact that it states, in addition, some of the acts specified in other and independent groups of the same section does not invalidate it."

We have given *Ex parte McCarthy* as much space as we have because it is cited, along with *People v. Harrold*, *supra*, and *People v. Frank*, in support of this statement in *People v. Gosset*, 1892, 93 Cal. 641, 643, 29 P. 246: "We do not think that the indictment charges more than one offense because it uses the words 'did deal, play, carry on, and conduct' the said game. 'When a statute enumerates a series of acts, either of which separately, or altogether, may constitute the offense, all of such acts may be charged in a single count; for the reason that notwithstanding each act may, by itself, constitute the offense, all of them can do no more, and likewise constitute but one and the same offense.'"

Again we find the Frank and McCarthy cases cited, this time in *People v. Thompson*, supra, 111 Cal. 242, 252, 43 P. 748, 751: "It is conceded that under the act declaring who are vagrants, and prescribing punishment therefor, the entire series of acts there laid down may be charged in one complaint. Ex parte McCarthy, 72 Cal. 384, 14 P. 96. * * * In *People v. Frank*, 28 Cal. [507] 513, the defendant was charged with falsely making a draft, and also with passing the draft knowing it to be forged, and the indictment was sustained. Such an indictment would be good, even though the false making was done upon one day and the passing was done months subsequent thereto, and even though the false making was done with intent to defraud A, and the passing was done with intent to defraud B. *People v. Harrold*, 84 Cal. 567, 24 P. 106."

The McCarthy case is also cited, together with *People v. Frank*, in support of similar situations, in *People v. Laine*, 1919, 41 Cal.App. 345, 349, 182 P. 986, 987, and *People v. Clemett*, 1929, 208 Cal. 142, 145, 280 P. 681, 682.

Reverting to *People v. Plath*, one of the three 337a cases, we find it stated, 166 Cal. 227, 231, 135 P. 954, 955-956: "We are of the opinion that the situation in this case is not one where it may fairly be held that we have a statute enumerating 'a series of acts either of which separately or all together constitute the offense.'" (Emphasis given to the definite article is that of the Supreme Court.) The case was distinguished from *People v. Frank*, and this significant language was used (166 Cal. 232, 135 P. 956): "The vagrancy statute (section 647, Pen.Code), which is relied on by appellant in this connection, does undertake to define a particular offense, to wit, 'Vagrancy,' declaring in 11 different subdivisions what acts shall constitute one a 'vagrant,' and render him liable to the penalty therein prescribed. Even under this statute it has never been held, so far as we can find, that a complaint charging a defendant with each and all of the acts specified in the 11 subdivisions would not be subject to demurrer for failure to comply with the provisions of

sections 950, 951, and 952 Penal Code. See in this connection *People v. Lee*, 107 Cal. [477] 480, 40 P. 754. The case of Ex parte McCarthy, 72 Cal. 384, 14 P. 96, relied on in this connection, where the complaint charged the matters contained in two of the subdivisions of the vagrancy section, was a *habeas corpus* proceeding, and inasmuch as the complaint did certainly state facts constituting a public offense within the jurisdiction of the court, it was not a nullity."

We lengthen this opinion to include these few words from the case cited by the Supreme Court, *People v. Lee*, 1895, 107 Cal. 477, 480, 40 P. 754, 755: "Where, as under some of our statutes, several separate, different, and distinct acts are enumerated, the commission of each or any of which constitutes the crime, it is not sufficient to charge the defendant with being guilty of the crime, without further charging the commission of the particular act or acts upon which the crime is based. A person, for example, charged with vagrancy, is of right entitled to know whether he is called upon to meet the charge as being a common drunkard, or as being a dissolute associate of known thieves, or being a healthy beggar,—in short, as belonging to what class, or as having [habitually committed] what act, to lay him liable as a 'vagrom man.'"

We thus discover that in the legal literature of the state, although no case so decides, section 647 is repeatedly and quite universally regarded as being governed by the *People v. Frank* group of cases. We have also seen that that group of cases outnumbers the 337a group. There is, moreover, sound reason for interpreting section 647 as the courts have done. Surely we cannot conclude that the legislature intended a part of the section to be read as establishing many separate crimes, and a part as establishing separate crimes that totaled but one. That which has been done is not to declare that it is unlawful to get drunk, or to prostitute oneself, or to peep in another's building, nor have these acts been declared to be misdemeanors. The punishment provided by section 647 is not for doing, but for being; for being a va-

grant. The section declares who is a vagrant. A common drunkard is a vagrant. Proof of drunkenness on one occasion obviously would not suffice to convict of vagrancy under this subheading, nor would six consecutive days, nor six consecutive week-ends, of drunkenness justify six convictions. A common drunk, who lodges in a barn without the permission of the owner, is a vagrant, not *two*. One who lodges in an outhouse without the permission of the owner, and who peeps into the owner's house, is one vagrant, not two. The more than twelve means afforded by the twelve subdivisions of section 647 for identifying a vagrant are not so lacking in a common philosophy that the conclusion is required that they must describe different crimes, not just many in one, as they appear to do.

It is doubtless true that the conclusion that we have reached will be attended by difficulties, when other problems than double punishment are involved. But so would any other conclusion. The difficulties that will arise are inherent in this type of legislation, where punishment is prescribed, not for an act but for belonging to a class of persons, and those who fall in the class are determined, some by their attitudes, others by their actions.

We expect, then, such results as that reached in *Re Tom Wong*, 1932, 122 Cal. App. 672, 675, 10 P.2d 797, 798, where a judgment was held not to be void which recited that the petitioner had been found

guilty of the crime of vagrancy, following his conviction under a complaint that "charged the petitioner under nearly every one of the twelve subdivisions of section 647."

[4] We therefore order that the judgment (or judgments) in this case be modified by striking the second paragraph imposing a sentence of 180 days upon Count II, and by striking from the first paragraph the words: "Violation of Subdivision 12 Section 647 Penal Code Count I" and inserting in the place thereof the words: "being a vagrant, as charged in the complaint"; and that as so modified the judgment is affirmed.

STEPHENS, J., concurs.

SHAW, Presiding Judge.

I concur, but with the same reluctance suggested in the foregoing opinion. One of the principal reasons leading me to this concurrence is that the legislature has attached the single name "vagrant" to the person who is or does everything described in the section, thus affording, as it were, a common denominator for all these matters and indicating a legislative intent that, though they may seem somewhat variant, they are, for the purposes of this enactment, to be deemed a unit. There may be a limit to the legislative power thus to unify disparate forms of misconduct, but I think it has not been passed here.

PEOPLE v. KERR.

Cr. 5162.

Supreme Court of California, in Bank.

April 17, 1951.

Rehearing Denied May 14, 1951.

John Albert Kerr, Jr., was convicted in the Superior Court, Fresno County, Strother P. Walton, J., of murder of the first degree, and an automatic appeal pursuant to statute followed. The Supreme Court, Schauer, J., held that upon the record it could not be said, as a matter of law, that defendant had not committed the homicide in the perpetration of robbery.

Affirmed.

1. Criminal law ⇨554

In homicide prosecution, where defendant testified that when he struck the fatal blows he had no thought of money and that the thought of taking his victim's money occurred to him only after the victim was fatally wounded, trial court was not required to accept defendant's testimony as being conclusive on his state of mind.

2. Homicide ⇨253(6)

In homicide prosecution, evidence sustained trial court's finding that murder had occurred in perpetration of a robbery and that it was therefore murder of the first degree. Pen.Code, §§ 189, 1239(b).

3. Homicide ⇨22(1)

Homicide was not by torture, notwithstanding fact that assailant, after inflicting injuries which later proved fatal, had abandoned his victim and left him to die without medical or other assistance.

4. Criminal law ⇨980(2)

Defendant who pleaded guilty to charge of murder was, at hearing to determine degree of crime, entitled to same basic constitutional guaranties and burden of proof as in case of defendant who pleads not guilty and is tried.

5. Criminal law ⇨260(11)

Rule that circumstantial evidence must lead to one reasonable hypothesis against defendant before it can be so used and that where there is more than one reasonable hypothesis resulting from circumstantial evidence then hypothesis favoring defend-

ant shall be used as well as rule that defendant is entitled to have degree of his guilt proven beyond reasonable ground of doubt are for application in, and primarily are concern of, trial court.

6. Criminal law ⇨260(11)

Appellate Court will not alter or hold unsupported trial court's findings merely because it might reasonably draw an inference different from one trial court reasonably drew, or merely because it might not be convinced beyond reasonable doubt that it would have made same finding.

7. Criminal law ⇨260(7)

In homicide prosecution, record would not sustain defendant's contention that trial court had failed to give defendant benefit of circumstantial evidence rule and rule that defendant's degree of guilt must be proved beyond reasonable ground of doubt.

8. Homicide ⇨332(2)

Where record affords substantial support for conclusion that one of the enumerated felonies was perpetrated or attempted and that killing was committed in such perpetration or attempt, judgment must be affirmed.

9. Criminal law ⇨1159(2)

After conviction all intendments are in favor of judgment, and verdict will not be set aside unless record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it.

William F. Docker and James H. Bars-tow, Fresno, for appellant.

Fred N. Howser and Edmund G. Brown, Attys. Gen., and Walter L. Bowers, Asst. Atty. Gen., for respondent.

SCHAUER, Justice.

This is an automatic appeal from a judgment which imposes the death penalty. (Pen.Code, § 1239(b).) Defendant pleaded guilty to a charge of murder and the trial judge, after hearing evidence, found that the crime was of the first degree and sentenced defendant to death. The judge

filed a memorandum opinion which expresses his view that the murder was of the first degree both because it was committed in the perpetration of robbery and also because it was perpetrated by torture. We have concluded that the court erred in construing the facts attending the murder as constituting torture within the meaning of the law (Pen.Code, § 189) but that the finding that the murder occurred in the perpetration of robbery and, hence, is of the first degree, must be affirmed.

The evidence, including the testimony of defendant, may be fairly summarized as follows:

On July 1, 1950, defendant decided to ask his friend Troy Buckles for a loan of \$200. Defendant wished to use this money in part to pay bills and in part to finance a three-day vacation trip with his fiancée. He went to the grocery store operated by Mr. and Mrs. Buckles, but did not then ask for the loan because other persons were present. On the morning of Sunday, July 2, defendant returned to the store. Defendant did not ask for the loan until all customers had left, Mrs. Buckles had gone on an errand, and Buckles had closed the store. It was then about noon. While Buckles was counting the cash and checks received, with defendant assisting him, defendant asked for the loan. Buckles refused because, he said, on previous occasions when defendant had borrowed from him the loans had not been repaid promptly. There followed an argument which grew more heated when Buckles, according to defendant's testimony, "said that all I was getting the money for was to spend it on my girl friend" and profanely and at some length expressed his opinion of defendant's conduct and the character of defendant's fiancée. Defendant seized a meat cleaver and struck Buckles on the head. Defendant took the cleaver and the box containing the cash and checks, put them under the seat of his car, drove to his fiancée's home, and they proceeded on their holiday trip.

[1] Defendant contends that the evidence does not show murder in the perpetration of robbery. He relies upon his own testimony that when he struck the fatal

blows he had no thought of money and was acting in anger because of Buckles' insulting remarks about defendant's fiancée and that the thought of taking the money occurred to him only after Buckles was fatally wounded. It is true that if defendant's thoughts followed the course described by him the killing would not be first degree murder in the perpetration of robbery. (See *People v. Hardy* (1948), 33 Cal.2d 52, 59, 198 P.2d 865; *People v. Sanchez* (1947), 30 Cal.2d 560, 569, 184 P.2d 673.) But the trial court was not required to accept defendant's testimony as being conclusive on his state of mind. A reasonable evidentiary basis for the finding contrary to defendant's testimony in respect to its subjective aspects is expressed in the memorandum opinion of the trial court:

"I am firmly convinced * * * that during the quarrel which preceded the blows the defendant formed the specific intent to get the money at any cost and that he struck the fatal blows for the purpose of disabling or killing Buckles and then robbing him. The money theme runs throughout this entire case. The defendant had been keeping steady company with * * * [his fiancée] for exactly a year. He stated that they planned to be married in September of this year. They had taken various trips together; to Las Vegas, to mountain resorts and to Santa Cruz. The Fourth of July holiday had been planned for a month and the defendant was definitely committed to the project, but needed more money. The temptation was too great. Buckles trusted him as a friend and asked him to assist him in checking the receipts. Over \$400.00 in cash was right in front of him.

"It is my definite opinion that during the course of the fifteen minute argument while the money was being checked and counted the defendant conceived and then executed the plan to secure the money by robbery."

[2] Defendant urges that the following circumstances make it unreasonable to infer that he struck Buckles with intent to take the money: Mrs. Buckles, when she left the store, had said that she would "be right

back"; she and several customers knew that only defendant and Buckles were in the store; the store had large windows through which passers-by might readily have seen the commission of the homicide. In effect, this is an argument that defendant would not in anger form and carry out an intent to rob, heedless of the possible consequences of arrest and conviction. Upon the record it cannot be said as a matter of law that defendant would not have conducted himself in such an unreasonable manner or that the trial court's factual conclusions are not supported.

[3] The People properly concede that the murder was not by torture. The trial judge's conclusion that it was resulted from his erroneous belief, stated in his opinion, that "A defendant who, after inflicting injuries which later prove fatal, abandons his victim and leaves him to die without medical or other assistance is guilty of murder by torture." There is language in *People v. Cardoza* (1943), 57 Cal.App.2d 489, 498, 134 P.2d 877, cited by the trial judge, which appears to support such statement. But, as is clear from the discussions of what constitutes torture found in *People v. Tubby* (1949), 34 Cal.2d 72, 77, 207 P.2d 51, and cases there cited, this is not the law and the contrary implication of the *Cardoza* case is disapproved.

[4] Defendant asserts that at the hearing to determine the degree of the crime he was entitled to the same basic constitutional guaranties, and the burden of proof was the same, as in the case of a defendant who pleads not guilty and is tried; and his brief contains argument and authorities in support of this assertion. We agree with the stated propositions of law. But defendant does not suggest how an appellate court can pass on the question whether the testimony established his guilt beyond a reasonable doubt, rather than merely by a preponderance of the evidence. And defendant does not contend and it does not appear that he was deprived of any constitutional guaranties.

[5-9] In arguing that the evidence is insufficient to show murder in the perpetration of robbery defendant says, "Appellant has been given no benefit of the rule that circumstantial evidence must lead to *one* reasonable hypothesis against the defendant before it can be so used, and that where there is more than one reasonable hypothesis resulting from circumstantial evidence, then the hypothesis favoring defendant shall be used. Furthermore, there is nothing in the evidence to overcome appellant's right to have the degree of his guilt proven beyond a reasonable ground of doubt." The rule as to circumstantial evidence and the requirement as to burden of proof are for application in, and primarily are the concern of, the trial court; an appellate court will not alter or hold unsupported the trial court's findings merely because it might reasonably draw an inference different from one the trial court reasonably drew, or might not be convinced beyond a reasonable doubt that it would have made the same findings. Upon the record here we cannot hold that the trial court failed to give effect to the rules which defendant invokes. "[I]f the record affords substantial support [as it does here] for the conclusion that one of the enumerated felonies was perpetrated or attempted, and the killing was committed in such perpetration or attempt, the judgment must be affirmed. [Citations.] After conviction all intentions are in favor of the judgment and a verdict will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it. [Citations.]" (*People v. Lindley* (1945), 26 Cal.2d 780, 791, 161 P.2d 227; see also *People v. Gilbert* (1943), 22 Cal.2d 522, 530, 140 P.2d 9.)

For the reasons above stated the judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.

37 Cal.2d 6

In re McGEE.

MARKWORT v. McGEE.

L. A. 21755.

Supreme Court of California, in Bank.

April 17, 1951.

Eldon James Markwort, contestant, instituted proceedings to contest the nomination of Patrick D. McGee, contestee, to the office of Assembly, from the 64th Assembly District of California by the Democratic and Republican Parties at the primary election. The Superior Court of Los Angeles County, Norman F. Main, J., entered a judgment in favor of the contestee, and the contestant appealed. The Supreme Court, Carter, J., 226 P.2d 1, reversed the judgment with directions to dismiss the proceedings on ground that the legislature had exclusive jurisdiction to judge the qualifications and elections of its members, but the Supreme Court overlooked matter of awarding costs on appeal to the contestee, and the clerk of the Supreme Court on remittitur awarded costs to the contestant. Thereafter the contestee filed a petition to have the remittitur recalled for purpose of awarding costs on appeal to the contestee. The Supreme Court, Carter, J., held that remittitur should be recalled and costs on appeal awarded to contestee.

1. Petition granted.

1. Appeal and error ⇨1222

A remittitur may be recalled and corrected by an appellate court when clerk's entry of judgment for costs in remittitur is improper, as where such entry is contrary to constitutional provision, statute, or rules on appeal.

2. Appeal and error ⇨1217

Generally, Supreme Court cannot exercise any jurisdiction over cause in which remittitur has been issued by its order and filed in court below, but such general rule rests on supposition that all proceedings have been regular, and that no fraud or imposition has been practiced on court or opposite party.

3. Appeal and error ⇨1218

Against an order or judgment improvidently granted on false suggestion, or under mistake as to facts, Supreme Court will afford relief after adjournment of

term and will, if necessary, recall a remittitur and stay proceedings in trial court, on ground that jurisdiction of Supreme Court cannot be divested by an irregular or improvident order.

4. Appeal and error ⇨1221

A decision of the Supreme Court is "inadvertent", so that it can be corrected after remittitur, if it is result of oversight, neglect, or accident, as distinguished from judicial error.

See publication Words and Phrases, for other judicial constructions and definitions of "Inadvertent".

5. Elections ⇨307

Where contestee prevailed on the merits in trial court in election contest, and on appeal by contestant Supreme Court entered a judgment reversing judgment for contestee and directing trial court to dismiss proceedings on ground that courts do not have jurisdiction to determine eligibility of candidates for election to the Legislature, but Supreme Court overlooked matter of costs on appeal, which should have been awarded to contestee, and clerk of Supreme Court made an entry on remittitur awarding costs to contestant, Supreme Court would recall the remittitur for amendment to provide for award of costs to contestee. Rules on Appeal, rule 26 (a, b).

Rollin L. McNitt and Edythe Jacobs, Los Angeles, for appellant.

Spencer E. Van Dyke and Frank P. Doherty, Los Angeles, for respondent.

CARTER, Justice.

This is a petition by respondent McGee to recall the remittitur previously issued in this cause for the purpose of awarding costs on appeal to respondent, or, in the alternative, to secure an order that the parties bear their own costs on appeal.

Appellant Markwort instituted a proceeding contesting respondent's election to the State Assembly. Respondent moved to dismiss the proceeding on the ground of lack of jurisdiction. The motion was denied. Thereupon, respondent petitioned

the District Court of Appeal for a writ of prohibition to restrain the trial court from trying the action. That petition was also denied. After a trial on the merits, judgment was entered for respondent. The District Court of Appeal affirmed, holding that the evidence sustained the judgment and that the courts of this state have jurisdiction to determine the eligibility of candidates for election to the Legislature. In re McGee, Cal.App. 222 P.2d 66. On hearing in this court, we held that the trial court lacked jurisdiction to entertain the proceeding. Accordingly, the judgment for respondent was reversed and the trial court was directed to dismiss the proceeding. In re McGee, 36 Cal.2d 592, 226 P.2d 1, filed January 10, 1951. Since the opinion contained no directions with respect to costs on appeal, the remittitur issued on February 10, 1951, with the order, entered by the clerk of this court, that appellant recover costs on appeal. Rule 26(b), Rules on Appeal.

Respondent alleges that appellant has served on him a memorandum of costs and disbursements totalling \$418.80. The grounds alleged for recalling the remittitur are that respondent, and not appellant, was the prevailing party on appeal; that a reviewing court, in the interests of justice, may make an award or apportionment of costs which it deems proper, Rule 26(a); that it is unjust to require respondent to bear the costs sustained by appellant on appeal when the position maintained by respondent since the inception of the proceeding—that no court has jurisdiction to determine an election contest involving a member of the Legislature—has been upheld.

[1] A remittitur may be recalled and corrected by an appellate court when the clerk's entry of judgment for costs in the remittitur is improper, as where such entry is contrary to a constitutional provision, *San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 165 Cal. 540, 132 P. 1021, a statute, *In re Estate of Wallace*, 12 Cal. 2d 476, 86 P.2d 95; *In re Estate of Steehler*, 197 Cal. 67, 239 P. 718, or rules on appeal, *Horan v. Varian*, 207 Cal. 7, 276 P.

1002. Rule 26(b) provides: “* * * In the absence of * * * directions by the reviewing court the clerk shall enter on the record and insert in the remittitur a judgment for costs as follows: * * * (4) in the case of a reversal of the judgment, in whole or in part, with or without directions, for the appellant. * * *” The judgment for respondent having been reversed (because the trial court lacked jurisdiction to determine the election contest), and since the opinion did not make any provision for the awarding of costs, the clerk's entry on the remittitur (“Appellant to recover costs on appeal”) was not incorrect, but literally follows Rule 26(b) (4), supra.

[2,3] However, it is obvious that, in substance if not in form, respondent was in all respects the prevailing party on appeal, as well as in the trial court; that, had this court not overlooked the matter of costs on appeal, such costs would have been awarded to respondent. He should not be required to bear appellant's costs merely because of the fortuitous circumstance that the trial court decided in his favor on the merits, while this court sustained his contentions with respect to the jurisdictional question. The question presented, then, is whether this court may recall its remittitur in order to enter judgment for costs in favor of respondent. The controlling principles concerning the recalling of a remittitur for reasons other than clerical errors therein were set forth in *Rowland v. Kreyenhagen*, 24 Cal. 52, 59, as follows: “* * * as a general rule, this Court cannot exercise any jurisdiction over a cause in which the remittitur has been issued by its order and filed in the Court below * * *

“But this general rule rests upon the supposition that all the proceedings have been regular, and that no fraud or imposition has been practiced upon the Court or the opposite party; for if it appears that such has been the case, the appellate Court will assert its jurisdiction and recall the case. Against an order or judgment improvidently granted, upon a false suggestion or under a mistake as to the facts of

the case, this Court will afford relief after the adjournment of the term; and will, if necessary, recall a remittitur and stay proceedings in the Court below. This is not done, however, upon the principle of resumption of jurisdiction, but upon the ground that the jurisdiction of the Court cannot be divested by an irregular or improvident order." See, also, *Isenberg v. Sherman*, 214 Cal. 722, 725, 7 P.2d 1006; note, 23 Cal.L.Rev., 354; cases collected in 84 A.L.R. 591.

Following these principles, it has been held that a remittitur may be recalled where the reviewing court was imposed upon by counsel, *Trumpler v. Trumpler*, 123 Cal. 248, 253, 55 P. 1008, where the decision was predicated upon a mistake of fact by the appellate court, *In re Rothrock*, 14 Cal.2d 34, 38, 92 P.2d 634; see, *Holloway v. Galliac*, 49 Cal. 149, or was improvidently rendered without due consideration of the facts of the case, *Municipal Bond Co. v. City of Riverside*, 138 Cal.App. 267, 288, 32 P.2d 661; cf. *Haydel v. Morton*, 28 Cal.App.2d 383, 385, 82 P.2d 623, or was the result of inadvertence on the part of the court, *In re Bill's Estate*, 7 Cal.Unrep. 174, 74 P. 704, [order reversing judgment inadvertently made when there was no appeal from the judgment].

[4,5] In the present case the failure to provide for the recovery of costs by respondent in our original opinion was inadvertent; that matter was simply overlooked. A decision is inadvertent if it is the result of oversight, neglect, or accident, as distinguished from judicial error. *Carter v. J. W. Silver Trucking Co.*, 4 Cal.2d 198, 205, 47 P.2d 733; *King v. Emerson*, 110 Cal.App. 414, 421, 288 P. 1099, 294 P. 768. It follows that the petition should be granted.

It is true that in several cases the appellate courts of this state have denied motions to recall remittiturs for the purpose of awarding costs on appeal to the losing party. *In re Levinson's Estate*, 103 Cal. 450, 459, 41 P. 483, 42 P. 479; *Paine v. Bank of Ceres*, 60 Cal.App.2d 621, 141 P.2d 219; *Petersen v. Civil Service Board*,

68 Cal.App. 752, 230 P. 196; *Crenshaw Bros. & Saffold v. Southern Pacific Co.*, 42 Cal.App. 44, 183 P. 208. However, the grounds for recalling a remittitur were recognized and it was pointed out that the circumstances present in such cases did not warrant such a procedure. Thus, in the *Levinson* case, supra, it was said, 108 Cal. at page 459, 42 P. 479: "When the remittitur has been duly and regularly issued, *without inadvertence*, we have no power to recall it. This court thereupon loses jurisdiction of the cause, except in a case of mistake, or of fraud or imposition practiced upon the court, neither of which elements appear in this case." (Emphasis added.) And in *Crenshaw Bros. & Saffold v. Southern Pacific Co.*, supra, 42 Cal.App. at page 47, 183 P. at page 209, the court said: "It is not claimed that there was fraud, or that the court was imposed upon, or that, by its judgment, it inadvertently failed to state which party should pay the costs of the appeal." The point decided in these cases was expressed in *Paine v. Bank of Ceres*, supra, 60 Cal. App.2d at page 623, 141 P.2d at page 221, as follows: "Normally, * * * the prevailing party is entitled to his costs on appeal as of course. If the losing party wants to urge that the appellate court should exercise its inherent power and deny costs to the prevailing party in the interests of justice he should normally urge such point before the appellate court has lost jurisdiction by the issuance of the remittitur." Such decisions are illustrative of the rule that a remittitur will not be recalled unless the matters relied upon by the moving party would have compelled a different result had they been considered by the reviewing court. See, *De Baker v. Carillo*, 52 Cal. 473; *Ellenberger v. City of Oakland*, 76 Cal.App.2d 828, 833, 174 P.2d 461. Moreover, in the cited cases it is apparent that the court did not fail to consider the matter of costs through inadvertence; unlike the present case, the losing parties sought a judicial determination as to whether the interests of justice required a reapportionment of the costs. As has been pointed out, respondent McGee

was not the losing party in any real sense. One of his contentions was sustained in every court.

The petition or motion to recall the remittitur is granted. It is ordered that the remittitur issued herein on February 10, 1951, be recalled, that the words "Appellant to recover costs on appeal" be stricken therefrom, that, for the words so stricken, the provision that "Respondent to recover costs on appeal" be substituted, and that, as so amended, the remittitur be issued.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



103 Cal.App.2d 446

PHILP v. HOBART.
Civ. 18001.

District Court of Appeal, Second District,
Division 2, California.

April 13, 1951.

Rehearing Denied May 1, 1951.

Hearing Denied June 11, 1951.

Action by Bertha Philp against Charles E. Hobart, executor of the estate of George Philp, deceased, to quiet title to certain realty. The Superior Court of Los Angeles County, Fred Miller, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Wilson, J., held that where taxes on realty from November, 1940 when plaintiff acquired deed from city, were paid by plaintiff and not by defendant's predecessor, there was an absence of one of the necessary elements to the establishment of adverse possession by defendant and that any damage suffered by defendant or his predecessor by reason of any improvements made by decedent after plaintiff acquired title was attributable to decedent's failure to use reasonable diligence and not to plaintiff's delay in filing suit.

Judgment affirmed.

1. Adverse possession ☞13

Generally to constitute a defense under statute of limitations there must be a

concurrence of all elements required to establish an adverse possession. Code Civ. Proc. § 325.

2. Adverse possession ☞86

Where plaintiff acquired deed to realty from city in 1940 after foreclosure of realty on a delinquent street assessment bond and taxes from 1940 were paid by plaintiff and not by defendant's predecessor, it was in absence of one of the necessary elements required to establish an adverse possession and defendant could not establish adverse possession. Code Civ. Proc. § 325.

3. Quieting title ☞29

Where decedent was served with 30-day notice of right of redemption after plaintiff purchased certificate of sale covering realty from city, and decedent was aware of fact that plaintiff was paying taxes on realty since he asked plaintiff why she was doing so and deed from city to plaintiff was a matter of record, any damage suffered by defendant or his predecessor by reason of any improvements made by decedent after plaintiff acquired title was attributable to decedent's failure to use reasonable diligence and not to plaintiff's delay in filing suit to quiet title and decedent having slept on his rights, a court of equity would not intervene.

4. Trusts ☞110

In divorced wife's action to quiet title to realty which wife had deeded to husband as his separate property at time of parties' divorce but which wife thereafter purchased from city after foreclosure of realty for a delinquent street assessment bond, evidence sustained finding that no fraud was perpetrated by wife as ground for enforcing trust in husband's favor.

5. Trusts ☞91

Where realty which wife had deeded to husband at time of their divorce was foreclosed on for a delinquent street assessment bond and was sold to city, and wife purchased certificate of sale covering realty from city and served husband with 30-day notice of right of redemption, mere inadequacy of price paid by wife was not ground for enforcing trust in husband's favor, in absence of fraud.

Perry Bertram and Holmes E. Hobart, Los Angeles, for appellant.

Stephenson & Karmelich, San Pedro, for respondent.

WILSON, Justice.

From a judgment in favor of plaintiff in an action to quiet title to real property defendant Charles E. Hobart, as executor of the estate of George Philp, deceased, appeals.

The parcel which is the subject of this action was held at one time in joint tenancy by plaintiff and decedent, who were husband and wife. On May 5, 1930, plaintiff was granted an interlocutory decree of divorce from George Philp at which time she deeded the lot to him as his separate property.

Prior to July, 1940, the property was foreclosed upon for a delinquent street assessment bond and sold to the Board of Fire Pension Commissioners of the City of band and wife. On May 5, 1930, plaintiff purchased the certificate of sale covering the property from said board for \$120. She served George Philp with a 30-day notice of right of redemption which had been given to her by the Treasurer of the City of Los Angeles and in November, 1940, procured a deed of the property to herself from the City Treasurer.

George Philp was occupying the property at the time it was deeded to plaintiff and he continued in possession until his death in 1948. Plaintiff paid all taxes and assessments thereon from the time she ac-

quired title. Prior to the foreclosure sale decedent had improved the premises by erecting two garages with an apartment over them. After the title was vested in plaintiff he erected two more garages with two apartments of two rooms each over them. George Philp died after the instant action was instituted and the executor of his estate was substituted as party defendant.

Defendant contends (1) the action is barred by sections 318 and 319 of the Code of Civil Procedure¹ because plaintiff was not seised or possessed of the property within five years before the commencement of the action; (2) she is barred by laches; (3) she holds title as constructive trustee for the benefit of defendant.

It is undisputed that plaintiff held the legal title to the property from November, 1940, and defendant concedes that under section 321 of the Code of Civil Procedure² there is a presumption she had possession thereof. That section provides that the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title unless it appear that the property has been held and possessed adversely to such legal title for five years before the commencement of the action. He asserts, however, that this presumption is rebutted by reason of the fact that George Philp entered into possession of the property under

1. Section 318: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question, within five years before the commencement of the action."

Section 319: "No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person was seised or possessed of the

premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made."

2. Section 321: "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action."

a claim of title and having occupied it continuously under such claim for more than five years before the commencement of this action, the property is deemed to have been held adversely under section 322 of the same code.³

[1, 2] Section 325 of that code provides that "in no case shall adverse possession be considered established under the provisions of any section or sections of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land." It is the general rule that to constitute a defense under the statute of limitations there must be a concurrence of all the elements required to establish an adverse possession. *Comstock v. Finn*, 13 Cal.App.2d 151, 155, 56 P.2d 957. Since the taxes on the property from November, 1940, were paid by plaintiff and not by defendant's predecessor, there is an absence of one of the necessary elements and defendant cannot establish adverse possession. *Bell v. Towns*, 95 Cal. App.2d 398, 399, 213 P.2d 73.

[3] Defendant maintains that plaintiff's delay in bringing her action resulted in a disadvantage to him since he was thereby deprived of having present certain witnesses. Other than decedent, he does not show in what way he was prevented from having the witnesses he desired. Insofar as the testimony of decedent is concerned, he was 85 years of age when the suit was filed and his death did not occur for nearly two years thereafter. No attempt, however, was made to perpetuate his testimony despite his advanced years.

3. Section 322: "When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the

[4] Defendant asserts that he was also prejudiced by plaintiff's failure to assert her rights until after decedent had expended time and money in erecting improvements on the property which greatly increased its value. A card was found among decedent's papers which showed the original report of the assessment on the property which was foreclosed for failure to pay delinquent street assessments. Decedent was served with a 30-day notice of right of redemption and he was aware of the fact that plaintiff was paying the taxes on the property since he asked her why she was doing so. Moreover, the deed from the Treasurer of the City of Los Angeles to plaintiff was a matter of record. It is obvious therefore that any damage suffered by defendant or his predecessor by reason of any improvements made by decedent after plaintiff acquired title was attributable to decedent's failure to use reasonable diligence and not to plaintiff's delay in filing suit. Decedent had the means of knowledge and failed to exercise reasonable diligence in connection therewith and having slept on his rights a court of equity will not intervene. *Malone v. Clise*, 18 Cal.App.2d 154, 157, 63 P.2d 321.

[5] Defendant's contention that plaintiff holds the property in trust for his benefit because of the grossly inadequate price she paid for it is without merit. The evidence sustains the finding of the court that no fraud was perpetrated by plaintiff upon decedent and inadequacy of price alone is not a sufficient ground for setting aside the sale. *Faucher v. State of California*, 82 Cal.App.2d 991, 994, 187 P.2d 918.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract."

103 Cal.App.2d 338

JULIEN v. GOSSNER.

Civ. 7856.

District Court of Appeal, Third District,
California.

April 9, 1951.

Action by Edward H. Julien for breach of oral lease of agricultural lands and for possession of premises against Phil Gossner, who filed a cross-complaint and counterclaimed for various sums of money alleged to be due from landlord. The Superior Court, Siskiyou County, James M. Allen, J., rendered judgment for plaintiff for rental sum due, and for defendant on cross-complaint and counterclaim, and plaintiff appealed. The District Court of Appeal, Van Dyke, J., held that evidence sustained finding that oral lease of agricultural lands had not been breached, but that landlord should have been allowed one-fourth value of pasturage consumed by tenant's hogs during certain years of lease.

Judgment amended in part, affirmed in part, and cause remanded with directions.

1. Landlord and tenant §329

Where original oral lease of agricultural lands provided that if tenant should hold over after first year terms of original lease would continue except as to hog pasturage, and original lease expired December 31, 30-day notice to hold-over tenant to vacate on August 31 was ineffective.

2. Landlord and tenant §331(6)

In action by landlord against tenant for breach of oral lease of agricultural lands and for possession of premises, evidence sustained finding that lease had not been breached.

3. Trial §396(2)

In action by landlord against tenant for breach of oral lease of agricultural lands and for possession of premises, where only issue made by pleadings was whether tenant was required to pay for whole pasturage for tenant's hogs or only one-fourth as rental, and tenant's answer admitted that he was to pay one-fourth of all pasturage used by him or sold to others, trial court's finding that no rental was to

be paid for last two years of lease went beyond issues made by pleadings.

4. Trial §396(1)

Trial court's finding should be confined to facts in issue, and province of court in respect to facts is to determine but not to raise the issue.

5. Trial §396(2)

Where a complaint contains an allegation of fact which is distinctly and unqualifiedly admitted by answer, there is no issue as to fact, and the allegation of fact being admitted is conclusive, and a finding against admission is outside the issues.

6. Landlord and tenant §329

Where oral lease of agricultural lands provided that tenant would pay for whole pasturage of tenant's hogs for first year and one-fourth value of pasturage consumed by animals for two last years of lease, and tenant admitted he was to pay one-fourth of value of pasturage consumed by his animals, the nonpayment of part of rent which was due for pasturage for last two years of lease amounted to a default in rent and was a breach of lease. Code Civ.Proc. § 1161, subd. 2.

7. Landlord and tenant §329

Where partial rental for pasturage was due for two last years of a three-year oral lease of agricultural lands and notice of breach of lease did not specifically point out default of nonpayment as required under statute, forfeiture of lease would not be declared. Code Civ.Proc. § 1161, subd. 2.

8. Landlord and tenant §329

Where partial rental for pasturage was due for two last years of a three-year oral lease of agricultural lands, landlord's continued acceptance of rental payments, which were made by tenant before and after landlord's notice of breach, was a waiver of breach and precluded declaration of forfeiture.

9. Landlord and tenant §103(1)

Enforcement of covenants for forfeiture of lease are avoided whenever possible.

10. Landlord and tenant Ⓒ112(1)

Right of lessor to declare a forfeiture of lease by reason of making of sublease without lessor's consent in violation of lease is waived when lessor, after knowledge of sublease, accepts rents specified in lease.

11. Landlord and tenant Ⓒ331(6)

In action by landlord against tenant for breach of oral lease of agricultural lands and for possession of premises, evidence sustained finding that tenant was entitled to recover on cross-complaint for alfalfa seed, wheat furnished landlord's aunt and fencing materials.

12. Landlord and tenant Ⓒ331(6)

In action by landlord against tenant for breach of oral lease of agricultural lands and for possession of premises, evidence was insufficient to support the finding that tenant was entitled to a \$2 per ton cartage charge for transporting grain crop to mill.

Floyd Merrill, Yreka, Erskine, Pillsbury & Tulley, San Francisco, for appellant.

Tebbe & Correia, Yreka, for respondent.

VAN DYKE, Justice.

This action arose out of a lease of agricultural lands in Siskiyou County. Plaintiff and appellant Julien owned the land. Defendant and respondent Gossner occupied the land for three years, that is, from January 1, 1946 to December 31, 1948. The terms and conditions of his tenancy were agreed upon orally during November of 1945, and he went into possession on January 1st. During the month of February following the parties exchanged letters concerning some of the leasing terms with respect to rental. The court made findings, in substance, as follows: For the first year, ending on December 31, 1946 (not August 31st as contended by appellant), respondent was to pay as rental, one-fourth of all crops and one-fourth of all receipts from pasturage, with this qualification, that respondent, for pasturage

consumed by his own hogs would pay to appellant the whole value of such pasturage. Upon that basis and for the first year the court found that respondent became indebted for rent in the total sum of \$1,161.80, of which he paid \$207.22, leaving a balance owing of \$954.58. This total rental included a charge for pasturing his own hogs made up of \$233 for stubble pasturage and \$100 for grass pasturage on about ten acres of creek bottom land. Neither party challenges the findings as to the amount of these rentals for the first year and judgment in favor of appellant was given therefor, subject, however, to certain offsets hereafter mentioned. Respondent continued to occupy the property and during the remaining two years of his occupancy paid various sums for rent.

With respect to the rent to be paid by respondent for the last two years of his occupancy the court found that the rent was agreed to be the same as for the first year, excepting that respondent "would not be obligated to pay or account to plaintiff for all the proceeds from the hog pasturage but only for one-fourth thereof" and that respondent remained in possession of the premises until December 31, 1948 "pursuant to said [oral] understanding that should he remain in possession after the first year all the terms and conditions of the original lease would be the same, except that instead of all the rents for hog pasturage going to plaintiff [appellant here], only one-fourth ($\frac{1}{4}$) thereof would go" to him. Further, on this same item of pasturage for respondent's hogs, the court found that the parties had agreed that after the first year respondent did account to plaintiff for "one-fourth ($\frac{1}{4}$) of all pasturage used by him or sold to others, hog pasturage excepted."

[1,2] Appellant claiming that the right of respondent to occupy the property terminated by agreement on August 31, 1948, served upon respondent a thirty-day notice that his tenancy would expire on that day. As noted, the court found against this contention as to the date of expiration and since the finding was based upon conflicting evidence it must be upheld. It fol-

lows that appellant's notice of termination was ineffective for any purpose. But appellant, further claiming that respondent had been guilty of breaching various conditions of his tenancy, served upon respondent two further notices, both on August 24, 1948. One of these notices was captioned "Three-Day Notice to Perform Covenants or Surrender Possession" and specified ten breaches of which it charged respondent to be guilty: 1. That respondent had failed to maintain in good repair a pressure pump system which was on the property; 2. That respondent had not built a dam on a creek bottom; 3. That respondent had permitted his hogs to damage the premises and run at large through forbidden areas on the property; 4. That he had pastured sheep on the property; 5. That he had failed to keep an employee on the premises at all times; 6. That he had not supplied board and food to defendant's aunt, Miss Gladys C. Julien; 7. That he had failed to give a proper or any accounting of the crops produced on the premises during the years 1947 and 1948; 8. That his employees had negligently caused a fire to destroy a building; 9. That he had failed to keep fences and buildings in proper repair; and, 10. That he had so farmed parts of the property as to exhaust the soil and that he had failed to properly summer fallow parts of the property. The court found that none of these charges of breach were true and these findings are supported by substantial evidence. The third notice served was a three-day notice demanding possession. After the service of these notices respondent remained in possession up to December 31st, the date which the court had found to mark the expiration of his right of tenancy. The effect of holding, as we do, that respondent had not breached his lease in any of the particulars charged and that under its terms he had a right to possession to the end of 1948, at which time he left the property, is that the remaining issues have to do with the amount of money respondent owed appellant as his landlord. In this respect the court found that, with the exception of money accruing as rental during the first year of respondent's occupancy, all rentals had been properly accounted for

and paid over. The record shows that appellant visited the property three or four times each year during respondent's occupancy and that from time to time he had received accountings and the money shown to be due thereby, with the exception of the last year. During that year respondent had grown rather extensive crops and had paid fairly large sums of money to appellant as the landlord's share thereof, except that he was indebted for pasturage in the sum of \$168.75, which he had not paid, and for one-fourth the value of a rye crop, amounting to \$339.60, which was likewise unpaid. Adding these two sums to the \$954.58 found unpaid from rentals accruing in 1946 the court found a total of \$1,462.96 rental unpaid.

Respondent had cross-complained and counter-claimed for various sums of money he alleged to be due him from appellant. Although the appellant's action purported to be brought pursuant to his notice of breach and demand for possession, and although he demurred to the counter-claim and cross-complaint as not being permissible in such an action, he nevertheless withdrew that objection and the issues of the counter-claim and cross-complaint were tried. Responsive to those issues, the court found that appellant was indebted to respondent for wheat delivered to appellant's aunt in the sum of \$358, for fencing materials furnished by respondent and for which appellant was obligated to pay in the sum of \$110, for fencing wire under the same conditions \$82.86, for alfalfa seed in the sum of \$626, and for cartage to transport appellant's share of the 1948 crops in the sum of \$168.06. The court applied these sums in reduction of the amount found due appellant and entered judgment in appellant's favor in the net sum of \$118.10.

[3-5] Appellant first contends that he should have been allowed the reasonable value of pasturage consumed by respondent's hogs during the years 1947 and 1948. We think this contention must be sustained. While the findings are somewhat confusing upon the matter, it is apparent that the court made no allowance for pasturage admittedly consumed during those years, and respondent by his answer and in response

to appellant's allegations that he was to be paid for all pasturage consumed by respondent's hogs admitted that he was to pay "one-fourth ($\frac{1}{4}$) of all pasturage used by him or sold to others." Thus with respect to pasturage used by respondent, the only issue made by the pleadings was whether all such pasturage or only one-fourth thereof was to be paid as rental. Responsive to that issue, the court found, as we have noted, that for the first year such pasturage should be wholly paid, but when the court found that nothing was to be paid for the remaining two years it went beyond the issues made by the pleadings.

" * * * 'The finding should be confined to the facts in issue. The province of the court in respect to facts is to determine but not to raise the issue.' * * * 'Where a complaint in an action contains an allegation of fact which is distinctly and unqualifiedly admitted by the answer, there is no issue as to the fact. The allegation of fact being admitted it is conclusive. A finding against the admission is therefore outside the issues.' * * * 'When a trial is had by the court without a jury, a fact admitted by the pleadings should be treated as "found." * * * If the court does find adversely to the admission, such finding should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings.' * * * In such case the facts alleged must be assumed to exist. Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not upheld by the admitted facts is erroneous.'" Welch v. Alcott, 185 Cal. 731, 754, 198 P. 626, 636.

Here respondent admitted he was to pay one-fourth of the value of pasturage consumed by his animals. He denied he was to pay more. In part, the court upheld this denial, but under the issues so made up it could not find that for any of the period of respondent's occupancy he was not required to pay anything.

[6,7] The fact, however, that pasturage for this item in some amount may have been payable as rental during 1947 and 1948, before the notice of breach was served upon

respondent, does not result in a right in appellant to the forfeiture of the lease. The notice of breach so served did not specify this default. The breach amounted to a default in rent and by the plain provisions of Section 1161, subdivision 2, of the Code of Civil Procedure, under which this notice was given, it was necessary that the default be specifically pointed out if a forfeiture on account thereof was to be claimed. The evident purpose of that section is to specifically point out breaches complained of in order that they may be remedied within the time allowed by the statute. Clearly the claim of forfeiture is limited to the breaches thus specifically pointed out and cannot find support in any breach not so designated. Johnson v. Sanches, 56 Cal.App.2d 115, 132 P.2d 853, and cases cited.

[8] Again, notwithstanding his claim that respondent had not paid this part of the rental, appellant nevertheless continued right along to accept rental payments that were made both before and after he gave his notices. In this respect, we will refer to only one portion of the evidence. On July 12, 1948, respondent wrote to appellant, saying that he was beginning to harvest a crop of grain and was delivering the same to a milling company at Montague for a named price and that the landlord's share of one-fourth would go through at that rate if it was satisfactory. While appellant did not respond to this letter, nevertheless on about July 16th he received \$1,000 partial payment of his share on this grain and on September 21st, after the notice had been given, he received \$3,722.58 as being the balance of his share. Appellant here claims that the trial court should have declared the lease to have been forfeited as of August 31, 1948, and should have treated appellant as a trespasser from that time forth and accountable for the full returns from the property, plus damages, and that he should have trebled these amounts. But appellant was in no position to make such demands.

"The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach, and precludes the landlord from declaring a

forfeiture of the lease by reason of said breach. This is the general rule, and is supported by ample authority." *Kern Sunset Oil Co. v. Good Roads Oil Co.*, 214 Cal. 435, 440, 6 P.2d 71, 73, 80 A.L.R. 453.

[9,10] " * * * The enforcement of covenants for forfeiture are avoided whenever possible. The right of the lessor to declare a forfeiture of a lease by reason of the making of a sublease without the lessor's consent in violation of the lease is waived when the lessor, after knowledge of the sublease, accepts the rents specified in the lease." *Bedford Investment Co. v. Folb*, 79 Cal.App.2d 363, 366, 180 P.2d 361, 363. See, also, *Van Doren v. Thurber*, 57 Cal.App.2d 506, 510, 134 P.2d 829.

The notice served by appellant did state that the lease had been breached for failure to summer fallow or sub-soil any of the land in 1948. The court found this not to be true and we think from the situation that the court was warranted in so finding. From the testimony the court could have concluded that rental was accepted after the proper time for summer fallowing and sub-soiling, if there was such obligation. Also the appellant had informed respondent he had leased the land to another who should be put in possession that he might proceed with farming for the following year. Responsive to this, respondent informed that other that while he was holding the property for pasturage purposes he would so conduct his operations as not to interfere with any farming that the succeeding tenant desired to do. The succeeding tenant testified in this respect that he was not interfered with by any acts of respondent and that respondent in that respect had been most cooperative, but that he did not go upon the land to do any farming because he knew of the dispute between appellant and respondent and, as he put it, he "was going to stay outside the line of fire." He also said that because of the dry year in 1948 it would have been impossible to plow any land before October 10th to 15th. The evidence applicable to the period prior to the giving of the notice of breach showed that this particular covenant had been performed up to that time and supported the

court's findings that the respondent had not been guilty of failure in this respect.

By the terms of the agreement between the parties and as a part of the rental, respondent was obligated to furnish board to appellant's aunt, who lived on a reserved portion of the ranch. The testimony was to the effect that he had performed this obligation even up to the end of the year, although he admitted that after July of 1948 his employee who was on the property made a charge against Miss Julien of \$30 per month for board. There was no evidence that this was paid and it was shown that she received board up to the end of the year. There was no evidence as to the value in money of board for the aunt. The court was justified in finding no breach of that particular obligation.

[11] Appellant next contends that the court erred in awarding respondent judgment for the sums claimed in his counterclaim and cross-complaint. Extended discussion is not necessary. The evidence supports the court's findings in this regard. It may be said, however, that upon this point the appellant in part takes the position that by the correspondence exchanged in February, 1946, the terms of the tenancy were reduced to writing and that respondent was bound thereby. As we have noted, the court found against this; and we think the finding was correct. The opening letter written by respondent stated, not that he wanted the lease reduced to writing, but that he wanted to write to appellant about "some of our agreement" concerning the lease. The court found, as heretofore stated, that the correspondence only affected the relations between the parties for the first year of respondent's occupancy and that, except for that, both parties had gone along on the basis of the original oral agreement.

As to the other items, to-wit, the alfalfa seed, the cartage, wheat furnished the aunt, and fencing materials furnished by respondent, there was evidence that these matters had been agreed to in the beginning.

[12] One other finding is not supported by the evidence. The court allowed against

appellant a charge for cartage for transporting his share of the 1948 grain crop from the ranch to the mill. This charge was allowed at \$2 per ton, but respondent paid only \$1.50 per ton, and he should have been allowed no more. The difference is \$50.51.

The cause is remanded to the trial court with directions to amend the findings of fact and conclusions of law so as to find that during the year 1948 respondent, pursuant to the agreement between the parties, transported the landlord's share of the grain grown during that year at a reasonable cost of \$117.55; that upon the evidence now in the record or to be taken, if necessary, the trial court find the reasonable value of the pasturage used for respondent's hogs for the years 1947 and 1948 and award appellant one-fourth thereof. These things having been done, the trial court is directed to enter an amended judgment accordingly. In all other respects, the judgment is affirmed. *Edwards v. Edwards*, 90 Cal.App.2d 33, 43, 202 P.2d 589; *Lind v. Baker*, 31 Cal.App.2d 631, 641, 88 P.2d 777; *Cappelmann v. Young*, 73 Cal.App.2d 49, 57, 165 P.2d 950.

ADAMS, P. J., and PEEK, J., concur.



103 Cal.App.2d 294

GOAD v. ROGERS.

Civ. 4091.

District Court of Appeal, Fourth District,
California.

April 6, 1951.

Action by Lloyd E. Goad against Joe Rogers to recover damages for breach of an alleged oral contract of employment. The Superior Court, Kern County, W. L. Bradshaw, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Griffin, J., held that the evidence sustained findings of trial court that defendant employed plaintiff for term of one year and

that plaintiff was willing to perform agreement.

Affirmed.

1. Frauds, statute of §158(4)

In action for damages for breach of an alleged oral contract of employment, the evidence sustained trial court's finding that the employment agreement was for a definite period of one year. Civ.Code, § 1624, subd. 1.

2. Appeal and error §931(1)

Where the evidence as to the negotiations forming the basis of an alleged oral contract is a contract, the question is one of fact, and it is for trial court to determine from the evidence whether a contract was proven, and all reasonable inferences are to be indulged in to support the findings.

3. Appeal and error §1002

In action to recover damages for breach of an alleged oral contract of employment, where the evidence was conflicting on the question whether the employment agreement was not to become effective until reduced to writing, the question of the intent of the parties was for determination of the trial court.

4. Contracts §32

When parties orally agree upon all the terms and conditions of an agreement with mutual intention that it shall thereupon become binding, mere fact that a formal agreement to same effect is to be prepared and signed does not alter binding validity of original oral agreement.

5. Appeal and error §1008(1)

Contracts §32

Whether it is mutual intention of parties that an oral agreement should become binding at once is to be determined by surrounding facts and circumstances of a particular case and is a question of fact for trial court.

6. Accord and satisfaction §1

Novation §7

Where plaintiff indicated that he would accept a certain amount for his eight weeks' services but defendant offered him a check for a sum considerably

less, there was no meeting of the minds and no acceptance of the offer and therefore there could be no satisfaction and accord or novation of the employment contract between the parties.

7. Master and servant ⇨40(3)

In action to recover damages for breach of an alleged oral contract of employment, the evidence sustained finding of trial court that plaintiff was ready and willing to continue his services as manager of defendant's theater for the balance of the year contract.

8. Contracts ⇨10(2)

In action for damages for breach of an alleged oral contract of employment, the evidence sustained finding of trial court that mutuality of obligation in the oral contract existed between the plaintiff and defendant.

West, Vizzard, Howden & Baker,
James Vizzard, Bakersfield, for appel-
lant.

J. W. Heard, Jr., Bakersfield, for re-
spondent.

GRIFFIN, Justice.

Defendant appeals from a judgment in favor of plaintiff based upon an action for damages for breach of an alleged oral contract of employment.

Plaintiff's complaint alleges generally that on August 1, 1948, plaintiff and defendant entered into an oral agreement whereby plaintiff was employed as manager of defendant's theatre at Lamont, California, for a period of one year, commencing on that date, at a weekly salary of \$100 per week, payable weekly, plus 15 per cent of the net proceeds to be derived from the operation of such theatre to be paid at the end of the one year's period; that as additional compensation defendant agreed to provide plaintiff with a completely furnished house in such town, at a small monthly rental; that on August 1, 1948, plaintiff entered upon such employment and was thereafter able and willing to continue the same but on September 14, 1948, defendant wrong-

fully discharged plaintiff; that plaintiff's wages were paid to September 9, 1948, and that he received nothing thereafter; that defendant failed to provide furniture for the house involved and that plaintiff was forced to buy such furniture and as a result of such discharge and failure plaintiff suffered certain alleged damages.

The answer admits such employment pursuant to an oral agreement, but claims it was to be at the will of the respective parties and not for any fixed or definite term. Further, it denies plaintiff was to receive any portion of the net proceeds or a house equipped with furniture. It further alleges as an affirmative defense, that plaintiff was discharged as a result of certain alleged misconduct (which the trial court found to be untrue), and that defendant gave plaintiff two weeks notice of termination of employment and offered to pay the plaintiff the sum of \$200 during such two weeks period and that plaintiff was to render no services thereafter. By cross-complaint defendant sought to recover from plaintiff certain alleged advances as an offset to plaintiff's demand.

The trial court found in accordance with the allegations of the complaint except it found that plaintiff was not to receive any portion of the net profits and that defendant was not to furnish plaintiff a completely furnished house. It found that plaintiff was willing to perform and that plaintiff was entitled to recover from defendant an amount equal to one year's wages, less certain advancements made by defendant.

The complaint is that the court's finding that defendant employed plaintiff for a term of one year and the finding that plaintiff was willing to perform the agreement are unsupported by the evidence.

Plaintiff's testimony shows that plaintiff was a man of about 25 years experience in various phases of the motion picture industry and was then employed by Screen Guild Pictures as a "film salesman" negotiating with independent theatres for the use and rental of motion picture films. From time to time he contact-

ed defendant in his theatre in Kern County, arranging film use and rental. Defendant had only been in the theatre business a short while and did not understand its operation. In May of 1948, defendant asked plaintiff to find a theatre manager for him. When plaintiff was unable to find such a manager, defendant then sought to employ plaintiff as manager. The matter was discussed in June of 1948, when defendant gave plaintiff an oral 90-day option to lease the theatre. On July 7, 1948, defendant contacted plaintiff at his office in Los Angeles and renewed his offer of employment, which plaintiff then accepted.

The gist of plaintiff's testimony as to this meeting is that defendant and his son came to plaintiff's office and talked to him about coming to Lamont and taking over the theatre; that defendant told him he had considerable business in Texas and that he would like to turn the theatre over to someone; that plaintiff told defendant that his position with the Screen Guild Pictures was only four days a week and that the theatre would require seven days and seven nights a week; that if he left he would lose his seniority with that company, and in addition he did not know where his family would live if they moved to Lamont; that on that occasion they "discussed the terms of what would be my contract with the Lamont Theatre"; that defendant offered him \$125 per week and that he told him he did not think this theatre would stand that amount; that he would rather work for \$100 per week to begin with and "if the first year warrants it, when we exercise the option that will be in the contract for the second year and we will raise it to \$125"; that Mr. Rogers was to pay him \$25 per week expenses, plus 15 per cent of the net profit at the end of the year. In response to the question propounded "Was there anything said in this conversation of July 7th about renewing the employment contract?" the answer was "Yes, I said I explained the reason for the one year contract, and taking the \$100 rather than \$125 a week. The second year would be approximately

\$125 if we were successful the first year." He then stated that he told defendant: "I thought it would be better to start at \$100 a week and if the second year warranted it, when the option was picked up or renewed then increase the salary to around \$125 with the percentage arrangement remaining"; that he then told defendant: "I would rather take a hundred dollars a week and at the end of the first year, if the house warrants the \$125, then we will go to \$125, plus the percentage, plus expenses." He then testified that he and defendant agreed that the employment agreement was subsequently to be reduced to writing; that, however, the exact terms of the agreement had already been worked out, and the writing was merely to set forth such orally agreed terms; that meanwhile, the oral agreement was to become effective immediately upon plaintiff taking over as manager; that at one particular time defendant asked if he did not think the contract should wait until after the expiration of the option to lease the theatre, that defendant told him later that he did not want to lease the theatre and that as soon as the option expired, on September 5, he would come into the theatre office and draw up the written agreement; that defendant also told him that: "When you get up there, after you get in, and get set, why we will go in and have Jim (the lawyer) draw it up". In plaintiff's deposition, offered in evidence by defendant, plaintiff was asked the question: "Now, when you talked to Joe Rogers first, how long was it agreed your employment should continue at Lamont? A. Specifically, one year." He also testified there that defendant also told plaintiff that he "wanted you (plaintiff) to come over and take it over and be there 'from now on'"; that he did not specifically say anything about limiting it to a year but only that the contract would be drawn up in the lawyer's office for the first year; that he told defendant that he was going to have Mr. Vizzard draw up the contract for one year with an option for years to follow "providing, of course, I am able to save the film rental that we hope to save,

and increase the grosses", and that defendant Rogers said "That is right, and that the deal was to be worked out under the terms of a written contract which the two were to have the attorney draw; that defendant "was very anxious to have me come earlier. Whether it was before I actually went to work or after, it was to take effect on August 1st. The contract was to become effective as of August 1st.

Plaintiff then testified that in view of plaintiff's acceptance of defendant's oral offer of employment and of the agreed terms thereof, he did on July 7, 1948, notify the various film companies that he would be taking over as manager of the Lamont Theatre and that at defendant's request plaintiff tendered his resignation to the Screen Guild Pictures, commenced work for defendant on July 18, and that during the ensuing two weeks plaintiff did not act as manager of the theatre but made a study of its operations, preparing to take over on August 1st; that he moved his family to the home mentioned, took over the management of the theatre on August 1st, and at that time the parties orally reiterated the terms of the employment agreement and placed it in immediate effect, although it had not been reduced to writing. A similar conversation is then related by the plaintiff as to the nature of that oral agreement.

It is defendant's position on this appeal that in the preliminary negotiations there was no agreement reached as to the fact that the employment contract was to be for one year, and likewise that there was no agreement that it was to take effect on August 1, 1948, it being defendant's contention that the contract of employment, if any was an oral agreement extending beyond the one-year period and was unenforceable under the provisions of the statute of frauds. Civ.Code, § 1624, subd. 1.

[1,2] The evidence is sufficient to support the court's finding that the employment agreement was for the definite period of one year, commencing August 1, 1948. Where the evidence as to the nego-

tiations forming the basis of the alleged oral contract is in conflict, the question is one of fact, and it is for the trial court to determine from the evidence whether a contract was proven, and all reasonable inferences are to be indulged in to support the findings. *Townsend v. Flotill Products, Inc.*, 82 Cal.App.2d 863, 866, 187 P.2d 466; 2 Cal.Jur. p. 870, sec. 510.

[3-5] It is next contended by the defendant that the evidence conclusively shows that the employment agreement was not to become effective until reduced to writing. The evidence on this question was conflicting and the question of the intent of the parties was for the determination of the trial court. It has been held repeatedly that when the respective parties orally agree upon all of the terms and conditions of an agreement with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be prepared and signed does not alter the binding validity of the original oral agreement. Whether it was the mutual intention of the parties that the oral agreement should become binding *eo instanti* is to be determined by the surrounding facts and circumstances of a particular case and is a question of fact for the trial court. *Johnston v. Twentieth Century-Fox Film Corp.*, 82 Cal. App.2d 796, 821, 187 P.2d 474; 6 Cal.Jur. p. 227, sec. 149.

Defendant next complains of the finding that plaintiff was able and willing to continue his services under the agreement. This is based upon certain conflicting evidence between the plaintiff and the defendant in regard to plaintiff's dismissal and an attempted compromise which the attorney for defendant endeavored to bring about. It appears that after plaintiff operated the theatre for several months some difficulty arose between the parties; that they met in the attorney's office and defendant said: "I guess we can't get along. I am going to have to call it all off." Plaintiff testified that he said: "I am pretty disgusted with it myself. I have got a wife and

baby that causes me some concern, and now I am out of a job. I have got to take them back to Los Angeles. * * * I am willing to book the theatre up for you for ten weeks, or approximately to November 15th, and you pay me only the one hundred dollars a week salary, and in that way that will give you approximately sixty days to get new personnel or someone to operate the theatre, or an agency, or dispose of it in some other manner, and I will stay out of the theatre." He testified that Rogers agreed to this and agreed that they would both be back in the morning and sign an agreement to that effect. He then testified that he went home and about an hour later defendant and his son drove up and told him that they were "dropping the midnight shows out of the theatre," which were booked until November 15th; that the next morning defendant said "We have changed our minds. You and your big shot ideas, we are not going to pay you anything. You can take your big shot ideas and get out of here"; that he told defendant "* * * isn't an agreement an agreement, or not?" and that defendant said: "I don't care, sue me, I have had a dozen lawsuits and never lost one of them"; that he threatened him with physical violence and stated to him that "We didn't agree to pay any hundred dollars a week, we agreed to pay a hundred dollars a month until November 15th"; and that plaintiff said: "All right gentlemen, we will discuss it later"; and that he then instituted this suit.

[6,7] On cross-examination there was some evidence produced that in the attorney's office plaintiff indicated he would accept \$800 for his eight weeks service but that defendant offered him a check for \$200. It is plain from the evidence that there was no satisfaction and accord or novation, as contended by defendant, for the reason that there was no meeting of the minds and no accept-

ance of the offer. *Sierra & San Francisco P. Co. v. Universal Electric & Gas Co.*, 197 Cal. 376, 241 P. 76; *Blumer v. Madden*, 128 Cal.App. 22, 16 P.2d 319; *Whepley Oil Co. v. Associated Oil Co.*, 6 Cal.App.2d 94, 44 P.2d 670. We see nothing in the evidence which indicates that plaintiff was not ready and willing to continue his services as manager for the balance of the year. The finding of the trial court in this respect is fully supported.

[8] The last argument is that there was no mutuality of obligation in the oral agreement between the plaintiff and the defendant, citing *Shortell v. Evans Ferguson Corp.*, 98 Cal.App. 650, 277 P. 519. The theory is that plaintiff was not bound by any promise to continue the employment for a period of one year by reason of the fact that the employment could be terminated at any time by the plaintiff, through the exercise of the option rights he held prior to the alleged making of the contract regarding the leasing of the theatre, and that the option did not terminate until September 5, 1948. We see no merit to this contention. A fair and impartial reading of the testimony in this respect indicates that plaintiff gave up his rights to exercise such oral option when he entered upon his employment contract. According to plaintiff's testimony, the defendant himself canceled that option. The testimony is that "Mr. Rogers said that he didn't wish to sell the theatre, he didn't wish the option to be exercised that he had given to me on June 5th at his home in Bakersfield to be exercised. He decided he would like to keep it."

The findings about which defendant complains are sufficiently supported by the evidence.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

HELVEY v. SAX et al.

Civ. 17734.

District Court of Appeal, Second District,
Division 1, California.

April 9, 1951.

Rehearing Denied April 26, 1951.

Hearing Granted June 4, 1951.*

Action by A. C. Helvey against Sella Sax, and others, to quiet title to three separate parcels of land. The Superior Court, Los Angeles County, Stanley Mosk, J., entered a decree quieting title in defendants and plaintiff appealed. The District Court of Appeal, Hanson, J., pro tem, held that the plaintiff had failed to prove his title to the land in question and had also failed to sustain his challenge to the title of defendants.

Judgment as modified affirmed.

1. Quieting title ☞10(1)

In quiet title suit, plaintiff may recover only upon the strength of his own title.

2. Quieting title ☞10(2)

Where claimant to land relies upon paper title alone, he must by proof trace his title to the government, or to a predecessor shown to have been in possession of the premises at the time the conveyance was made by him, or show that plaintiff and defendant both claimed through a common grantor.

3. Quieting title ☞44(4)

In quiet title action, by plaintiff who relied only upon quitclaim deeds to three parcels of land, evidence was insufficient to trace plaintiff's title to the government, a predecessor in possession at time of conveyance, or a common grantor of both plaintiff and defendant.

4. Taxation ☞4, 614, 746

While a fee simple title holder is the owner of his land, nevertheless, the land is subject to the paramount power of the state, as a sovereign to tax it, to sell it for nonpayment of taxes, and to issue a tax deed to evidence the sale.

5. Taxation ☞573½

Where a public agency with taxing powers charges a tax upon land, no resort can be had against the owner or his personal estate, because the tax levied is in rem and not in personam.

* Subsequent opinion 237 P.2d 269.

6. Taxation ☞779

Title granted by tax deed, pursuant to a valid sale of land for nonpayment of taxes, conveys not merely the title of the person assessed but a new, complete and paramount title to the land in fee simple absolute, created by an independent grant from the state, or its agencies, as sovereign.

7. Taxation ☞730, 731

Where plaintiff obtained quitclaim deeds from the owner of the land sold for taxes, and defendants, who were purchasers at the sale of the land, obtained their deeds from the state, plaintiff, who sought to quiet title, and defendants, did not acquire title through a common grantor.

8. Taxation ☞778

A purchaser at a valid tax sale who receives a tax deed, derives his title from the state and not from the owner of the land sold for taxes.

9. Quieting title ☞51

Where plaintiff, in quiet title action, failed to prove his title to the lands in question, and also failed to sustain his challenge to the title of the defendants, it was not error to quiet title in defendants.

10. Waters and water courses ☞183½

Contention of plaintiff, in quiet title action, that defendants' tax titles were void on grounds that the land received no benefits by being included in or taxed by the water district, could not be sustained where it was shown that the assessed owners, through whom plaintiff claimed, failed to challenge the tax levy as they were required to do under provisions of Water Acts. Gen.Laws, Act No. 6178, § 1 et seq.; Act No. 9124, § 1 et seq.

11. Appeal and error ☞1152

Where lower court had ordered judgment for plaintiff against defendants who had defaulted, but the final written judgment did not give judgment for plaintiff against defaulting defendants, plaintiff was entitled to a corrected judgment.

William M. Taylor, Coachella, for appellant.

Newby, Holder & Newby, Los Angeles, for respondent Budrovic.

Newman & Newman, Los Angeles, Earl Redwine, Riverside, for respondent Carreon.

Jonah Jones, Jr., Long Beach, for respondent Dunlap.

HANSON, Justice pro tem.

The initial question we are called upon to decide, and which we regard as being decisive, is whether a decree quieting title to three separate parcels of real estate should have been rendered by the trial court in favor of the plaintiff-appellant, where his alleged title to each parcel rested only on a quitclaim deed, without any showing by him as to any antecedent title, or that his grantor was ever in possession of the premises, or that his title, as well as that of defendant claimant owner, originated from a common grantor.

The question, we think is answered by well-established principles of law that require little, if any elaboration, to show their application to the case before us.

[1,2] In this state the long-established rule is that in a quiet title suit the plaintiff may recover only upon the strength of his own title and not upon the weakness of the title of the defendant. *Rockey v. Vieux*, 179 Cal. 681, 178 P. 712. Accordingly, if a defendant challenges the title of the plaintiff, the latter is not entitled to a decree even if he proves that the defendant has no title, unless he proves title in himself. *Rockey v. Vieux*, supra. Moreover, where a plaintiff, as here, relies upon a *paper title* alone, he must by proof trace his title (1) to the government, or (2) to a predecessor shown to have been in possession of the premises at the time of the conveyance made by him or (3) that the plaintiff and the defendant both claim through a common grantor. *Rockey v. Vieux*, supra.

[3] In the instant case the plaintiff utterly failed to offer any proof to sustain any one of the three alternatives mentioned, unless it can be said that the named grantees in the tax deeds derived their titles, as did the plaintiff, from the persons to whom the real estate was assessed.

That any such argument is unsound seems to us to be entirely self-evident. However, we pause briefly to expose the fallacy of any such contention.

[4-8] While a fee-simple title holder is the owner of his land, nevertheless, the land is subject to the paramount power of the state, as the sovereign to tax it; to sell it for nonpayment of the tax; and to issue a tax deed to evidence the sale. The phrase, "the State" as here used necessarily includes every public agency vested by the State with the taxing power. Where the charge is a tax on the land alone, as is the case here, and the law contemplates no resort may be had against the assessed owner or his personal estate, the tax as levied is *in rem* and not *in personam*. Hence, the title granted by a tax deed pursuant to a valid sale of the land for nonpayment of such a tax conveys not merely the title of the person assessed, but a new, complete and paramount title to the land in fee simple absolute, created by an independent grant from the state (or its agencies) as the sovereign. *Hefner v. Northwestern Mutual, etc., Co.*, 123 U.S. 747, 8 S.Ct. 337, 31 L.Ed. 309. For a long list of additional cases see note to 75 A.L.R. 416; 51 Am.Jur. 937. The power thus exercised by the state or its agencies is derived from its exclusive paramount sovereign authority and not by reason of any grant to it from the owner of the realty. The state or its agencies in no sense acts by, through or under the owner, but entirely independent of the owner's title and in a direct sense adverse to it. Hence a purchaser at a valid tax sale who receives a tax deed derives his title from the state. In short, he obtains his title from a source other than from the owner. The owner is in no sense a grantor. The cases so holding, See 75 A.L.R. 416, are legion, but so far as we are advised we have no square decision on the point in this state. In the case of *Dorn v. Baker*, 96 Cal. 206, 31 P. 37, there is language to the effect that the holder of a tax deed derives his title from the owner rather than from the state. The statement was unnecessary to the decision. It is enough to distinguish the case to point out that the tax in that case was

levied against land, the legal title to which was in the state, and hence the tax necessarily could not attach against the fee owned by the state, but at most against such right as the alleged owner had in the property, i. e., a school land certificate the state had issued acknowledging partial payment of the consideration and an agreement on its part to convey upon the payment of the remaining consideration. *San Pedro, etc., R. R. Co. v. City of Los Angeles*, 180 Cal. 18, 179 P. 393; *State Land Settlement Bd. v. Henderson*, 197 Cal. 470, 241 P. 560.

Another case in this state which contains language we are unable to approve is *Syme v. Warden*, 114 Cal.App. 707, 300 P. 863. In that case, which was an action to quiet title, the plaintiff introduced in evidence a deed to him from the administratrix of the estate of one Petri, deceased; a written lease of the property by plaintiff to one Delight; testimony by Delight that he had taken possession of the property under the lease and was still in possession. Additionally, there was testimony that Petri was in possession of the property prior to and up to the date of her death. The defendants relied upon tax collector's deeds, showing that at the time of the assessments Petri was in possession and was the person to whom the property was assessed. Accordingly, as the court held, the plaintiff established a prima facie case warranting judgment in his favor when he proved the execution and delivery of a deed from the grantor while in possession. However, the court then went on to say that Petri was a common source of title; that the interest, if any, the holders of the tax titles acquired was merely the title of the decedent Petri; and that a tax deed conveyed only such interest in the land as the taxpayer had in it. These observations of the court, in our opinion, are contrary to accepted principles of the law.

[9, 10] Regardless of what we have so far said concerning the failure of the

plaintiff to prove his own case we are of the opinion that the judgment below must be affirmed upon the ground that the plaintiff failed to sustain his challenge to the title of the various defendants. The plaintiff assails the defendants' tax titles on several grounds, among others, that the lands received no benefits by being included in or taxed by the Water District which levied the taxes. The short answer to this contention is that the assessed owners, through whom the plaintiff claims, failed to challenge the tax levy as they were required to do under the provisions of the Water Acts applicable to the case. Acts 9124 and 6178. As we regard the briefs of the respondents as being a complete answer to the alleged errors assigned by appellant on this phase of the case, we see no point in extending this opinion by, in effect, reiterating what is therein set forth.

[11] At the close of the case below the court ordered judgment for the plaintiff as to the defendants who had defaulted, but judgment in favor of the contesting defendants. As the formal written judgment which was signed did not give judgment to the plaintiff against the defaulting defendants, plaintiff assigns this as error of the trial court, when in fact the error was due to the inattention of counsel for the plaintiff. Nevertheless, the appellant is entitled to a corrected judgment. Accordingly, the judgment is ordered modified to the extent indicated, but in all other respects the judgment is affirmed with all the costs here and below imposed upon plaintiff other than the costs preliminary to default by the defaulting defendants which are ordered to be assessed by the trial court against the defaulting defendants as provided by statute.

The judgment as modified herein is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

BUCKMASTER v. SILVA.

Civ. 7843.

District Court of Appeal, Third District,

April 9, 1951.

Rehearing Denied May 4, 1951.

Hearing Denied June 4, 1951.

Action by Margaret Buckmaster, as special administratrix of the estate of Manuel Silva, deceased, against Mercedes Silva, also known as Mercedes Duarte Silva to set aside a deed executed by Manuel Silva to defendant on ground that said deed was fraudulent and void as against existing creditors. The Superior Court, San Joaquin County, George F. Buck, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Adams, P. J., held that defendant had suffered no detriment because of delay in bringing action since defendant had for past 12 years collected substantial rentals on the property involved, and doctrine laches was no bar to action.

Judgment affirmed.

1. Executors and administrators ⇨437(1)

Suit by special administratrix of estate of husband against wife to set aside deed to realty on ground that conveyance was made with intent to defraud creditors, was not barred by laches where wife had collected substantial rentals on realty during period, and had taken no steps to administer estate prior to appointment of special administratrix, delay in bringing action had been contributed to by wife and had not been detrimental to wife. Code Civ.Proc. § 336.

2. Appeal and error ⇨173(1)

Where defense to suit to set aside deed was neither pleaded nor raised at trial, it could not be raised for first time on appeal.

Lafayette J. Smallpage, and Harold J. Willis, Stockton, for appellant.

Crozier C. Culp and Marvin Sherwin, Oakland, Darrah & Ellis, Stockton, for respondent.

ADAMS, Presiding Judge.

Manuel Silva died intestate on July 4, 1942, leaving surviving him his widow,

Mercedes Silva, and four children. On September 22, 1941, he had executed a gift deed conveying to Mercedes Silva 249.28 acres of farm land in San Joaquin County, which deed was recorded October 28, 1941. At the time of his death his sole assets consisted of an undivided one-half interest in about one acre of land with a small house thereon, which was subject to a homestead declared and recorded by Mercedes Silva on or about June 27, 1941.

On June 3, 1940, a judgment had been entered against Silva and others in favor of George G. Prytz in the total sum of \$3,624.83; and on April 15, 1942 a judgment had been entered against Silva in favor of Indemnity Insurance Company of North America, a corporation, in the total sum of \$2,639.18. By the conveyance of the 249.28 acre farm to his wife, Silva had rendered himself insolvent, and neither of the foregoing judgments was ever satisfied.

As, after Silva's death, none of his heirs sought letters of administration of his estate, on or about November 13, 1946, the creditors above mentioned procured the appointment of Margaret Buckmaster as administratrix, and filed with her their two claims, which were duly allowed by her and approved by the court. On or about December 18, 1946, the administratrix began this action to set aside the deed executed by Silva to his wife, on the ground that said deed was fraudulent and void as against existing creditors.

On April 5, 1947, Conrad Silva, a son of decedent, filed a petition to revoke the letters granted to Margaret Buckmaster, and applied for letters in his own behalf. His petition and application were granted and he qualified as administrator on April 22, 1947. However, on August 25, 1948, Margaret Buckmaster was appointed special administratrix, in which capacity she now appears in this action.

On or about April 11, 1947, Mercedes Silva filed in the probate court a notice of motion to vacate the allowance of the claims of Prytz and the Indemnity Insur-

ance Company, and to secure the rejection of such claims. The motion was duly heard and denied. She thereafter filed in this court a petition for a writ of review, praying that the aforesaid order of the trial court be annulled on the grounds that Prytz's judgment was barred by the provisions of section 336 of the Code of Civil Procedure; that the court which rendered the judgment of the Indemnity Insurance Company was without jurisdiction because same had been entered without notice to defendant Silva and without his appearance, when he had a valid defense to said action; and that the creditors' claims were approved by the administratrix without disclosing that she had been nominated by said creditors, and contrary to section 703 of the Probate Code. Also that the court's allowance and approval of said claims was made ex parte and without notice to the heirs at law, all of whom disputed the claims.

This court heard said matter and dismissed the writ, see *Silva v. Superior Court*, 83 Cal.App.2d 521, 189 P.2d 314, and hearing in the Supreme Court was denied. Also see *Scholle v. Finnell*, 166 Cal. 546, 552, 137 P. 241.

After a hearing was had in the present action, and on or about October 24, 1949, findings of fact in favor of plaintiff were filed and judgment in accordance therewith was rendered. The court found that judgments in favor of Prytz and Indemnity Insurance Company had been regularly rendered, as alleged by plaintiff; that the claims based thereon were filed by them with the administratrix and duly allowed and approved by her and the court; that by the deed to Mercedes Silva, Manuel Silva had rendered himself insolvent and that the conveyance was made with the intent to defraud creditors. Judgment for plaintiff followed and this appeal was then taken.

Appellant Silva again contends on this appeal that the action was barred by the statute of limitations and by laches; also that, at most, plaintiff's recovery should be limited to the value of the property at the

time and place of its conveyance to Mrs Silva.

As for the statute of limitations and laches, those matters were disposed of at the prior hearing before this court, and it is sufficient to refer to that decision on these points. Also see *Prytz v. Associated Farms, Inc.*, 88 Cal.App.2d 1, 198 P.2d 110.

[1] On the matter of laches it is urged that defendant suffered detriment because of the delay in bringing this action. We are unable to see that appellant has suffered any disadvantages from the delay, if for no other reason than that the evidence established and the court found that on or about February 1, 1940, the land in controversy was leased by Manuel and Mercedes Silva for a twelve year term, with option for renewal for three years, at a rental of \$4500 per year for the first three years, and \$5250 per year for the remaining nine years of the term, all of which rentals Mrs. Silva has collected. While appellant's brief states that after Mr. Silva's death appellant and her children worked on the ranch and "made the only fund which these alleged creditors seek to take away from her," the evidence shows that she did not live on the land conveyed to her after it was rented before Mr. Silva's death, but that she lived on the one acre piece at Holt during 1941 and up to spring of 1945, after which she lived in Stockton. During all of the time since the death of Silva she has had the benefit of the rentals from the lease. Furthermore, she contributed to such delay as there was, for neither she nor her children took any steps to administer decedent's estate until after the appointment of Margaret Buckmaster. Compare *Austin v. Hallmark Oil Co.*, 21 Cal.2d 718, 735, 134 P.2d 777.

[2] Apparently appellant's third contention is raised for the first time on this appeal, as we find no reference to it in the record before us. It was not pleaded, nor do we find that the trial court was requested to consider it. For that reason it need not be considered here. See Mac-

Kenzie v. Angle, 82 Cal.App.2d 254, 263, 186 P.2d 30, and cases there cited, hearing in Supreme Court denied; Rubel v. Peckham, 94 Cal.App.2d 834, 211 P.2d 883.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.



TOSHIO HAMASAKI v. FLOTHO et al.

Civ. 18044.

District Court of Appeal, Second District,
Division 2, California.

April 10, 1951.

Rehearing Denied May 7, 1951.

Hearing Granted June 7, 1951.*

Action by Toshio Hamasaki, Takuye Hamasaki, his guardian ad litem, against Fred W. Flotho, Jr., Fred W. Flotho, Sr., and Randolph E. Leland, for injuries sustained in automobile accident. The Superior Court of Los Angeles County, Harold B. Jeffery, J., entered an order granting plaintiff's motion for a new trial on the issue of damages only, and the defendants appealed. The District Court of Appeal, McComb, J., held that, where evidence was sharply conflicting as to question of liability of driver and of owner of automobile striking six year old plaintiff who ran from behind truck into street in front of automobile, and it was stipulated that plaintiff had incurred medical and hospital expenses of \$817.10 while the jury in awarding a verdict for \$1,000 gave only \$182.-90 for general damages, and evidence disclosed that plaintiff sustained severe skull fractures and complete collar bone fracture and was permanently and incurably a victim of psychomotor epilepsy which would require medical treatment for life, amount of award was clearly inadequate, and granting new trial on issue of damages only was abuse of discretion.

Judgment reversed and new trial ordered on all issues raised by pleadings.

1. New trial ⇨9

Where the evidence as to liability is sharply conflicting and damages awarded

229 P.2d—51

* Subsequent opinion 240 P.2d 298.

are so grossly inadequate as to indicate a compromise as to issues of liability and damages, a new trial should be granted as to all issues in the case and not confined to the issue of damages only.

2. Damages ⇨132(15)

New trial ⇨9

Where evidence was conflicting as to question of liability of driver and of owner of automobile striking six-year-old plaintiff, and plaintiff incurred medical and hospital expenses of \$817.10 while the jury in awarding \$1,000 verdict gave only \$182.-90 for general damages, and evidence disclosed that plaintiff sustained severe skull fractures and complete collar bone fracture and was permanently and incurably a victim of psychomotor epilepsy, amount of award was inadequate, and granting new trial on issue of damages only was abuse of discretion.

Parker, Stanbury & Reese, Los Angeles, by Raymond G. Stanbury, Los Angeles, for appellants.

Culbert L. Olson, John H. Carter and Richard C. Olson all of Los Angeles, for respondent.

McCOMB, Justice.

This appeal by defendants is from an order of the trial court granting plaintiff's motion for a new trial on the issue of damages only.

Facts: Defendant Fred Flotho, Jr. was driving an automobile, owned by defendant Fred Flotho, south on Carmelita Street in Los Angeles, when plaintiff, a boy of about six years of age, ran from behind a truck into the street in front of the automobile driven by defendant Fred Flotho, Jr. The automobile struck plaintiff causing him serious personal injuries.

It was stipulated that the medical and hospital expenses were \$817.10.

The point of the accident was 195 feet from the nearest crosswalk. There was a sharp conflict in the evidence as to (1) the speed at which the automobile was traveling just prior to the accident and (2)

the position of the car upon the street at the point of the accident.

A jury returned a verdict in favor of plaintiff in the sum of \$1000.

The trial judge granted a new trial on the issue of damages only unless defendants agreed that the damages should be assessed in the sum of \$6682.90. This defendants declined to do.

Question: Did the trial court err in granting a new trial on the issue of damages only?

[1] *Yes.* Where the evidence as to liability is sharply conflicting and the damages awarded are so grossly inadequate as to indicate a compromise as to issues of liability and damages, a new trial should be granted as to all the issues in the case and not confined to the issue of damages only. (Wilke v. Crofton, 34 Cal.2d 304, 310, 209 P.2d 790; Woods v. Eitze, 94 Cal. App.2d 910, 915, 212 P.2d 12; Shurman v. Fresno Ice Rink, 91 Cal.App.2d 469, 477, 205 P.2d 77; Keogh v. Maulding, 52 Cal. App.2d 17, 19, 21, 125 P.2d 858.)

[2] Applying the foregoing rule to the facts in the present case, inasmuch as the evidence was sharply conflicting as to the question of defendants' liability it needs no argument to demonstrate that the damages were grossly inadequate since it was stipulated that plaintiff had incurred medical and hospital expenses of \$817.10, while the jury in awarding a verdict for \$1000 gave only \$182.90 for general damages. The evidence disclosed that plaintiff had sustained severe fractures of the skull, some depression and separations up to nearly one half inch; that he was permanently and incurably a victim of psycho-motor epilepsy which would require medical treatment for the rest of his life; and that he also sustained a complete fracture of his collar bone.

Such evidence shows the amount of the award was clearly inadequate. That the trial judge so considered it is evidenced by the fact that in conditionally denying the motion for a new trial he required defendants to pay \$6,682.90, thus fixing the general damages at more than 31 times the general damages awarded by the jury.

It is clear that the trial judge abused his discretion in granting a new trial on the issue of damages only.

The judgment is reversed and a new trial on all the issues raised by the pleadings is ordered.

MOORE, P. J., and WILSON, J., concur.



103 Cal.App.2d 380

MOSS v. COCA COLA BOTTLING CO.

Civ. No. 7888.

District Court of Appeal, Third District,
California.

April 10, 1951.

Action by Lehr Moss against the Coca Cola Bottling Company of Chico, a partnership, to recover damages alleged to have been caused by drinking from a bottle of coca cola manufactured and bottled by defendant which bottle, when opened contained a mouse. The Superior Court, Butte County, Dudley G. McGregor, J., entered judgment for plaintiff after jury verdict and the defendant appealed. The District Court of Appeal, Van Dyke, J., held that the evidence sustained jury's verdict for plaintiff on the negligence count.

Affirmed.

1. Food ⚡25

In action for damages alleged to have been caused by drinking from a bottle of soft drink manufactured and bottled by defendant, which bottle, when opened, contained a mouse, the evidence sustained jury's verdict for plaintiff on count for negligence.

2. Food ⚡25

In action for damages alleged to have been caused by drinking from a bottle of soft drink manufactured and bottled by defendant, which bottle, when opened, contained a mouse, the fact that the evidence failed to show that contents of bottle were

deleterious did not prevent plaintiff from recovering.

3. Evidence ⇨14

The District Court of Appeal took judicial notice that even a normal person in seeing a disgusting looking object in a bottle from which he had just drunk may and often will suffer intense nausea which may produce more serious results.

4. Damages ⇨131(4)

\$301 to a workman for upset stomach as a result of drinking a bottle of soft drink which contained a mouse, was not excessive.

5. Evidence ⇨194

In action for damages alleged to have been caused by drinking from a bottle of soft drink manufactured and bottled by defendant which bottle, when opened, contained a mouse, trial court did not abuse its discretion in admitting into evidence bottle of soft drink containing mouse, even though it was more than a year and a half after the incident, especially since the trial judge allowed defendant to show by contradictory evidence that the bottle of soft drink exposed to air for such a long period of time would likely change and form a mold. Code Civ.Proc. § 1954.

6. Appeal and error ⇨843(2)

In action for damages alleged to have been caused by drinking from a bottle of soft drink manufactured and bottled by defendant which bottle, when opened, contained a mouse, where there was sufficient evidence to sustain general verdict on plaintiff's counts of negligence, the District Court of Appeal would not decide whether there was sufficient evidence to sustain plaintiff's second count for breach of warranty.

7. Trial ⇨330(5)

A general verdict imports findings in favor of the prevailing party on all material issues and, if there is substantial evidence to sustain a verdict on one count, which is unaffected by error, the fact that there is not sufficient evidence to sustain necessary findings of fact upon another count

to support the verdict will not justify a reversal of general verdict.

Ware & Ware, Chico, for appellant.

Whitten & Fortino, Chico, for respondent.

VAN DYKE, Justice.

Plaintiff brought this action against the Coca Cola Bottling Company of Chico, California, for damages alleged to have been caused by drinking from a bottle of Coca Cola manufactured and bottled by defendant, which bottle, when opened, contained a mouse.

Plaintiff's action was predicated on two counts, one on negligence, and the other on breach of warranty. Trial was had upon the two counts and the jury returned a general verdict for plaintiff, assessing his damages in the sum of \$500. The court reduced the amount of the verdict to \$301. Plaintiff stipulated to the reduction in lieu of a new trial. Defendant has appealed from the judgment.

Defendant first contends that the evidence is insufficient to support the verdict. It is specifically urged that plaintiff failed to prove that the bottle containing the mouse had been bottled by defendant, and if so, plaintiff still failed to prove that the bottle was in the same condition when used as when delivered to plaintiff's employer. The evidence shows at the time of the occurrence complained of by him plaintiff was employed as a molding machine operator by the Chico Wood Products Company. The company had previously purchased a vending machine for dispensing Coca Cola and placed it on the premises for the convenience of its employees. Plaintiff's employer purchased Coca Cola from defendant in case lots and delivery was made by defendant. Each delivery contained a sufficient amount to last a week and the bottles not immediately placed in the vending machine were stored in a locked room. The vending machine was under the exclusive control of plaintiff's employer who serviced it. All Coca Cola placed in the machine was purchased from defendant.

On the afternoon of June 9, 1948, plaintiff was working the swing shift which commenced at 4:30 P. M. Around 6:30 P. M. plaintiff and the crew of about six men decided to have some Coca Cola. The crew threw their nickels on a table near the machine they were operating and one of them went after the Coca Cola. It is approximately 120 feet from the molding machine to the Coca Cola machine. During the time one of the crew was engaged in obtaining the Coca Cola, plaintiff and another member of the crew, a Mr. Ferguson, went to the rest room for a period of two or three minutes. When they returned to the molding machine the members of the crew were drinking from the bottles. Plaintiff testified that two bottles remained. They had been opened. He picked one up and started to drink. He said he took one swallow, and observed a mouse in the bottle; and that the contents of the bottle tasted like something dead, and smelled. Another witness observed the Coca Colas being removed from the vending machine. He saw the bottles carried to where they were to be used. He testified further that the contents of the bottle from which plaintiff drank had a terrific smell.

Plaintiff's injuries consisted of an upset stomach for a period of ten days or two weeks. He experienced nausea when he thought of Coca Cola or similar products. Otherwise plaintiff was not harmed. After drinking from the bottle plaintiff continued to work out his shift, during which time he consumed his lunch. He did not seek medical treatment and remained steadily employed.

Defendant introduced evidence showing the lay-out of its plant and the bottling operations, including bottle cleaning methods and inspections. The equipment included an automatic device which stopped the bottling operation in the event a bottle contained an obstruction.

[1] We think the evidence summarized above is sufficient to sustain the jury's verdict on the negligence count. From it the jury could find that the Coca Cola was manufactured and bottled by the defendant and delivered by it to the plaintiff's employer and that the contents of the bottle had

not been tampered with and remained the same up to the time plaintiff drank from the bottle. The evidence was sufficient to enable the jury to find that the mouse was in the bottle when delivered by defendant to plaintiff's employer. The case of *Medeiros v. Coca Cola Bottling Co.*, 57 Cal. App.2d 707, 714, 135 P.2d 676, 680, is similar to the case now before us. In that case an action for damages was brought, it being claimed that the plaintiff therein had drunk from a bottle of Coca Cola which contained a cleaning brush. This court said:

"In support of its contention that the evidence does not support the verdict of the jury, appellant urges that it introduced evidence that the standard of conduct of defendant in the manufacture of Coca-Cola was the same as the fair average of all manufacturers of the drink, that evidence offered excluded the possibility that the brush was left in the bottle by defendant, that there is no direct evidence that defendant bottled the questioned Coca-Cola. Without reviewing the evidence on these points it is sufficient to say that evidence that the standard of conduct of defendant in the manufacture of its product is the same as the fair average of all manufacturers of the drink is not conclusive.

"There are numerous cases holding that the unexplained presence of a foreign object or substance in bottled or packaged goods is a sufficient basis for an inference of negligence on the manufacturer's part to send the case to the jury. [Citing cases] And as to whether the evidence offered by defendant excluded the possibility that the brush was left in the bottle by defendant, and whether defendant manufactured the questioned bottle, these questions were for the jury, and we cannot say that there was not sufficient evidence to justify their verdict."

See, also, *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436, 438, holding, with respect to the doctrine of *res ipsa loquitur*, that it "may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, provided plaintiff first proves that the condition of

the instrumentality had not been changed after it left the defendant's possession."

[2,3] Defendant contends the evidence fails to show that the contents of the bottle were deleterious. It says the presence of the mouse does not necessarily show that the contents were harmful. This contention is answered by the *Medeiros* case, supra, the court there stating at page 714, of 57 Cal.App.2d, at page 680 of 135 P.2d: "Defendant's contention seems to be that however noisome and disgusting a foreign object found in a beverage may be or appear, the manufacture of such beverage cannot be held liable for negligence in permitting such object to be in his product unless the contents of the bottle are themselves rendered unfit for human consumption; and that regardless of the effect of the finding of such object in a bottle from which he has drunk, a party cannot recover damages for sickness resulting therefrom, unless he is actually poisoned or otherwise injuriously affected by the drink itself. We think that a court may well take judicial notice that even a normal person in seeing a disgusting looking object in a bottle from which he has just drunk may and often will suffer intense nausea which may produce more serious results. Also one may recover for injury resulting from mental shock in such cases. [Citing cases.]"

[4] Defendant contends the award of \$301 in damages is excessive, arguing that plaintiff did not suffer special damage or any physical disability. As noted above, plaintiff testified that the occurrence caused him to have an upset stomach for ten days or two weeks and the thought of Coca Cola gave him nausea. The injuries are recognized elements of damage, and it cannot be said that the award was excessive.

[5] Defendant contends that it was prejudicial error to admit into evidence the bottle of Coca Cola containing the mouse. This was done over objections by defendant that the conditions in the bottle had changed from the time plaintiff had drunk therefrom to the time the bottle was introduced in evidence. About a year and a half had elapsed when the case came on for

trial and in the meantime the bottle had remained unsealed, except that a used cap had been placed upon it and secured by adhesive tape. Defendant urges that it was highly prejudicial to allow the jury to view the bottle with the contents in a decomposed state and that it was error not to allow it, as it requested, to introduce evidence to show the change in conditions which had occurred. The trial court stated its reasons for permitting the introduction of the bottle into evidence as follows: "I believe that you can thoroughly cover that by contradictory evidence, by cross examination, or by witnesses of your own choosing to cover that situation. I believe any average jury is intelligent enough to know that in a year and a half there may have been considerable changes in any article that is subject to decomposition or spoiling." Under Section 1954 of the Code of Civil Procedure the introduction into evidence of material objects "must be regulated by the sound discretion of the court." We find no abuse of discretion. In addition, defendant introduced evidence showing that a bottle of Coca Cola exposed to the air will change color, and form mold.

[6,7] Defendant contends that the cause of action for breach of warranty is fatally defective in that plaintiff failed to give defendant reasonable notice of the breach. Since we have concluded that there is sufficient evidence to sustain the verdict and judgment for plaintiff on the negligence count, it is unnecessary to discuss the alleged defects in respect of the second count for breach of warranty. As noted above, the jury returned a general verdict for plaintiff. As stated in *Shields v. Oxnard Harbor District*, 46 Cal.App.2d 477, 491, 116 P.2d 121, 130: "A general verdict imports findings in favor of the prevailing party on all material issues and, if there is substantial evidence to sustain a verdict on one count which is unaffected by error, the fact that there is not sufficient evidence to sustain the necessary findings of fact upon another count to support a verdict, or that there have been errors in connection with such other count, will not justify a reversal of the general verdict.

Hume v. Fresno Irr. Dist., 21 Cal.App.2d 348, 356, 69 P.2d 483; King v. Schumacher, 32 Cal.App.2d 172, [173], 179, 89 P.2d 466; see also 2 Cal.Jur. (1921) 1029."

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



103 Cal.App.2d 311

**KROUSE et al. v. JUSTICE'S COURT OF
TP. NO. 2, LAKE COUNTY, et al.**

Civ. 7881.

District Court of Appeal, Third District,
California.

April 7, 1951.

Hearing Denied May 31, 1951.

Petition for writ of mandate by Paul Krouse and Clarence Cargill against Justice's Court of Township Number Two, Lake County, California, and the Honorable Willet H. Shaul, Justice thereof, directing dismissal of actions in which petitioners were convicted in the Justice's Court for violation of the Fish and Game Code. The Superior Court, Lake County, Benjamin C. Jones, J., rendered judgment for defendants and petitioners appealed. The District Court of Appeals, Deirup, J. pro tem. held that it affirmatively appeared from the record that petitioners consented to the trial date in the Justice's Court by failure to object thereto, and they were properly within that Court's jurisdiction.

Judgment affirmed.

1. Mandamus ☞187(9)

In proceeding for writ of mandate seeking dismissal of justice's court's cases for violation of Fish and Game Code, where trial court record was incomplete on appeal from denial of peremptory writ, the presumption that evidence introduced at trial supported judgment was not available. Rules on Appeal, rule 52, as amended in 1951; Fish and Game Code, §§ 1151, 1275.5.

2. Appeal and error ☞907(3), 938(3)

The purpose of rule providing that if a record on appeal does not contain all papers, records and oral proceeding, but is certified by judge or clerk, or stipulated to by parties, it shall be presumed in absence of proceedings for augmentation that it includes all matters material to a determination of points on appeal, but that on an appeal on judgment roll alone, or on a partial list or complete clerk's transcript, the presumption shall not apply unless error claimed by appellant appears on face of record, was to permit and encourage brief and inexpensive records on appeal, and compels appellate court to determine issues before it solely from record. Rules on Appeal, rule 52, as amended in 1951.

3. Criminal law ☞617

Where case is set for trial in presence of defendant and his counsel and no objection to date as being beyond statutory period appears in record, the objection is deemed waived. Pen.Code, § 1382, subs. 2, 3; Rules on Appeal, rule 52, as amended in 1951.

4. Criminal law ☞254

Where entries in justice's docket indicated petitioners appeared before justice on March 6, 1950, were arraigned, entered pleas of not guilty, asked for jury trial, and trial was set for April 4th, the record affirmatively indicated that petitioners consented to trial date by failure to object thereto and precluded consideration of objection that trial date was more than 30 days after date of arrest. Penn.Code, § 1382, subs. 2, 3; Rules on Appeal, rule 52, as amended in 1951.

5. Evidence ☞208(1), 265(8)

In proceeding for writ of mandate seeking dismissal of justice's court cases for violation of Fish and Game Code, where petition alleged that petitioners' counsel agreed to trial date provided it was within 30-day period, the allegation was an admission that petitioners' counsel agreed to trial date and petitioners were charged with knowledge of fact that 30-day period elapsed after date of arrest.

Pen.Code, § 1382, subds. 2, 3; Rules on Appeal, rule 52, as amended in 1951; Fish and Game Code, §§ 1151, 1275.5.

6. Criminal law ☞254

Entries in justice's docket, that petitioners and counsel stipulated to trial date, which were not made at time event occurred, would not constitute prima facie evidence of facts related therein, but fact that belated entries were made would not give rise to inference that petitioners did not agree to trial date.

Clarence Cargill, Paul Krouse, Vacaville, pro se.

Frederic Crump, Dist. Atty., Lakeport, Edmund G. Brown, Atty. Gen. by Gail A. Strader, Deputy Atty. Gen., for respondent.

DEIRUP, Justice pro tem.

Appellants were charged in the respondent Justice's Court with violation of Sections 1151 and 1275.5 of the Fish and Game Code of the State of California. They were arrested on March 4, 1950, and were arraigned on March 6th and entered pleas of not guilty. Their cases were set for trial on April 4th. At the time set they moved the justice's court to dismiss the actions on the ground that appellants had not been brought to trial within 30 days after they had been arrested and brought within the jurisdiction of the court. The motions were denied and appellants were convicted by a jury.

On April 6th, before the time fixed for sentence, appellants filed in the superior court a petition for a writ of mandate directing the dismissal of the actions. An alternative writ was issued. After the filing of an answer the matter was heard and judgment was entered denying a peremptory writ of mandate. This appeal is taken from the judgment.

Section 1382 of the Penal Code provides in part:

"The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases:

"1. * * *

"2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information.

"3. If a defendant in a misdemeanor case in a justice's court, whose trial has not been postponed upon his application, is not brought to trial within thirty days after the defendant is arrested and brought within the jurisdiction of the court,
* * *"

The contention of appellants is that the record before this court shows that the appellants were entitled to dismissals by reason of the provisions of subdivision 3 of the section.

The record which was requested by the appellants and is now before us is meager. It consists of the petition for a writ of mandate, the order for the alternative writ, the alternative writ, the answer to the petition, the minutes of the superior court which recite that a demurrer was overruled and that the alternative writ was discharged and a peremptory writ denied, the judgment of the court, reciting that findings had been filed and adjudging "that the petitioners are not entitled to a peremptory writ of mandate and the application therefor is denied"; also the notice of appeal and demand for a transcript of the proceedings mentioned and certified copies of all exhibits, including the docket entries in the justice's court. There are three exhibits in the record. The first is a stipulation consolidating the cases for trial on April 4, 1950, not dated, and signed only by the district attorney. The second is a photograph of the docket of the justice of the peace relating to the case of *People v. Krouse*; and the third is a photograph of the docket relating to the case of *People v. Cargill*. The findings are omitted from the record. There is no reporter's transcript.

[1,2] The minutes of the trial court show that witnesses were sworn and examined. Respondents suggest that it must be presumed that evidence was introduced at the trial which supported the judgment of

the court, in view of the fact that the record is incomplete. Such a presumption, however, has not been available to a respondent since July 1, 1943, the effective date of the Rules on Appeal which were adopted by the Judicial Council. For Rule 52 as amended as of January 1, 1951 (the amendment being italicized) reads as follows: "If a record on appeal does not contain all of the papers, records and oral proceedings, but is certified by the judge or the clerk, or stipulated to by the parties, in accordance with these rules, it shall be presumed in the absence of proceedings for augmentation that it includes all matters material to a determination of the points on appeal. *On an appeal on the judgment roll alone, or on a partial or complete clerk's transcript, the foregoing presumption shall not apply unless the error claimed by appellant appears on the face of the record.*"

The amendment to the section does not affect the present appeal, which was perfected before it took effect.

The purpose of Rule 52 was to permit and encourage brief and inexpensive records on appeal. It has the effect of a law, *Alkus v. Johnson-Pacific Co.*, 80 Cal.App. 2d 1, 181 P.2d 72, and compels an appellate court to determine the issues before it solely from the record on appeal. *Gardner v. Shreve*, 89 Cal.App.2d 804, 202 P. 2d 322; *Kuhn v. Ferry and Hensler*, 87 Cal.App.2d 812, 197 P.2d 792; *Kohn v. Kohn*, 95 Cal.App.2d 722, 214 P.2d 80; *Palpar, Inc. v. Thayer*, 83 Cal.App.2d 809, 189 P.2d 752; *In re Estate of Pierce*, 32 Cal.2d 265, 196 P.2d 1.

[3, 4] It appears from the entries in the docket of the respondent justice of the peace that each of the appellants appeared before him on March 6, 1950 and was arraigned and entered a plea of not guilty and asked for a jury trial and that the trial was set for April 4th at 10:00 A.M. Appellants contend that because the date of the trial was more than 30 days after the date of the arrest on March 4th, it must be presumed that appellants' counsel did not consent, for his consent would have had to be a stipulation which would be

invalid unless entered in the docket or given in writing. They cite no applicable authority in support of their contention. The courts have held that where the case is set for trial in the presence of the defendant and his counsel and no objection to the date as being beyond the statutory period appears in the record, the objection is deemed waived. *People v. Rongo*, 169 Cal. 71, 145 P. 1017; *Ex parte Apakean*, 63 Cal.App. 481, 218 P. 768; *Ray v. Superior Court*, 208 Cal. 357, 281 P. 391; *In re Scott*, 81 Cal.App. 577, 254 P. 596. Thus it appears affirmatively from the record that the appellants consented to the trial date by their failure to object thereto.

[5] It is alleged in the petition for the writ of mandate that appellants' counsel stated on March 6th that the date of April 4th was agreeable "provided it was within the thirty-day period" and that he was assured that it was, the justice of the peace and a deputy sheriff having computed the days on the calendar, beginning with March 6th. The respondents alleged in their answer to the petition that several dates were suggested and that appellants' counsel finally agreed on April 4th, without any proviso. We cannot, of course, determine which of the allegations is true. But if we take as an admission the allegation in the petition we find that counsel for appellants did agree to the trial date. Appellants are charged with knowledge of the fact that the thirty-day period elapsed 30 days after the date of the arrest on March 4th, but they made no objection on this or any other ground. There is in the record as an exhibit an undated stipulation, signed by the district attorney but not by appellants, for the consolidation of the cases for trial on April 4th. There is nothing in the record to explain the stipulation but appellants seek to draw an inference from it that they did not consent to the late setting. However, they had agreed to the date of trial and any refusal on their part to sign a stipulation later could not affect their prior agreement.

[6] The docket contains further entries under the date of April 4th to the effect that the "day set for the trial of Paul

Krouse and Clarence Cargill and stipulated to by Runnels and the defendants Krouse and Cargill was on March 6, 1950." Since those entries were not made at the time the event occurred they do not constitute prima facie evidence of the facts related. Code Civ.Proc., sec. 116a. On the other hand the fact that the belated entries were made does not give rise to any inference that the defendants did not on March 6th agree to the date of the trial.

The judgment is affirmed without costs.

ADAMS, P. J., and VAN DYKE, J.,
concur.



103 Cal.App.2d 453

CITY OF FRESNO v. HEDSTROM et ux.

Civ. 4095.

District Court of Appeal, Fourth District,
California.

April 13, 1951.

The city of Fresno brought action against Emil A. Hedstrom and Helma L. C. Hedstrom, his wife, to acquire title by condemnation proceedings to 10 acres of a 40-acre farm owned and occupied by the defendants. A judgment awarding defendants damages in the sum of \$16,000 was entered in the Superior Court of Fresno County, Edward L. Kellas, J., and the plaintiff appealed. The District Court of Appeal, Mussell, J., held that the award of \$6,000 for severance damages could be sustained under the evidence.

Judgment affirmed.

1. Eminent domain ⇨136

Under statute providing for condemning of a part of a larger parcel of land, to recover severance damages, loss in market value claimed must proximately flow from the taking, and damage which is speculative, remote, imaginary, contingent, or merely possible, or damage caused by competition, or recovery in advance for torts

or other injuries that may be committed cannot serve as legal basis for recovery. Code Civ.Proc. § 1248, subd. 2.

2. Eminent domain ⇨203(2)

In action by city to condemn 10 acres of a 40-acre farm for airport purposes, testimony relative to effect of low-flying aircraft over the 10 acre tract involved and over the remaining 30 acres was admissible only to determine the damage, if any, to the remaining 30 acres in so far as it affected its market value. Code Civ.Proc. § 1248, subd. 2.

3. Eminent domain ⇨149

In action by city to condemn 10 acres of a 40-acre farm for airport purposes, award of \$6,000 for severance damages could be sustained by evidence showing loss to defendants' land in frontage on certain street, the loss of access and egress to the remaining 30 acres and depreciation in its value for subdivision purposes. Code Civ.Proc. § 1248, subd. 2.

4. Eminent domain ⇨262(4)

In action by city to condemn 10 acres of a 40-acre farm for airport purposes, where verdict awarding \$6,000 as severance damages did not specify what portion, if any, of the damages was awarded for damage occasioned by low-flying aircraft and there was substantial evidence to support the award on other grounds, general verdict would not be set aside for lack of evidentiary support upon showing that no severance damages were occasioned by low-flying aircraft. Code Civ.Proc. § 1248, subd. 2.

5. Trial ⇨255(8)

In action by city to condemn 10 acres of 40-acre farm for airport purposes, where trial court correctly instructed jury as to applicable law in limiting allowance of damages occasioned by low-flying aircraft to that caused by taking of the 10-acre tract involved, if plaintiff desired to further clarify the issues in such respect and to have jury instructed as to laws and regulations applicable to aerial navigation, plaintiff should have requested such instructions.

6. Eminent domain ⇨255

In action by city to condemn 10 acres of 40-acre farm for airport purposes, where city did not set up defense that defendants' failure to file claim against city was a complete bar against recovery of damages claimed by defendants in the pleadings or at the trial, city could not raise such defense for first time upon appeal.

7. Eminent domain ⇨169

Filing of claim against city was not necessary in an action in condemnation brought by city.

8. Eminent domain ⇨149

In action by city to condemn 10 acres of a 40-acre farm for airport purposes, evidence supported finding that the 10 acres taken was of the actual value of \$10,000.

9. Evidence ⇨474(18)

The owner of property, whether generally familiar with such values or not, is competent to estimate its worth, the lack of knowledge going to the weight rather than admissibility of the testimony.

C. M. Ozias, City Atty., of Fresno, for appellant.

Aynesworth & Hayhurst and Irvine P. Aten, all of Fresno, for respondents.

MUSSELL, Justice.

Action in eminent domain.

The instant action was commenced by the city of Fresno to acquire title by condemnation proceedings to the south 10 acres of a 40 acre farm owned and occupied by the defendants. The jury found that the value of the 10 acres sought to be condemned was \$10,000 and awarded the further sum of \$6,000 as "severance damages". Plaintiff appeals from the judgment entered against it for the sum of \$16,000.

The 40 acre tract owned by defendants is rectangular in shape and is approximately 2640 feet long (north and south) and 648 feet wide (east and west). The south frontage of 648.45 is on Shields Avenue,

which runs east and west and bounds the property owned and operated by the city as a municipal airport on the north. In 1939 the city acquired the airport property (1100 acres) and leased it to the United States government. This property was used as a training ground by the government air forces and was known as the "Hammer Field Air Base". A few years later the government released the property to the city, at which time the name of the airport was changed to "Fresno Air Terminal" and since that time the city has been maintaining and operating it. It is used extensively by commercial air lines, privately owned aircraft and to some extent by the United States government.

One of the main runways of the airport, if extended northwesterly, would cross the 10 acres sought to be condemned from the southeast corner to the northwest corner thereof. For several years a "localizer" has been maintained, by agreement with defendants, on the northwest corner of the 10 acre tract. The "localizer" sends a beam of light down this main runway, thereby enabling aircraft on landing to "line up on the beam" and land in bad weather. The present action was filed by the city to acquire the south 10 acres of defendants' property for additional facilities for the operation of the airport.

At the trial, the defendants and their two sons were permitted, over plaintiff's objection, to testify that aircraft, in taking off from and landing at the airport, flew over defendants' entire property; that the noise from low flying planes kept the defendants awake at night; that they were annoyed by the lights from the planes at night; that they were inconvenienced in the use of their telephone because of the noise; that the airplanes caused their house to vibrate and the windows to rattle; and that upon one occasion during the war the defendants attempted to raise turkeys but were obliged to discontinue doing so because the landing lights and the glare from the planes at night caused them to stampede; that the value of the entire property was damaged by the constant low flying of aircraft across it.

The appellant contends that the foregoing testimony should have been excluded and that the trial court erroneously included as one of the issues in the case the question of damages heretofore sustained and now being sustained by the defendants by reason of the low flying of aircraft over the 30 acres not taken and argues that the giving of two instructions in that connection constituted prejudicial error.

The principal question for our determination is whether the award of \$6,000 for severance damages can be sustained under the evidence and in view of the instructions given by the trial court.

The rule for determining severance damages is stated in paragraph 2, section 1248 of the Code of Civil Procedure, as follows: "If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff".

[1] As was said in *Arnerich v. Almaden Vineyards Corp.*, 52 Cal.App.2d 265, 272, 126 P.2d 121, 124: "To recover severance damages under section 1248, subdivision 2, of the Code of Civil Procedure, the loss in market value claimed must directly and proximately flow from the taking. Damage which is speculative, remote, imaginary, contingent, or merely possible, or damage caused by competition, or recovery in advance for torts or other injuries that may or may not be committed cannot serve as a legal basis for recovery. 2 Nichols on Eminent Domain, 2d Ed., p. 736, § 239; 29 C.J.S., Eminent Domain, § 154, p. 1013; *Coast Counties Gas & Electric Co. v. Miller & Lux, Inc.*, 118 Cal.App. 140, 5 P.2d 34; *East Bay Mun. Utility Dist. v. Kieffer*, 99 Cal. App. 240, 278 P. 476, 279 P. 178."

In *McDougald v. Southern Pacific R. R. Co.*, 162 Cal. 1, 3, 120 P. 766, in an action by the owners of land to recover compensation from a railroad for a part of the land permanently appropriated for the public use, it was held the plaintiff was entitled to receive as damages the difference be-

tween the value of the entire parcel as it was just before the defendant took permanent possession, and its value immediately after the works of the defendant were completed and put in operation, taking into consideration all of the injurious consequences to the part of the land not taken, reasonably probable from such works and the operation thereof and from the severance of the land taken.

[2, 3] The testimony relative to the effect of low flying aircraft over the 10 acre tract involved and over the remaining 30 acres of defendants' property was admissible only to determine the damage, if any, to the 30 acres insofar as it affected its market value. The materiality of such evidence depended upon a showing that the damages, if any, were caused or would be caused by the taking of the 10 acres. As pointed out by appellant, some of the evidence introduced over objection related to inconvenience and detriment suffered by defendants long prior to the filing of the instant action. In this connection, Wilmer Garrett, superintendent of airports for the city of Fresno, testified that airplanes had been flying over the Hedstrom property ever since the establishment of Hammer Field and that there were no severance damages occasioned by aircraft flying. Other witnesses for plaintiff also testified that there were no severance damages. The evidence was sufficient to support a finding by the jury that there were no severance damages occasioned by the low flying aircraft and the verdict does not state that damages were awarded for that reason. There was, however, substantial evidence to support the award of severance damages made by the jury as having been occasioned by the loss to defendants' land in frontage on Shields Avenue, the loss of access and egress to the 30 acres and the depreciation in its value for subdivision purposes.

Speed B. Leas, a qualified appraiser and real estate broker, for many years familiar with the property, testified as follows: "That by taking the 10 acres and eliminating the free access to the 30 acres from any point on Shields Avenue as a studied program of subdivision might indicate was

the most practical, it has damaged the remaining land solely now from the point of subdivision at least \$250 per acre." This testimony, if believed by the jury, was sufficient to support the award of damages as having been occasioned solely by the depreciation of defendants' property for subdivision purposes.

There was additional testimony supporting the verdict of the jury. Emil A. Hedstrom, one of the defendants, testified that in his opinion the damage resulting to the remaining 30 acres by the severance of the 10 acres therefrom and the creation of airways over his property to and from the airport was \$10,000; that this damage was occasioned by depreciation on account of the loss of frontage of property on Shields Avenue and depreciation damage by reason of the airplane traffic; that it would be difficult to segregate the two elements of damage and that the reasonable market value of the 10 acre tract was \$11,000.

C. E. Bye, a qualified appraiser, testified that in his opinion the reasonable market value of the property being taken by the city was \$8,000; that the severance damages amounted to the sum of \$11,000; that he based his appraisal as to the severance damages on the fact that the taking of the 10 acres eliminated the access and egress to the remaining 30 acres. He further stated that the taking of the south 10 acres, the best one-fourth of defendants' property, would depreciate the market value of the remaining land as subdivision property, its best and highest use; that he had also considered the effect of low flying planes and that the difference between the value of defendants' property as agricultural land and as subdivision property was \$11,000, after eliminating the south 10 acres.

[4] The jury, in its verdict, and the trial court, in its findings, did not specify what portion, if any, of the \$6,000 awarded was for damage occasioned by aircraft and since there was sufficient substantial evidence to support the findings and judgment on other grounds, the general verdict should not be set aside for lack of evidentiary support. *Wells v. Brown*, 97 Cal.App.2d 361, 364-365, 217 P.2d 995.

[5] It is argued that the court erred in giving the following instructions to the jury:

"You are instructed that if you find from the evidence that the City of Fresno is condemning the south ten acres of defendants' land for use as a portion of its Municipal Airport and intends to and will use the air space immediately above the remaining thirty acres of defendants' land lying directly north thereof at such a low altitude as to appreciably interfere with, or lessen, or destroy its profitable and enjoyable uses for any purposes for which now or in the future it may be profitably or beneficially used, then and in such event, the defendants are entitled in this action to recover the damages for loss of use and enjoyment even to the full value of the remaining land of defendants, if that be found to be the loss therefrom."

"If you find that the defendants' land is so situated that it is reasonably suitable for a residential subdivision but that its value as a residential subdivision will be lessened by the operational hazards of low-flying aircraft and other hazards resulting from the appropriation of the immediate superadjacent air space of the remaining 30 acres, if you find that in its operation of said air terminal said air space will have been appropriated by the proposed use of said property being taken by the plaintiff, that the fact should be taken into account in estimating the market value of the lands of the defendants not being taken."

Plaintiff's position is that the remedy of defendants for damages, if any, by reason of the low flying of aircraft over the remaining 30 acres of defendants' property is one either for injunctive relief or for damages for trespass and that the jury, under the instructions, was given an unrestricted discretion in assessing whatever damages it desired without regard to the limitations prescribed by the laws and regulations applicable to aerial navigation.

The first of the two quoted instructions should have limited the allowance of damages occasioned by low flying aircraft to that caused by the taking of the 10 acre tract involved. The second instruction informed the jury that it could take into ac-

count the effect of the proposed use of the property being taken by the plaintiff. However, the court correctly instructed the jury as to the law applicable in the following instruction:

"You are instructed that in determining the damages, if any, which will result to that part of the defendants' land not sought to be condemned, namely, the remaining 30 acres, you must determine the market value on February 21, 1950, of the said remaining 30 acres and then deduct from such amount the market value of said 30 acres after the taking of the 10 acres in the manner proposed, * * * taking into consideration all the injurious consequences, if any, to the remaining 30 acres not taken, reasonably probably to follow from the works of the city upon the 10 acres and the operations thereof. The difference between these values, if you find from the evidence that there is any difference, will be the amount of damages to which defendants will be entitled on account of the injury to the remaining 30 acres of their property. If you find that the market value of said remaining 30 acres has not diminished or decreased, then the defendants are not entitled to recover anything in this action except the market value of the 10 acres sought to be condemned."

If the plaintiff desired to further clarify the issues in this respect, it was incumbent upon it to submit and request such instruction and if, as is contended by the plaintiff, the court should have submitted instructions as to the laws and regulations applicable to aerial navigation, no error resulted for the same reason. 24 Cal.Jur., p. 796; *Peckham v. Warner Bros. Pictures*, 42 Cal.App.2d 187, 189, 108 P.2d 699.

[6,7] Plaintiff next argues that the failure of the defendants to file a claim against the city of Fresno is a complete bar against the recovery of the damages claimed by the defendants. However, the city did not set up this defense in the pleadings or at the trial and cannot now raise it for the first time upon appeal. Our

attention has not been directed to any authority requiring the filing of a claim against a city in an action in condemnation brought by it. The filing of such a claim is not necessary.

[8,9] Finally, it is argued that the evidence does not support the finding of the jury that the property taken was of the actual value of \$10,000. There was, however, substantial evidence to support this finding. Marshall M. Pipes, the owner of the 40 acres immediately east of the Hedstrom property, testified that the reasonable value of the 10 acre tract sought to be condemned was \$1,000 per acre, and one of the defendants, Emil A. Hedstrom, fixed the value at \$11,000. It is a recognized rule that the owner of property, whether generally familiar with such values or not, is competent to estimate its worth, the lack of knowledge going to the weight rather than the admissibility of the testimony. *Stroman v. Lynch*, 91 Cal.App.2d 406, 408, 205 P.2d 409.

As was stated in *Employees' Participating Ass'n v. Pine*, 91 Cal.App.2d 299, 303, 204 P.2d 965, 967: "'Questions of value are almost always matters of opinion, and evidence thereon usually goes no further than to give the court more or less general ideas on the subject. From the evidence thus received a trial court must draw its own conclusions of value by a process of balancing and reconciling, if possible, the varying opinions. * * * (T)he trial court, in an effort to attain an even justice, often exercises a wide discretion in awarding damages.'"

In the instant case the jury had a wide discretion in awarding damages and its finding in that respect, being supported by substantial evidence, will not be here set aside.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

**YOUNGSTOWN STEEL PRODUCTS CO.
OF CALIFORNIA v. CITY OF
LOS ANGELES et al.**

Civ. 17841.

District Court of Appeal, Second District,
Division 3, California.

April 10, 1951.

Hearing Granted June 7, 1951.*

Action by The Youngstown Steel Products Company of California against The City of Los Angeles and the Department of Water and Power for declaratory relief and injunction seeking an interpretation of an easement granting a right of way for electric wires over the property of the plaintiff. From a judgment in the Superior Court of Los Angeles County, Daniel N. Stevens, Judge assigned, the plaintiff appeals. The District Court of Appeal, Bartlett, J., pro tem, construed the easement and held that under grant of an easement for electric wires over the property of the grantor "for aerial only" where it was necessary in carrying on the grantor's business to move cranes which sometimes reached a height of 61 feet and the movement thereof was extremely dangerous to the operators thereof, the cost of raising the wires to the required height should be borne by the grantees of the easements.

Modified and affirmed.

1. Easements ⇨12(1)

Where words in instrument granting an easement of a right of way for electric wires over the property of grantor "for aerial only" were in writing and were repugnant to words in printing, in arriving at the intention of the parties, insofar as the written words were repugnant to printed words, latter must be disregarded. Civ. Code, § 1651.

2. Electricity ⇨9(1)

Under grant of an easement of a right of way for electric wires over the property of grantor "for aerial only", intent of parties was to limit the grantee to the maintenance of wires across the lands of the grantor and that such wires should cross the land of the servient tenement at a height which would not interfere with the grantor's right to the reasonable use of its land.

* Subsequent opinion 240 P.2d 977.

3. Easements ⇨38

In grant of an easement law protects right of owner of servient tenement to make any use of his land which does not constitute an unreasonable interference with the easement.

4. Easements ⇨38, 42

In the case of a grant of an easement, every incident of ownership not in conflict with the easement is reserved to the servient tenement and no burden may be imposed thereon which the original grant did not contemplate.

5. Easements ⇨42

Where easement is founded upon a grant only those interests expressed in the grant and necessarily incident thereto pass from the owner of the fee.

6. Electricity ⇨9(1)

On a grant of an easement for electric wires over the property of the grantor, the grantee was under an absolute duty not only to install the wires properly but at all times to maintain them in a safe manner in view of changing circumstances.

7. Appeal and error ⇨176

Contention of respondent that there was consideration for grant of an easement could not be made on appeal in view of the pleadings of the parties and respondent's stipulation.

8. Electricity ⇨9(1, 3)

Under grant of an easement of a right of way for electric wires over property of grantor "for aerial only", where no height was fixed for wires to be carried over servient tenement, intent of parties was that electric lines should be maintained at a height that would not interfere with whatever reasonable use grantors might desire to make of their land and it was not intended to permit grantee to maintain uninsulated power lines carrying 35,000 volts and then, when on account of changing conditions it became hazardous to do so, to increase the burden on the servient tenement by making the expense of the change chargeable against it.

9. Easements ⇨36(1)

In order to establish a prescriptive right proof must be made that there has

been an adverse user for five years asserted in such manner that the owner is apprised thereof.

10. Easements ⚡47

Generally the location of an easement once selected cannot be changed by either the landowner or the easement owner without the other's consent.

11. Electricity ⚡9(1)

Under grant of an easement of a right of way for electric wires over the property of grantor "for aerial only", fact that grantor made no objection until there was some reason to object was not evidence that there was any acquiescence on the part of the grantor in permanent maintenance of the wires at a specified height.

12. Electricity ⚡9(3)

Under grant of an easement for electric wires over property of the grantor "for aerial only", where insulated power line was constructed across property at height of approximately 51½ feet carrying 35,000 volts of electricity and it was necessary in carrying on grantor's business to move cranes which sometimes reached a height of 61 feet and the movement thereof was extremely dangerous to the operators thereof, the cost of raising the wires to the required height should be borne by the grantees of the easements.

13. Stipulations ⚡14(1)

A judgment interpreting an easement granting a right of way for electric wires over the property of the grantor declaring that grantees were entitled to maintain the wires at a specified height and that the grantees were not entitled to require the grantor to change such right without their consent was proper in view of the stipulation of the parties.

14. Easements ⚡53

All easements contain secondary easements consisting of the right to do such things as are necessary for the full enjoyment of the easement and such right would include the right to enter the premises to repair power lines for which the easement was granted.

15. Costs ⚡234

Where judgment was modified in specified particulars the appellant was allowed its costs on appeal.

Chandler, Wright, Tyler & Ward, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Gilmore Tillman, Chief Asst. City Atty. for Water and Power, Alfred H. Driscoll, Deputy City Atty., Los Angeles, for respondents.

BARTLETT, Justice pro tem.

This is an action for declaratory relief and an injunction seeking an interpretation of an easement granting a right-of-way for electric wires over the property of appellant. The lower court awarded the respondents a judgment against the appellant for the sum of \$988.78 and, in effect, decreed that there is no obligation on the part of respondents to raise the power lines beyond the height that existed at the date of the filing of the complaint. The question before us, therefore, is who is going to pay for raising the power lines under the facts existing in this case.

The case was tried upon an agreed statement of facts. So far as pertinent here and to the questions raised in the briefs of the parties, the admissions in the pleadings and the stipulation regarding the facts disclosed: That on November 5, 1929, the Republic Supply Company of California, a predecessor in interest of appellant, granted an easement to the respondents which, omitting the description of the property, read as follows: "For and in consideration of the sum of One (\$1.00) Dollar, receipt whereof is hereby acknowledged, a right-of-way is hereby granted The City of Los Angeles, its successors and assigns, with the right to erect and maintain poles with all necessary wires and fixtures thereon, and to keep same free from foliage, across that certain property belonging to the undersigned, situate in the County of Los Angeles, State of California, described as follows: For Aerial Only. * * *

"It is understood that the employees of said City shall, when necessary, have ac-

cess to said right of way and the poles and wires thereon, for purposes of repairs, etc. provided said City shall be responsible for any damage which may be unnecessarily done to the property above described."

This grant was on a printed form prepared by respondents except the words "For Aerial Only" which were inserted with a pen. The Republic Supply Company received no consideration for its grant of this easement. A power line was then constructed across the northern part of this property, consisting of some 7.767 acres, at an altitude above the ground of approximately 51½ feet, which carried 35,000 volts of electricity and was not insulated. At the time these wires were installed in November, 1929, the Republic Supply Company made no objection to the height at which these wires were installed and these wires have been maintained by respondents at that height and no objection was ever made by the Republic Supply Company or by the appellant who succeeded to all the rights of the Republic Supply Company and acquired the property on January 1, 1941, until October, 1946. At the time of the installation of these wires in November, 1929, the land referred to in the easement, as well as adjoining land to the west thereof, was used as a sales yard for pipe and equipment. This land has been used for that purpose ever since. The lines in question did not supply electrical energy to the appellant but to another customer of the respondents. Since its acquisition of the property, the appellant has continued to use the land covered by the easement and adjoining property for the same purpose. Buildings are located on the lands described in the easement and on adjoining land to the west but there are large vacant areas in these lands which are needed for the storage of pipe and equipment. These lands are located in an industrial area near Wilmington where it is customary to use such areas for such purposes. It is necessary and essential in the carrying on of appellant's business on the land covered by the easement to use one or more cranes to move pipe from various racks and places into trucks and cars. On April 30, 1946, appellant changed the type of crane

that it had been using prior to that time and in order to more completely and efficiently use its land, acquired a new type of crane which enabled the appellant to store its pipe to a greater height. This crane, in doing work which is necessary in some operations, reaches a height of 61 feet. In storing some of the pipe the crane was required to go into the parts of the land below the power lines. In October of 1946, while the crane was being used it came into contact with respondents' lines and approximately 35,000 volts were charged into the boom and crane. The wheels of the crane were rubber-mounted and the operator did not suffer serious injury. Following this event the appellant removed a 5 foot section of the boom mounted on the crane but by reason thereof the boom and crane could no longer be used to 100 per cent efficiency. After that and subsequent to the filing of this complaint a similar accident occurred in which the operator of the crane narrowly escaped electrocution. During the pendency of the action the parties further stipulated that in order to prevent the possibility of injury to workmen, the respondents set new poles carrying wires across the property of appellant which raised the transmission line to an altitude sufficient to obviate interference with the use made of portions beneath it and, further, that the cost of the change in elevation amounted to the sum for which the judgment was rendered.

[1,2] It is to be noted that the words of the grant in writing "For Aerial Only" are repugnant to the words in printing. Therefore, in arriving at the intention of the parties insofar as these words are repugnant, the printed words must be disregarded. Civ.Code, sec. 1651. It was stipulated by the parties that no poles were then or at any time ever had been erected upon the property in question. The manifest intention of the parties by the use of the words "For Aerial Only" was to limit the grantee to the maintenance of wires across the lands of the grantor. No height was fixed at which the wires should be carried and in view of the rights of the servient tenement in the grant of an easement which we will hereafter discuss, the parties intended that these wires should cross the

land of the servient tenement at a height which would not interfere with the owners' right to the reasonable use of its land.

That the owners were making a reasonable use of their lands is shown by the findings of the court and the stipulations of the respondents.

[3,4] In the case of the grant of an easement the law is alert to protect the right of the owner of the servient tenement to make any use of his land which does not constitute an unreasonable interference with the easement. Every incident of ownership not in conflict with the easement is reserved to the servient tenement. No burden may be imposed upon the servient tenement which the original grant did not contemplate. *Anderson v. Southern Cal. Edison Co.*, 77 Cal.App. 328, 246 P. 559, was an action to recover damages for injuries caused by contact with high voltage wire maintained by the defendant. As one of its defenses the defendant claimed an easement over the lands in question and that therefore the plaintiff, who was a painter's apprentice, engaged in work which took him to the roof of a building located underneath the wire, was a trespasser. In 1910 the defendant constructed power lines across the territory which was then and at the time of the decision of the court, still was agricultural in character. The poles were 40 feet high and the wires at the lower point were about 30 feet from the ground, were uninsulated and carried 11,000 volts of electricity. At the time of the accident there was a sag in the wires but this was a normal sag and brought the wires to the height stated. In 1921 the owner of the land underneath the wire rented the property to persons who in 1922 constructed a corrugated iron building directly under the wire, the peak of the roof having a clearance of about 3 feet. In discussing the question of the rights of the defendant company by reason of an easement to carry wires across this property the court said, 77 Cal.App. at page 335, 246 P. at page 562: "Whatever interest defendant company may have in the land in question by reason of the asserted easement, the right of the owner thereof to its use of the land for any purpose was

not abridged, provided only that such use did not conflict or defeat the rights of the company in the use of its lines. In other words, the interest of the company was not an exclusive one." Later, 77 Cal.App. on page 336, 246 P. on page 562, the court said this: "In the enjoyment of its asserted interest, it was the duty of the defendant to keep within its limited interest and to so erect its aerial right of way as not to interfere with the reasonable use of the surface of the soil to which the owner had made avail. In failing to do so, it became itself a trespasser on the rights of the owner and those claiming under him. *Citizens' Telephone Co. v. Cincinnati N. O. & T. P. Ry. Co.*, 192 Ky. 399, 233 S.W. 901, 18 A.L.R. 615."

[5] Respondents call attention to the fact that the case was not one between the owner of the land and the company in question and that, as the court stated in its opinion, it was not concerned with their respective rights in the easement. However, the court, for the purpose of its opinion, assumed the existence of the easement and, having made such an assumption, on account of the nature of the defense interposed by the defendant, necessarily had to pass on the questions referred to in the quoted portion of the opinion. We cite this case on account of the similarity of the facts involved. Furthermore the statements of law set forth in this opinion are in exact accord with all California decisions making pronouncements on the rights of the servient tenement. For instance, in *City of Pasadena v. California-Michigan Land & Water Co.*, 17 Cal.2d 576, 579, 110 P.2d 983, 985, 133 A.L.R. 1186, the court clearly expresses the law applicable: "Where the easement is founded upon a grant, as here, only those interests expressed in the grant and those necessarily incident thereto pass from the owner of the fee. The general rule is clearly established that, despite the granting of an easement, the owner of the servient tenement may make any use of the land that does not interfere unreasonably with the easement. *Hoyt v. Hart*, 149 Cal. 722, 87 P. 569; *Durfee v. Garvey*, 78 Cal. 546, 21 P. 302; *Dierssen v. McCormack*, 28 Cal.App.2d 164, 82 P.2d 212; *Perley v.*

City of Cambridge, 220 Mass. 507, 513, 108 N.E. 494, L.R.A.1915E, 432; 3 Tiffany, Real Property, 3d Ed., 1939, § 811. It is not necessary for him to make any reservation to protect his interests in the land, for what he does not convey, he still retains. Jones, Easements, § 391 et seq., p. 313." Also in *Dierssen v. McCormack*, 28 Cal.App.2d 164, 82 P.2d 212, the same conclusions are expressed as are set forth in the preceding quotation and the court also says, 28 Cal.App.2d at page 170, 82 P.2d at page 216: "The law is jealous of the claim of an easement (19 Cor.Jur. 958) and likewise of the extent of the rights claimed under an instrument granting an easement."

[6] Two men almost met their death as a result of the condition existing on the property in question. The respondents contend that this was due to the use by appellant of a longer boom than the one previously used. The answer to that is that the only reasonable conclusion that can be drawn from the stipulated facts is that the use made by appellant of its land was not only reasonable but was necessary to an efficient use thereof. Such being the case the near tragedies referred to were caused by the manner in which, under the changing conditions then existing, the respondents maintained their wires. The respondents were under an absolute duty not only to install such a dangerous instrumentality properly, but at all times to maintain it in a safe manner in view of changing circumstances. As said in *Lozano v. Pacific Gas & Elec. Co.*, 70 Cal.App.2d 415, 422, 161 P.2d 74, 78: "Even if at the outset of the installation of the equipment the company may have been entirely free from fault, yet, if, under changing circumstances, a hazardous condition arose, nonaction or the failure to remedy such condition would constitute culpable negligence. *Polk v. City of Los Angeles*, supra [26 Cal.2d 519, 159 P.2d 931]; *McCormick v. Great Western [etc.] Co.*, 214 Cal. 658, 8 P.2d 145, 81 A.L.R. 678."

[7] Respondents contend that there was a consideration for the grant of this easement. The complaint alleged that there

was no consideration for the grant. The answer denied this and then proceeded to allege that the consideration was as follows: "* * * but, to the contrary, allege that at the time of the granting of said easement it was understood and agreed that in consideration of said grant the properties of plaintiff's said predecessor would be supplied with electric energy from the power line to be erected thereon and that pursuant to said agreement said property has ever since been and is now being supplied with electric energy from said power line on said easement." Respondents thereafter stipulated that the facts alleged were not true. Such being the state of the record, respondents are in no position now to make any such contention. It is to be noted that this is not one of those cases where the services furnished were for the benefit of the servient tenement.

[8] Respondents state that they are aware of the high degree of care required of an electric utility in maintaining its facilities but that this is a rule of negligence and has no bearing upon the law of easements. Also that there is no basis for contending that lack of consideration should be construed more strictly against the grantee and state: "Furthermore, the trial court has held that the respondents have acquired the right to maintain wires across the easement 'not only by virtue of the grant thereof by the Republic Company to the defendants, but also by prescription.'" We have adverted to neither of these matters for the purposes suggested, but solely in a consideration as to what light these matters might throw on the intent of the parties in creating an easement "For Aerial Only". No height was fixed for the wires to be carried over the servient tenement. We conclude that it is obvious that the intent of the parties was that these lines should be maintained at a height that would not interfere with whatever reasonable use plaintiff might desire to make of its land. We cannot conclude that an easement was given without consideration with the intent to permit the respondents to maintain lines carrying 35,000 volts by uninsulated wires and then

when, on account of changing conditions, it became hazardous to do so and a legal duty devolved upon the respondents to change that height, to increase the burden on the servient tenement by making the expense of this change chargeable against it.

[9] Respondents' only answer to appellant's contention that the court erred in holding that respondents had acquired by prescription a right of way to maintain these wires at a height of 51½ feet is that: "There is ample support in the findings of fact to support the trial court's holding * * *." They do not call attention to any such finding nor to any evidence which would support such a finding. In order to establish a prescriptive right it is necessary to prove that there has been an adverse user for 5 years asserted in such a manner that the owner is apprised thereof. *Peck v. Howard*, 73 Cal.App.2d 308, 167 P.2d 753. An examination of the stipulation regarding the facts show that there was nothing adverse in the maintenance of these wires at a height of 51½ feet until April 30, 1946, when appellant began making what respondents stipulate was a more efficient use of this property and later its crane came in contact with these uninsulated wires. Until that time there had been no conflict in the use of appellant's premises and respondents' maintenance of its lines at that height. Nothing before that would indicate that respondents claimed any such right regardless of any uses which the owner might make of his land. After the use became adverse and after appellant was apprised of respondents' claim, this action was filed in less than one year.

[10-12] The proposition most earnestly advanced by respondents is, to use the language of their brief, the following: "The Location and Extent of an Easement Granted in General Terms May Become Fixed Through Designation by Either or Both of the Parties or by Acquiescence Therein, and Once Having Become so Fixed, the Location and Extent Thereof Cannot Be Materially Changed by Either Party Without Consent of the Other." In discussing this question it is contended by them that the

easement herein being in general terms and the wires having been maintained by the respondents at the same location at the same height for many years brings them within the principle stated. The rule and the reason for it is succinctly stated in the following quotation from 17 American Jurisprudence, page 988, set forth in respondents' brief: "The general rule is that the location of an easement once selected cannot be changed by either the landowner or the easement owner without the other's consent. The reason for this rule is that treating the location as variable would incite litigation and depreciate the value and discourage the improvement of the land upon which the easement is charged." In their entire discussion of the applicability of this principle respondents ignore what to us is vital in this case and that is this, that when respondents presented appellant's predecessor with a form of easement which would have granted a right to use a strip of land across this property to " * * * erect and maintain poles with all necessary wires and fixtures thereon * * *" there was added the words absolutely repugnant thereto, "For Aerial Only." If they had not added these words, there would have been in existence the same type of easement described in respondents' brief in their quotation from *Pacific Gas & Electric Co. v. Crockett Land & C. Co.*, 70 Cal.App. 283 found at pages 292 and 293, 233 P. 370, at pages 373 and 374. All of the cases cited by respondents contain the important distinction from the one confronting us in that the easement created in general terms, granted a right to actually use portions of the grantor's land. These cases were all concerned with situations analogous to that where a grant in general terms is made to maintain a ditch or road on and across the land of the owner and the route of that ditch or that road becomes fixed by long continued usage and the consent, expressed or implied, of the owner. Such cases are not concerned with the problems presented to us. As stated by appellant: "The issue now is who is going to pay for raising the wires?" Any idea that the grantees were maintaining these uninsulated wires carrying 35,-

000 volts of electricity at a height of 51½ feet with a hostile intention of continuing to do so regardless of any change in conditions or any lawful use the servient tenement might make of its estate is dispelled by all reasonable intendments to be taken from the stipulated facts. The fact that the owner made no objection until there was some reason to object, cannot be taken as any evidence that there was any acquiescence on its part in a permanent maintenance of those wires at that height. We conclude that the cost of raising of the wires should be borne by the respondents as, according to the pleadings, it has been, and that respondents therefore are not entitled to judgment for the amount so expended.

[13] In our opinion the court was correct in that portion of the declaratory relief granted in which it stated: "That under said right-of-way, the defendants are entitled to maintain said wires over, above, and across the property covered by said right-of-way at the height at which they now exist, to wit, a height in excess of sixty-one (61) feet above the ground at their lowest point * * *" and that plaintiff is not entitled to require defendants to change this right without defendants' consent. We so hold by virtue of certain matters shown by the stipulation of the parties to have occurred during the pendency of the action. We note that by the stipulation, on account of the second accident wherein the crane came in contact with the wires and which occurred while the action was pending, the parties agreed: "That as a result of said accident the parties through their attorneys herein stipulated that the defendant should immediately raise its power lines

to such a height that no further accident could possibly occur * * *." Furthermore the respondents filed a supplementary answer in which they alleged that pursuant to this stipulation they had done the matters agreed to and the appellant stipulated that the allegations of the supplementary answer were true. Such being the case, it would appear that all controversy between the parties except the one as to which party should pay for raising these wires had been finally settled and determined by the parties themselves.

[14] No contention that the court should not have declared that the respondents had the right of access to such right of way for the repair of the lines can be maintained. All easements contain "secondary easements" consisting of the right to do such things as are necessary for the full enjoyment of the easement and that would include the right to enter the premises to repair the lines. *Anderson v. Southern Cal. Edison Co.*, supra, 77 Cal.App. 328, 335, 246 P. 559. As there are no appurtenances upon the easement other than the wires making an aerial crossing, the words in the judgment referring to other appurtenances should be stricken.

The judgment is therefore ordered modified in the following particulars: By striking therefrom paragraph 1 of said judgment and the words "and other appurtenances" wherever said words appear in paragraph 3 of said judgment.

[15] As thus modified, the judgment is affirmed. The appellant is allowed its costs on appeal.

SHINN, P. J., and VALLÉE, J., concur.

103 Cal.App.2d 391

HICKSON et al. v. BEITEL et al.

Civ. 18239.

District Court of Appeal, Second District,
Division 2, California.

April 11, 1951.

Donald Wayne Hickson and Richard Lee Hickson, by their guardian ad litem, Leslie L. Hickson, sued Jimmie Beitel and Leta M. Beitel to recover for personal injuries suffered by the two minor plaintiffs while riding as guest passengers in an automobile, driven by their mother, which came into collision with an automobile owned by defendants. The Superior Court, Los Angeles County, George Francis, J., rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, McComb, J., held that the evidence sustained the jury's finding that defendants had been negligent and that such negligence had been a proximate cause of the accident.

Affirmed.

1. Automobiles ⇨244(12, 36)

In action by minor automobile occupants for injuries sustained when north bound automobile driven by their mother was struck by south bound automobile owned by defendants, evidence that driver of south bound automobile, while driving in traffic at speed from 55 to 60 miles an hour, had swerved around automobile stopped at intersection and hit plaintiffs' automobile, which was already in intersection and in process of negotiating left turn, supported jury's finding that defendants had been negligent and that their negligence had been proximate cause of accident. Vehicle Code, §§ 529, 551.

2. Appeal and error ⇨1067

As to action for their own injuries brought by minor children of driver of automobile involved in intersection collision with automobile owned by defendants, there was no prejudicial error in trial court's refusal to give defendant's instruction which was applicable only to cause of action of driver of automobile in which children had been passengers, where jury found against that driver on her cause of

action against defendants. Const. art. 6, § 4½; Vehicle Code, §§ 529, 551.

3. Automobiles ⇨245(51)

Whether violation of statute proximately contributed to automobile accident or was excusable or justifiable are questions of fact except where court is impelled to say that from facts reasonable men could draw only inference that negligence of violator contributed to accident. Vehicle Code, §§ 529, 551.

4. Automobiles ⇨246(60)

In action by minor automobile occupants for injuries sustained when north bound automobile driven by their mother was struck by south bound automobile owned by defendants, in view of fact that evidence disclosed that driver of defendants' automobile had passed another automobile on his right which was stopped at intersection and that accident immediately ensued, jury was properly advised as to statute regarding overtaking and passing and that a violation thereof was negligence per se which created a presumption of negligence that was not conclusive. Vehicle Code, §§ 529, 551.

Russell H. Pray and William C. Price,
Long Beach, for appellants.

Ball, Hunt and Hart, Long Beach, by
Clarence S. Hunt, Long Beach, for respondents.

McCOMB, Justice.

This appeal is from a judgment in favor of plaintiffs after trial before a jury in an action to recover damages for personal injuries suffered by two minor children while riding as guest passengers in an automobile driven by their mother which came into collision with an automobile owned by defendants.

Facts: The mother of plaintiffs was driving north next to the double center line on Atlantic Avenue in Compton approaching the intersection with San Vicente Street. Atlantic Avenue is a main through street 70 feet in width with marked lanes

indicated by a painted double white center line and single broken lines to either side. The four lanes were of concrete paving, each approximately 10 feet in width. San Vicente, running east and west, was paved with "black top" and was 40 feet in width.

As Mrs. Hickson approached the intersection she slowed down to approximately 25 miles an hour. When about 300 feet south of the intersection she commenced to signal for a left turn by holding out her left arm. This signal she continued until she reached the corner. At this time she observed defendants' car southbound in the lane just west of the double center line. There was an automobile stopped at the intersection in the southbound lane. As Mrs. Hickson crossed over the double white line defendants, driving at about 55 miles per hour, swerved around the stopped southbound car and struck Mrs. Hickson's automobile causing personal injuries to the minor plaintiffs.

Questions: First: Was there substantial evidence to support the jury's implied finding that defendants were negligent and that such negligence was a proximate cause of the accident?

[1] *Yes.* The evidence being viewed in the light most favorable to the respondents discloses that defendant Jimmie Beitel, while driving in traffic at a speed of from 55 to 60 miles an hour, swerved around a car stopped at the intersection and hit the car driven by Mrs. Hickson which was already in the intersection.

Clearly such evidence supports the finding of the jury that defendants were negligent and that their negligence was the proximate cause of the accident.

[2] *Second: Did the trial court err in refusing to instruct the jury as follows?*

"If you should find from the evidence that a party to this action conducted himself or herself in violation of Section 551 (a) of the California Vehicle Code, just read to you, you are instructed that such conduct constituted negligence as a matter of law."

The question is immaterial in the present appeal for the reason that the jury found against Mrs. Hickson and in favor of defendants so far as her claim was concerned. Since the foregoing instruction was applicable only to Mrs. Hickson's alleged cause of action and the jury found against her, defendants were not prejudiced by the failure to give the instruction and this court must disregard any error, if it be such, under Article VI, section 4½ of the Constitution.

[3] *Third: Did the trial court err in instructing the jury as follows?*

"Conduct which is in violation of Vehicle Code sections 529 and 551 just read to you constitutes negligence *per se*. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he (or) (she) was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise."

No. Whether or not a violation of a statute proximately contributed to an accident or whether the violation was excusable or justifiable are questions of fact except where the court is impelled to say that from the facts reasonable men could draw only the inference that the negligence of the violator contributed to the accident. (*Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 590, 177 P.2d 279.)

[4] In view of the fact that evidence in the instant case disclosed that defendant Jimmie Beitel passed another car on his right which was stopped at the intersection and an accident immediately ensued, the jury was properly advised of the provisions

of section 529 of the Vehicle Code,¹ also that violation thereof was negligence per se which created a presumption of negligence that was not conclusive.

Affirmed.

MOORE, P. J. and WILSON, J., concur.



103 Cal.App.2d 499

HOAGLAND et al. v. CITY OF LOS ANGELES (two cases).

Civ. 17891.

District Court of Appeal, Second District,
Division 2, California.

April 17, 1951.

Rehearing Denied May 7, 1951.

Hearing Denied June 14, 1951.

W. W. Hoagland and E. M. Findlay, etc., brought action against the City of Los Angeles, a municipal corporation, to recover for work performed by plaintiffs on defendant's sewer which consisted of three concentric rings of brick. The Superior Court of Los Angeles County, Frank G. Swain, J., rendered a judgment for the plaintiffs for an allegedly inadequate amount, and the plaintiffs and the defendant appealed. The District Court of Appeal, McComb, J., held that Superior Court properly awarded plaintiffs damages in amount of net profits lost because defendant reduced quantity of work, and that the Superior Court applied the proper standard of measurement for determining square

feet of brick for which defendant should pay plaintiff.

Affirmed.

Wilson, J., dissented.

1. Municipal corporations ⇨254

Where agreement between city and contractors for repair of sewer consisting of concentric rings of brick provided that total quantity of work should be based on 22,849 square feet, and that such footage would not be increased or decreased by more than 25 per cent of such amount, but city reduced footage to 10,685.02 square feet, so that plaintiffs were damaged by losing net profits in sum of \$7,916.28, contractors were entitled to recover such amount from city, though agreement provided that named quantities were approximate only and were not guaranteed to be correct.

2. Contracts ⇨147(3)

In the interpretation of a written contract, all of the writing must be read together and every part interpreted with reference to the whole so that each provision therein will be effective for its general purpose.

3. Municipal corporations ⇨254

Where contractors in preparing their estimate for work of repairing city's sewer which was constructed of three concentric rings of brick, and in submitting their bid to city, based the estimate and bid on inner surface measurements, they were not entitled to be paid for such work on any other basis of measurement.

1. Section 529 of the Vehicle Code reads as follows: "When Overtaking on the Right is Permitted. (a) The driver of a motor vehicle may overtake and pass to the right of another vehicle only under the following conditions:

"(1) When the vehicle overtaken is making or about to make a left turn.

"(2) Upon a city street with unobstructed pavement of sufficient width for two or more lines of vehicles in each direction.

"(3) Upon a one-way street.

"(4) Upon any highway outside of a city with unobstructed pavement of sufficient width and clearly marked for four or more lines of moving traffic.

"(5) Upon a highway divided into two roadways where traffic is restricted to one direction upon each of such roadways.

"(b) The driver of a motor vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety. In no event shall such movement be made by driving off the paved or main traveled portion of the roadway.

"(c) The provisions of this section shall not relieve the driver of a slow moving vehicle from the duty to drive as closely as practicable to the right-hand edge of the roadway."

Kenneth Sperry, Long Beach, for appellants and respondents Hoagland and Findlay.

Ray L. Chesebro, City Atty., and William P. Mealey, Asst. City Atty., Los Angeles, for respondent and appellant City of Los Angeles.

McCOMB, Justice.

Facts: Plaintiffs and defendant entered into a contract whereby plaintiffs, contractors, agreed to do certain repair work on the outfall sewer of defendant municipality.

The sewer in question was elliptical in shape approximately 6 feet 1 inch in height and 5 feet in width, and was originally constructed by the use of three concentric rings of brick held together with mortar, referred to as the inner ring, the middle ring and the outer ring. The bricks in each ring were laid edgewise so that each ring was approximately 4 inches in thickness. For a space of about 13 inches on each side of the sewer there is a vertical section that is flat. Above this the ceiling of the sewer is shaped like an arch.

By the terms of the agreement defendant agreed to pay plaintiffs for the work upon the following basis:

"(1) Per square foot for removing and replacing brick in the inner ring, \$3.40;

"(2) Per square foot for removing and replacing brick in the middle ring, \$2.30;

"(3) Per square foot for removing and replacing brick in the outer ring, \$2.50;

"(4) Per square foot for repointing existing bricks, \$1.80."

The instructions to bidders contained this provision: "The following quantities are approximate only, and are not guaranteed to be correct. They are the quantities, however, which will be used for the purpose of comparing bids:

"1. 44,545 square feet remove and replace brick in inner ring of sewer.

"2. 16,119 square feet remove and replace brick in middle ring of sewer.

"3. 8,470 square feet remove and replace brick in outer ring of sewer.

"4. 22,849 square feet repoint existing bricks."

The specifications provided among other things:

"The quantities of work in any single addition or deduction, or the net total result of all additions or deductions in this contract, shall not change the quantity of work under any item in the Proposal by more than 25% of the original quantity included in such item, provided, however, that if the item comprises less than 10% of the contract cost, this limitation shall not apply."

Plaintiffs' claim is set forth in the following portion of a letter sent to the Board of Public Works, a copy of which was attached to their claim:

"We do not agree with the method of computing the number of square feet of brick work completed under items number 1, 2 and 3; and we believe that we are entitled to additional payments under item number 4, because of a contract provision limiting changes in quantities.

"Payment for removing and replacing brick under items 1, 2 and 3 has been based on quantities determined in the following manner—the surface width of each ring of brick replaced was measured on the face of the brickwork *nearest* to the inner surface of the sewer and this measurement multiplied by the horizontal length of the replaced section was taken as the number of square feet replaced. As shown on the bottom of the attached sketch, this method of determining areas does not provide payment for a segment of brickwork which occurs in each square foot, due to the fact that the brick are laid on a circular surface. We believe that the proper method of determining the area of brick replaced is by using a width dimension measured on the center line of each course of brick and multiplying this figure by the horizontal length.

"The City has computed the surface width of the inner surface of the sewer above the spring line, by assuming a circular section with a 2'-6" radius centered 6-½" above the spring line; this dimension is 8.93 feet. Our company has computed the same dimension measured on the center

line of the brick course, and, as shown on the attached sketch, have arrived at a percentage increase of 6.75% to be added to all brickwork to adjust the City's estimated quantities, to center line computed quantities. In the last paragraph of this letter we are itemizing the additional payments to be made for brickwork under this method of computing quantities."

After trial before the court without a jury the court found: 1. That defendant had not paid plaintiffs the minimum amount to which they were entitled under their contract, and 2. That the city had correctly computed the amount due for brick work completed by plaintiffs.

From the portion of the judgment favorable to plaintiffs defendant appeals, and from the judgment against them plaintiffs appeal.

A. Defendant's appeal.

Question: Did the trial court properly award plaintiffs \$7,916.28 because defendant had not paid plaintiffs the minimum amount guaranteed by the contract?

[1] *Yes.* Under the terms of the agreement between the parties it was provided that the total quantity of repointing work would be on 22,849 square feet, and that such footage would not be increased or decreased by more than 25% of said amount.

[2] The evidence discloses that defendant reduced the quantity of said repointing to 10,685.02 square feet, and that plaintiffs were damaged by losing net profits in the sum of \$7,916.28. There is no merit in defendant's contention that the provisions in the instructions to bidders reading, "The following quantities are approximate only and are not guaranteed to be correct. They are the quantities, however, which will be used for the purpose of comparing bids * * *," permitted defendant to order any quantity it saw fit because the specifications which must be read in conjunction with the instructions to bidders specifically provided that 22,849 square feet of repointing existing bricks should not be reduced by more than 25% of such contract. It is elementary that in the interpretation of a written contract all of the writing must be read

together and every part interpreted with reference to the whole so that each provision therein will be effective for its general purpose. (*Ghirardelli v. Peninsula Properties Co.*, 16 Cal.2d 494, 496, 107 P.2d 41.)

By applying this rule it is evident that the provisions in the specifications modified the statement in the instructions to bidders. Therefore the trial court's judgment against the city upon this phase of the case was correct.

B. Plaintiffs' appeal.

Question: Did the trial court apply the proper standard of measurement for determining the square feet of brick for which defendant should pay plaintiff?

[3] *Yes.* Bids were received upon the square foot basis on the contract so far as the inner ring was concerned. The contract provided that plaintiffs should be paid for "square feet remove and replace brick in inner ring of sewer," and the trial court found, "that in preparing their estimate for said work and in submitting their bid the plaintiffs in truth and in fact based the same on inner surface measurements and hence are not entitled to be paid for said work on any other basis of measurement."

The trial court's finding was supported by plaintiff Hoagland who testified as follows:

"Q. Now, the quantity of brick required in any given ring, inner or middle or outer ring, the number of brick and amount of brick was not changed by the fact that it was constructed on a curvature, was it? A. I think that is right.

"Q. The same number of brick were used. The difference, caused by the curvature was a matter of different thickness of the mortar, is that right? A. Yes.

"Q. Now, in figuring your cost of doing this job prior to the submission of the bid, submitting your bid figure, you took into consideration the quantity of mortar that would be necessary to be used, did you not? * * * A. Yes. * * *

"Q. At the time you were figuring your work and submitting your contract price, you knew these bricks were on a curvature, did you not? A. That is correct."

It is thus evident by plaintiffs' own admission that plaintiffs figured the additional quantity of material rendered necessary by the fact that the brick work was to be laid on a curve and that their bid was submitted in accordance therewith. It therefore necessarily follows that if plaintiffs are paid an additional amount by reason of the quantity of work being determined other than upon a square foot basis they will receive more than they are entitled to.

Since the judgment of the court was predicated upon unambiguous language in the contract and its finding was supported by the evidence the judgment was correct.

Affirmed.

MOORE, P. J., concurs.

WILSON, Justice.

I dissent.

The findings of the court relating to the method of computation of the amount due and owing to plaintiffs for removing and replacing brick are without foundation in the record.

The evidence, considered in its entirety, sustains plaintiffs' contention as to the manner in which the measurements and computations should be made in determining the number of square feet of brick removed and replaced for which they should be but have not been paid.

The minuscule fragment of evidence quoted in the majority opinion does not sustain the conclusion reached therein nor does it, as declared by the majority, sustain the finding of the court that plaintiffs, in preparing their estimate and in submitting their bid for the work, based the same on the inner surface measurements and that they are not entitled to be paid for the work on any other basis of measurement.

The testimony that the "number of brick" was not changed by the fact that they were laid on an arch and that the difference caused by the curvature "was a matter of different thickness of the mortar" does not sustain the finding. Obviously plaintiffs did not compute the total square footage of the exposed ends of the brick alone without the mortar necessary to hold them in place.

The brick are four inches in width and were laid on edge; the radius of the perimeter of the top of the arch is therefore four inches greater than the radius of the bottom of the arch; the number of square feet is found by multiplying the distance around the mean perimeter by the horizontal length of the work performed. If the measurement is made upon the perimeter of the top or outside surface of the arch plaintiffs would be paid more than they would be entitled to receive, and if measured along the bottom or inside line of the arch they would not be paid enough.

Plaintiffs offered expert evidence, *of which there was no contradiction*, to the effect that where the contract and specifications do not prescribe the method of measurement the customary practice is to use the method which would most accurately reflect the true quantities of work performed, and that the *only method* of ascertaining the true number of square feet of work performed in removing and replacing brick on an arch is to use the center or mean line of the thickness of the arch, thus basing the computation on the average of the two areas, the upper and lower perimeters; thereby the result would be the same and the area of surface would be the same as if the arch had been flattened out.

The contract provided that plaintiffs were to be compensated on the basis of a specified sum "per square foot for removing and replacing brick." All documents making up the contract were prepared by agents of defendants and are therefore to be construed most strongly in plaintiffs' favor. The specifications provided that the contractors would be paid "on a price per square foot in place"; no specific method of measurement was provided in the contract.

The only engineer called by defendant to testify on this subject was the deputy city engineer who prepared the specifications. He testified that the only practical method of measuring the brick was to use the inner surface of the curve. This opinion was reached by him because he could not physically put a tape measure around the upper surface. He was apparently not aware of the simple mathematical method, known to

any school boy, of computing the number of square feet in any curved surface, either on a curve the perimeter of which is known and can be physically touched and measured or on one that it presented in an abstract problem. The inner surface being known, the outer surface, says the beginner's text book in mathematics, can be easily computed by adding four inches to the radius of the curve. Though the witness had prepared the specifications, he expressed his inability to answer a question as to the customary practice, where a contract is silent as to the method of measurement, to adopt the method which will reveal the most accurate measurement. He further testified that he had never been an engineer on a job where a similar question of computation had arisen and that he got his *information from a bricklayer* who was in the employ of the city. It is plain nonsense to accept the evidence of such a witness against that of expert engineers who had had years of experience in similar work involving many millions of dollars.

Not only does the evidence quoted in the majority opinion fail utterly to support the finding but other uncontradicted evidence of plaintiff Hoagland is directly contrary to the findings of the court as shown by his answers to questions asked by the city attorney on cross-examination:

"Q. As a matter of fact, when you bid this job, when you did the first job, and all through the progress of this job, you expected to be paid on the basis of the measurement of the face of the work done, did you not? A. No.

"Q. You did [bid] it on that basis, did you not? A. No; I bid it, when I computed this job, I computed it on the basis of a square foot of brick work, one square foot, four inches thick; in other words, a square foot of brick work laid out."

In answer to questions by the court in seeking additional information with reference to the estimates which he made in preparation for his bid, he stated he figured the volume of material and "worked it out on the square foot basis for a ring of brick four inches thick. *I worked it out on a square foot basis for cement, sand and*

*brick work * * ** I just figured the square feet of brick work laid out."

"Q. Per square foot of the inner surface or the outside surface? A. Per square foot of the *average surface*, because I figured a per square foot of brick four inches thick in determining the volume of material, which would be estimated *on the average surface rather than the inner and outer surfaces * * ** And then I transferred those figures up into this sheet, which in turn were transferred to this sheet, and so *I did not adjust for the lesser quantity which would be obtained by measuring only on the inside surface of the sewer*. I would have had to adjust the figure and increase the per unit cost, and I did not do it. * * *

"Q. And your price per square foot was based on the assumption that the square feet had the same bottom dimension that it had at the top. A. *It would be measured on the median line*, that is correct." (Emphasis added.)

The foregoing testimony is uncontradicted that in making their estimate plaintiffs used for computation the median line between the upper and lower surfaces of the arch, and if they had computed on the basis of the lower surface their "per unit" bid would have been increased proportionately. The only expert evidence in the case is that such is the correct method of computation. There was no evidence, expert or otherwise, to the contrary.

All efforts to obtain statements from the witness that his computations were made on a line other than the median line met with failure. Since the evidence stands without question or contradiction, such method should have been adopted by the trial court. The court's finding has no support in the record and plaintiffs are entitled to the amount sued for.

There need not be a retrial since the court made findings of (1) the quantities if based upon the measurement of the inner or lower surface of each ring of brick removed and replaced and (2) the quantities if measured on the mean line between the upper and lower surfaces. The finding as to the quantities arrived at by the two

respective methods of computation are not questioned by either party, hence it is only a matter of calculating the amount due by multiplying the number of square feet measured on the mean line by the price per square foot specified in the contract for each ring of brick.

The judgment should be modified by striking therefrom the words and figures "Seven Thousand Nine Hundred Sixteen and 28/100 Dollars (\$7,916.28)" and inserting in lieu thereof the words and figures "Twenty-one Thousand Seven Hundred Eleven and 60/100 Dollars (\$21,711.60)."

Rehearing denied; WILSON, J., dissents.



103 Cal.App.2d 388

HARPER v. HEIZER.

Civ. 18156.

District Court of Appeal, Second District,
Division 2, California.

April 11, 1951.

Action by A. M. Harper against Helen H. Heizer, to quiet title to realty. The Superior Court, Los Angeles County, Kenneth C. Newell, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Moore, P. J., held that the evidence sustained finding that defendant, who was the daughter of plaintiff, did not contribute anything of value to the purchase of property by mother.

Affirmed.

1. Quieting title ⇨7(1)

Where daughter allegedly loaned mother money for a down payment on the purchase of realty, and daughter was named as a grantee with mother, but the money was repaid within 60 days after the loan and the money did not go into the purchase price of realty, the loan constituted no consideration for the title to property, as regards mother's right to have title quieted in her.

2. Quieting title ⇨44(3)

In quiet title action by mother against her daughter, the evidence sustained finding that the daughter did not contribute anything of value to the purchase of property by mother, even though the daughter had been named as a grantee with mother in the deed.

3. Trusts ⇨81(4)

Where at time of purchase of property daughter told her mother that daughter's name would have to go on the deed as one of the grantees with mother in order to get the occupancy of a certain apartment on the lot and to get credit for the purpose of making all the improvements on land, the mother's ultimate payment of the purchase price of the property resulted in daughter's holding an apparent title solely for the benefit of mother. Civ.Code, § 853.

Blanche and Fueller, Pasadena, for appellant, Charles M. Fueller, Pasadena.

Leon U. Everhart, Pasadena, and Edward P. Hart, Los Angeles, for respondent, Henry F. Walker, Los Angeles, of counsel.

MOORE, Presiding Justice.

Appeal from judgment quieting title in plaintiff. The complaint is in two counts, namely, (1) to quiet title; (2) to enforce a resulting trust. Appellant demands a reversal on the grounds that the findings are not supported by the evidence and the judgment is contrary to law.

Respondent is the mother of appellant and three other children. The property involved is a lot in Pasadena improved with three houses. In 1937 when respondent was 67 years of age she and her husband moved their domicile from Merced to Altadena where, for a while, appellant resided with them. Five years later the aged couple purchased a small house in east Pasadena on Vista avenue. They improved it by adding an apartment to the garage which was occupied by appellant for a year. The amount paid as rent is still in dispute and is immaterial here, but then and for some time thereafter she con-

tributed monthly to her parents, and, after her father's decease, to her mother. The latter held such payments until they totaled \$725 which sum was invested in U.S. series E bonds. After respondent sold her Merced property she assigned the \$1,600 trust deed received in part payment therefor to appellant in repayment of loans the latter had previously made to her parents.

After appellant's return in 1944 and while residing at some distance from respondent, she undertook to persuade her mother to purchase a larger place on Hudson avenue. At this she succeeded in March, 1945, notwithstanding respondent's protestations that she was comfortably situated on Vista avenue and practically free of debt. She entered into an escrow to purchase the Hudson property for \$8,000. Because she was without funds she accepted appellant's loan of \$270 which she supplemented with other loans to make the initial payment of \$500. Having sold the Vista avenue home for \$6,000 she was enabled to repay appellant the \$270 and to consummate the new purchase by giving a note for \$3,157.42, secured by a trust deed.

[1] At the time of the purchase appellant told her mother that appellant's name would have to go on the paper in order to get the occupancy of the garage apartment on the lot and to get credit for the purpose of making all the improvements. As a result of such argument respondent caused the title to be vested in the names of herself and appellant. This is the basis of appellant's claim that the title should remain so vested although she admits that it was not to be a "regular joint tenancy title." In further support of her contention appellant argues that while respondent had paid out in remodeling and improving the structures \$11,664.36, only \$1,062.29 thereof had been earned by her mother at baby sitting while the rentals collected from tenants had aggregated \$10,102.07. She asserts that the rentals were made possible only by virtue of her agreement to lend her credit. She now contends that she is entitled to prevail because (1) she loaned her mother \$270 to make up

the down payment on the purchase; (2) she loaned her credit; (3) she signed the note and trust deed given as part payment for the land; (4) also, in 1947 she signed the note for \$1,500 and trust deed to secure same; (5) she occupied and paid rental on the garage apartment which she furnished; (6) she paid installments aggregating \$725. The answers to such claims are that the \$270 was repaid in 60 days after the loan. Since it did not go into the purchase price it constitutes no consideration for the title. *Viner v. Utrecht*, 26 Cal.2d 261, 269, 158 P.2d 3. Her agreement to lend credit to her mother did not take from appellant anything, nor did it cause her any detriment. Signing the trust deed in 1945, to secure payment of the \$3,157 balance of the purchase price as well as the subsequent \$1,500 note and trust deed cost appellant nothing. The note was repaid and the balance is being paid in monthly installments. Appellant's name on both caused her neither pecuniary loss nor spiritual distress. The payee's remedy in each instance was a foreclosure; no judgment for deficiency could have been rendered against appellant. *Brown v. Veloz*, 90 Cal.App.2d 793, 799, 204 P.2d 110. If appellant occupied the garage apartment, she paid only \$50 monthly while other tenants during her absence paid from \$75 to \$85. The court could have reasonably inferred that her payment of the lesser sum was on account of being respondent's daughter and not because the latter had an interest in the ownership of the place. If the furniture was used during appellant's absence, it was kept in a better condition than if it had lain in dust and neglect, and she suffered no expense of moving or storage. As to the \$725 paid to respondent, the installments were gifts, made for respondent's support. They were not invested in the new home.

[2] It was therefore not an unreasonable inference to find that appellant did not contribute anything of value to the purchase of the property. The judgment quieting title against appellant and in respondent is the necessary, logical sequence of such finding and therefore cannot be dis-

turbed. *Stromerson v. Averill*, 22 Cal. 2d 808, 815, 141 P.2d 732.

[3] In view of the foregoing conclusions, an extended discussion of respondent's asserted right to a resulting trust in her favor would be futile. Suffice it to say that in the absence of an express contract to the contrary, the mother's ultimate payment of the purchase price of the property naturally results in appellant's holding an apparent title to be solely for the benefit of respondent. Civil Code, sec. 853; *Parks v. Parks*, 179 Cal. 472, 478, 177 P. 455.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.



103 Cal.App.2d 276

WILLIAMS v. WILLIAMS.

Civ. 18199.

District Court of Appeal, Second District,
Division 2, California.

April 5, 1951.

Action for divorce by Vevia C. Williams against William Clarence Williams, also known as William Clarence Gunderson, on grounds of extreme cruelty. The Superior Court, Los Angeles County, Julius V. Patrosso, J., entered an interlocutory decree of divorce, and granted division of the community property, alimony, and custody of children to wife, and granted the husband the right to visit the children on alternate weekends. From subsequent order of the court modifying the alimony award, plaintiff appealed. The District Court of Appeal, McComb, J., held that the trial court did not abuse its discretion in the award of community property or the modification of the alimony award.

Affirmed.

1. Divorce ⚡252

When a divorce is granted on the ground of extreme cruelty, the innocent

party must be awarded more than one-half of the community property.

2. Divorce ⚡286

In the absence of an abuse of discretion, the decision of the trial judge, in an action for divorce on grounds of extreme mental cruelty, awarding wife over one-half of the community property, was final.

3. Divorce ⚡241

Where community property had value of \$23,850, in divorce action for extreme mental cruelty, awarding wife \$13,200 and husband \$10,650 was not an abuse of discretion.

4. Divorce ⚡299

Where trial court granted decree of divorce to wife on grounds of extreme mental cruelty, decree that defendant could visit children and have their complete custody on alternate weekends was authorized.

5. Divorce ⚡305

Court order reducing amount of alimony awarded wife in divorce decree, to induce wife to bring parties' children back into the state so that the husband could have their custody on alternate weekends, was not an abuse of discretion.

Gladys Towles Root, Los Angeles, for appellant.

Maurice Rose and Albert L. Zook, Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff appeals from (1) that portion of an interlocutory decree of divorce which awards community property to defendant and grants defendant the right to visit and have possession of the minor children of the parties on alternate weekends, and (2) an order of the trial court modifying the interlocutory decree of divorce by granting plaintiff \$1.00 per month for her maintenance and support instead of \$100 per month as originally awarded in the interlocutory decree of divorce.

[1] **1. Interlocutory Decree of Divorce.**

(a) *Did the trial court err in dividing the community property between the parties?*

No. When a divorce is granted on the ground of extreme cruelty the innocent party must be awarded more than one half of the community property. (Tipton v. Tipton, 209 Cal. 443, 444, 288 P. 65; Gaeta v. Gaeta, 102 Cal.App.2d 87, 226 P.2d 619.)

[2] In the instant case the community property was of the value of \$23,850. Of this plaintiff was awarded property of the value of approximately \$13,200 and defendant was awarded property of the value of approximately \$10,650. In the absence of an abuse of discretion the decision of the trial judge as to the division of community property is final. (Cunha v. Cunha, 8 Cal.App.2d 413, 416, 48 P.2d 130). In view of the division made it cannot be said that there was an abuse of discretion.

(b) *Did the trial court err in providing in the interlocutory decree of divorce that defendant had the right to visit the minor children of the parties and to award their custody to him on alternate weekends?*

[3] No. It is within the power of the trial court in making disposition of minor children of divorced parents to award the care, custody and control thereof to either the innocent or offending party when the decree is granted upon the ground of extreme cruelty. (In re De Leon, 70 Cal. App. 1, 6, 236 P. 738.)

[4] Clearly since the trial court had authority to award the complete custody of the children to defendant, it had the authority to decree that defendant might visit the children and have their custody on alternate weekends

[5] 2. Order Modifying the Interlocutory Decree as to Amount of Plaintiff's Alimony.

Did the trial court err in reducing the amount of alimony awarded to plaintiff from \$100 per month to \$1.00 per month?

No. The evidence disclosed that after the trial plaintiff removed the minor children of the parties from the state so that defendant could not have the opportunity of visiting his children and having their custody on alternate weekends. Therefore the trial court in endeavoring to have plaintiff comply with the provisions of the in-

terlocutory decree properly reduced the amount of alimony she was to receive. (Fay v. Fay, 12 Cal.2d 279, 282, 83 P.2d 716; cf. Gury v. Gury, 219 Cal. 506, 507, 27 P.2d 758.)

It thus appears that the trial court did not abuse its discretion in making the order here questioned.

Affirmed.

MOORE, P. J., and WILSON, J., concur.



103 Cal.App.2d 496

KARLEIN v. KARLEIN.

Civ. 17909.

District Court of Appeal, Second District,
Division 1, California.

April 17, 1951.

Viola R. Karlein brought action against Ludwig Karlein for divorce. The Superior Court of Los Angeles County, William B. McKesson, J., entered an order denying defendant's motion to set aside his default and default interlocutory judgment, and the defendant appealed. The District Court of Appeal, Drapeau, J., held that trial court abused its discretion in denying motion of defendant husband to vacate interlocutory judgment of divorce on ground of excusable neglect under showing made by defendant husband.

Order reversed.

1. Appeal and error ⇐957(1)

Generally, reviewing tribunal will uphold the discretion exercised by trial court in granting or denying motions to set aside defaults for excusable neglect. Code Civ. Proc. § 473.

2. Divorce ⇐161

Trial court abused its discretion in denying motion of defendant husband to vacate interlocutory judgment of divorce on ground of excusable neglect under showing made by defendant husband that he was at

the time in a disturbed mental state. Code Civ.Proc. § 473.

3. Appeal and error ☞959(1)

An appellate court listens more readily to an appeal from order denying relief than one granting relief under statute providing for setting aside a default judgment for excusable neglect. Code Civ.Proc. § 473.

4. Judgment ☞143(3)

The statute providing for setting aside a default judgment for excusable neglect is remedial and any doubt as to propriety of setting aside a default under the statute should be resolved in favor of the application, even in a case where the showing is not strong. Code Civ.Proc. § 473.

5. Judgment ☞138(2), 162(2)

Neither party should be deprived of a hearing except when guilty of inexcusable neglect and doubts should be resolved in favor of an application to set aside a default judgment. Code Civ.Proc. § 473.

6. Judgment ☞139

Setting aside default is primarily within trial court's legal discretion, exercised according to spirit of law in manner subserving substantial justice. Code Civ.Proc. § 473.

7. Judgment ☞162(2)

Doubt as to propriety of vacating default judgment should be resolved in favor thereof to the end of securing a trial upon the merits. Code Civ.Proc. § 473.

8. Appeal and error ☞959(1)

Orders denying motions to set aside default judgments are scanned more carefully on appeal than orders granting such relief so that case may be heard on merits whenever possible. Code Civ.Proc. § 473.

William Hicks, Hollywood, for appellant.

McIver & Snow, Montebello, for respondent.

DRAPEAU, Justice.

Plaintiff and defendant married in Las Vegas in 1941. They have two children, one adopted.

November 10, 1949, the wife filed complaint for divorce.

November 18, 1949, defendant appeared, without counsel, on an order to show cause, and was ordered to make payments for the support of his children.

January 6, 1950, defendant again appeared, without counsel, on a contempt proceeding, which was dismissed.

On both of these occasions defendant attempted to reconcile with plaintiff, but she "refused to talk to" him.

November 14, 1949, copy of the complaint and summons was served personally upon defendant.

December 22, 1949, his default was entered, no appearance having been made for him.

January 12, 1950, interlocutory judgment of divorce was made, and entered on the following day.

February 3, 1950 defendant appeared by counsel and moved to set aside the default and the default judgment. The motion was submitted upon affidavits of defendant, his wife, and others, and by the court denied. From this order defendant appeals.

Defendant's affidavit alleges that he was not familiar with legal procedure, and had some difficulty with the English language; that plaintiff in 1947, and again in 1948, instituted divorce proceedings against him which terminated by reconciliation; that when he was served with summons and complaint he did not realize that the complaint had to be answered within ten days; that up until January 11, 1950, defendant made several attempts to get in touch with counsel who represented him in the previous divorce proceedings, but was unable to contact him.

Defendant's affidavit further alleges that on January 11, 1950, he was taken into custody on a psychopathic warrant issued upon an affidavit sworn to by his wife; that he was held in Los Angeles County Hospital and in Patton State Hospital until January 27, 1950, when he was found sane by a jury and released; that at the time of the default hearing resulting in the interlocutory decree he was actually confined in the

psychopathic ward of Los Angeles County Hospital, and that plaintiff well knew of his incarceration.

The wife in her affidavit averred that plaintiff was better acquainted with legal procedure than the ordinary person, having been involved in legal matters, both civil and criminal; that from the date of her separation from defendant he had paid nothing to her for her support, or for the support of the children; that defendant had threatened to kill her and the children, and that she was in fear of him.

Other affidavits were by court attaches and counsel. Counsel for defendant averred that he believed defendant had a good and valid defense to the cause of action alleged in plaintiff's complaint. Affidavits of court attaches stated that at the time defendant appeared before them they had advised him to obtain counsel for himself.

[1] While it is the general rule that reviewing tribunals will uphold the discretion exercised by a trial court in granting or denying motions for relief under Section 473 of the Code of Civil Procedure, it would seem in this case that defendant should have an opportunity to defend himself. The Court Commissioner before whom defendant appeared for the purpose of fixing temporary support and counsel fees reported that defendant appeared on the verge of a nervous collapse. On that hearing it was stipulated that defendant would submit himself to a "psychological" examination. The contempt proceeding was dismissed because of defendant's mental condition. Undoubtedly defendant was in a disturbed mental state.

[2] In the circumstances here appearing a showing of excusable neglect was made, and defendant was entitled to relief from the default taken against him and from the interlocutory judgment which followed. It certainly may not be said that he was guilty of inexcusable neglect.

[3,4] An appellate court listens more readily to an appeal from an order denying relief under Section 473 of the Code of

Civil Procedure. The law is remedial and any doubt as to the propriety of setting aside a default should be resolved in favor of the application, even in a case where the showing under the section is not strong. *Hambrick v. Hambrick*, 77 Cal.App.2d 372, 175 P.2d 269.

[5] Neither party should be deprived of a hearing except when guilty of inexcusable neglect, and doubts should be resolved in favor of an application to set aside a default judgment. *Bodin v. Webb*, 17 Cal. App.2d 422, 62 P.2d 155.

[6-8] In the case of *Brill v. Fox*, 211 Cal. 739, 297 P. 25, 26, our Supreme Court states the rule to be applied in such cases as this:

"The legal principles underlying the granting of motions to set aside defaults are comparatively simple, and have been frequently announced by this court. The question is primarily one within the discretion of the trial court, but this discretion is not capricious or arbitrary, but it is an impartial discretion guided and controlled in its exercise by fixed legal principles.

"It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice.' (Citing cases.) It is also well settled that it is the policy of the law to bring about a trial on the merits wherever possible, so that any doubts which may exist should be resolved in favor of the application, to the end of securing a trial upon the merits. (Citing cases.) Although it is true that courts of appeal have shown great reluctance in cases of this kind to disturb the order of the trial court, it is equally true that denials of such relief by the trial court are scanned more carefully than cases where the trial court has granted the relief, to the end that wherever possible cases may be heard on their merits. (Citing cases.)"

The order is reversed.

WHITE, P. J., and DORAN, J., concur.

103 Cal.App.2d 585

CHAPMAN v. GIPSON.

Civ. 17853.

District Court of Appeal, Second District,
Division 1, California.

April 19, 1951.

N. B. Chapman brought action against A. L. Gipson to dissolve a partnership and to secure an accounting. A judgment confirming referee's report was entered in the Superior Court of Los Angeles County, Ingall W. Bull, J., and the plaintiff appealed. The District Court of Appeal, Doran, J., held that where chief issue was the accounting and the parties had presented to trial court "voluminous" accounts, there was no impropriety in ordering a reference.

Judgment affirmed.

1. Reference ⇨102(4)

Regardless of any defect in service of notice of motion to confirm report of referee, timeliness of notice was waived by plaintiff, where plaintiff's counsel appeared and participated at the hearing of the motion and contested the referee's report. Code Civ.Proc. §§ 1005, 1013.

2. Partnership ⇨332

Referee's report in action to dissolve partnership and for an accounting in which he found plaintiff was indebted to defendant in a certain amount constituted findings of fact and conclusions of law, whatever terminology might have been used, and plaintiff could not complain that judgment confirming referee's report was signed without making of required findings of fact and conclusions of law and that such findings and conclusions were not waived by plaintiff. Code Civ.Proc. §§ 643, 644.

3. Partnership ⇨332

In action to dissolve partnership and secure accounting, where chief issue was the accounting and parties had presented to trial court "voluminous" accounts, there was no impropriety in ordering a reference.

Arthur A. Jones, Los Angeles, for appellant.

Hector P. Baida, J. Leroy Irwin, Santa Monica, for respondent.

DORAN, Justice.

The complaint herein was instituted by appellant Chapman for the purpose of dissolving a partnership existing between Chapman and respondent Gipson and to secure an accounting. Appellant alleges that respondent had "misapplied partnership receipts, profits and funds, secretly in bad faith, misappropriated co-partnership property funds wrongfully, and persisted in bringing some \$4,000.00 worth of electric parts into the co-partnership place of business" alleged to have been stolen. Appellant's brief avers that on February 6, 1947, some four months after starting the business, "plaintiff and respondent ceased to do business as a co-partnership".

Respondent's answer alleges an oral agreement to pay appellant \$1,295 for appellant's interest in the business, and willingness to pay such sum. Some nine months later respondent filed a cross-complaint for dissolution and accounting. Appellant's answer to this cross-complaint alleges termination of the partnership and that the disagreement arose because respondent Gipson refused to produce a bill of sale showing legitimate acquisition of the alleged stolen electric parts. This disagreement led to a fist fight between the two partners.

As stated in appellant's brief, the parties and attorneys appeared in court on February 19, 1948, and appellant tendered to the Court "A voluminous 40-page typewritten accounting * * * and a copy of a voluminous accounting made by Certified Public Accountants employed by respondent". The trial court, however, refused to hear the matter and referred it for an accounting to J. W. Mullin, Jr. a special referee. The referee was then "furnished with a 44-page written accounting, prepared in great detail, together with an inventory, by appellant N. B. Chapman, and an accounting in writing prepared by respondent's accountant". A hearing was held before the referee on November 26, 1948, and on February 17, 1949 the referee's report was filed with the trial court.

On February 23, 1949, appellant's brief avers, "without notice to appellant, the

court signed an order" adopting the referee's report; respondent then moved the trial court to set aside such order and, on notice, to confirm the referee's report. Appellant complains that "The customary five days' notice" of this hearing was not given, but admits that on "Apr. 27, 1949, both counsel appeared in opening court and appellant objected to the referee's report". The trial court adopted the referee's report and ordered judgment accordingly. A minute order of June 8, 1949, recites: "Counsel for defendant is ordered to prepare Findings and Judgment", and appellant complains that no such findings of fact or conclusions of law were ever entered, and that there was no waiver thereof. The judgment entered was in respondent's favor in the amount of \$2,386; the referee's fees were divided equally between the parties.

[1] Appellant's first question as phrased in the brief is, "May the respondent file a Notice of Motion to confirm the report of the referee, in the trial court on April 23, 1949, serve a copy of the Notice of Motion upon appellant's attorney on April 25, 1949, and hold a hearing on April 27, 1949?" The argument is that Section 1005 of the Code of Civil Procedure requires five days notice of a motion. Respondent's brief points out that the notice herein was served by mail; that Section 1013 provides that service is complete at the time of the deposit in the mail, and that appellant has not made the affidavit of service by mail a part of the record on appeal.

Regardless of any defect in the service, "the timeliness of the notice was waived by the appellant, for his counsel appeared and participated at the hearing of the motion on April 27, 1949, and contested the referee's report. He did not raise the question of service in the trial court." As is said in *Acock v. Halsey*, 90 Cal. 215, 220, 27 P. 193, 194, "the object of giving the notice was fully accomplished without giving it".

[2] The second and third questions raised in appellant's brief relate to the fact that although the trial court ordered respondent to prepare findings of fact and conclusions of law, and such findings were

not waived by appellant, the judgment was later signed without the making of such findings and conclusions. In this connection appellant relies upon Section 643 of the Code of Civil Procedure providing that "The referees or commissioner must report their findings in writing to the court within twenty days after the testimony is closed and the facts found and conclusions of law must be separately stated therein".

Respondent answers this argument by quoting Section 644 of the Code of Civil Procedure which provides that "The finding of the referee or commissioner upon the whole issue must stand as the finding of the court, and upon filing of the finding with the clerk * * * judgment may be entered thereon in the same manner as if the action had been tried by the court". In *Chiarodit v. Chiarodit*, 218 Cal. 147, 150, 21 P.2d 562, 563, the court said: "where the whole case is tried by the referee his findings take the place of the decision by the court and become a part of the judgment roll".

Since the referee did make an accounting as between the parties as was directed in the order of reference, and did report to the trial court that such accounting showed that appellant was indebted to respondent in the sum of \$2,386, it is not a matter of great moment whether the court referred to the referee's document as a "report" or as "findings". In effect the referee's report of the facts found and the conclusion that appellant was indebted to respondent, can be nothing less than findings and conclusions, whatever terminology may be used. Respondent's brief also notes that although the appellant did object to confirmation of the referee's report, the questions now raised, namely, service of notice and inadequacy of findings, were apparently not presented to the trial court. Appellant's present objections in respect to these matters are untenable.

[3] Appellant's final argument is that "counsel for appellant objected in open court to a reference to a referee declaring that two separate voluminous written accountings were made up and ready to file with the court, and that no further ac-

counting of any kind was required". It is urged that there was no necessity for an accounting by a referee; that it was error to direct a reference, and that "Every litigant is entitled to his day in court, before a regular trial judge". The action, however, as instituted by appellant, was an equitable one "for dissolution of partnership and accounting". The chief if not the sole issue before the court was the accounting. The parties had presented to the trial court, as stated by appellant, "voluminous" accounts. Under such circumstances there was no impropriety in ordering a reference. Appellant's contentions are without merit.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



103 Cal.App.2d 669

PEOPLE v. THOMAS.
Cr. 4590.

District Court of Appeal, Second District,
Division 3, California.
April 20, 1951.

Virginia Thomas was convicted in the Superior Court of Los Angeles County, Stanley Mosk, J., of assault with a deadly weapon and from the judgment and sentence she appealed. The District Court of Appeal, Vallée, J., held that the evidence was sufficient to sustain conviction and that an appeal would not lie from the sentence.

Appeal from sentence dismissed and judgment affirmed.

1. Criminal law Ⓒ1023(10)

An appeal will not lie from a sentence.

2. Assault and battery Ⓒ92

Evidence that defendant pointed gun at a man and pulled the trigger and that bullet was seen to hit the man was sufficient to sustain conviction of assault with a deadly weapon, though witness did not

see the bullet leave gun and the man shot did not act as if he had been hit.

3. Assault and battery Ⓒ56

Aiming loaded gun at a man and pulling the trigger constituted "assault with a deadly weapon".

See publication Words and Phrases, for other judicial constructions and definitions of "Assault with a Deadly Weapon".

4. Criminal law Ⓒ260(11)

Where case is tried by the court sitting without a jury, it is the function of trial court, and not of appellate court, to resolve any inconsistencies and contradictions in the testimony of a witness.

5. Criminal law Ⓒ553

The trier of fact may believe and accept a portion of the testimony of a witness and disbelieve the remainder of such testimony.

6. Criminal law Ⓒ1144(13)

On appeal, that portion of evidence which supports the judgment must be accepted, and not that portion which would defeat or tend to defeat the judgment.

7. Criminal law Ⓒ1159(2)

A judgment cannot be set aside on appeal unless it clearly appears that on no hypothesis is there sufficient substantial evidence to sustain it.

8. Criminal law Ⓒ553

Testimony that defendant pointed gun at a man and pulled the trigger and that witness saw bullet hit the man was not "inherently improbable" so as to justify its rejection on appeal from conviction of assault with a deadly weapon.

See publication Words and Phrases, for other judicial constructions and definitions of "Inherently Improbable".

9. Criminal law Ⓒ553

Testimony is not "inherently improbable" unless it appears that what was related or described could not have occurred.

10. Criminal law Ⓒ1159(4)

To warrant rejection on appeal of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that such

statements are true or their falsity must be apparent without resorting to inferences or deductions.

11. Criminal law ⇨1159(2)

Where insufficiency of the evidence is asserted on appeal from conviction, the only function of appellate court is to determine whether there is sufficient substantial evidence to support the conclusion reached in trial court.

Stanley L. Avery, Edward I. Gorman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

[1] Defendant was charged with assault with intent to commit murder. She was convicted of assault with a deadly weapon by the court sitting without a jury. She appealed from the judgment and sentence. As an appeal does not lie from the sentence, that appeal must be dismissed.

Defendant challenges the sufficiency of the evidence to sustain the judgment.

During the evening of June 16, 1950, a man named Mial, another named Holt, and Mr. and Mrs. Bennett were together. They visited several clubs where they drank beer. About 3:00 a. m. on June 17 they called at defendant's home. Defendant and a man named Perry were there. All parties then drank some whisky. Mrs. Bennett fell asleep in the living room. Defendant and Mial went into the back bedroom. After a few minutes defendant came out of the bedroom, went into an adjoining bathroom, and then into the living room. She returned to the back bedroom. Mial was still there. Defendant came out shortly, went to the front bedroom, and came out with a gun in her hand. Bennett said to defendant, "There is no sense in all that * * * I will get him out of here." Defendant said something to the effect "I ought to kill him." She then returned to the back bedroom. Mial was still there. Defendant pointed the gun at Mial and pulled the trigger. The bullet hit him. Bennett saw defendant pull the trigger,

saw the shot fired, saw the shot hit Mial, but did not see the bullet come out of the gun. Mrs. Bennett was awakened by the shot and saw the gun in defendant's hand. After she fired the shot, defendant returned to the living room and said "Don't nobody have to leave, aint nothing happened, nobody has to leave."

Mial, who was buttoning his shirt when the shot was fired, came out of the bedroom with his coat on his arm. Defendant, still holding the gun in her right hand, let him out the front door. Three or four minutes later the Bennetts and Holt left through the front door and found Mial lying on the lawn groaning. There was blood on his shirt. Bennett and Holt rushed him to a hospital where he was operated upon. He had been shot in the side and was in the hospital nearly three months.

The gun was found under the bed in the front bedroom of defendant's house loaded with four live cartridges and one empty shell. The bullet was found on the floor in the back bedroom. There was a bullet hole in the north wall of the back bedroom about 26 inches above the floor.

On June 19, 1950, an officer had a conversation with defendant. She asked him how Mial was. He asked her where she got the gun. She said a Mexican fellow had brought it to her house a month before. Defendant testified that she was holding the gun when it was fired but that it was discharged accidentally.

Mial testified that he had no recollection of what occurred at defendant's home because he was intoxicated; that he was shot in the right side that night.

[2,3] The evidence establishes the foregoing facts and fully sustains the judgment. Defendant argues that because Bennett did not see the bullet leave the gun, because Mial did not act as if he had been hit, and because he walked out of the house without aid, the trial court was not warranted in concluding that the bullet hit Mial. The argument is fallacious. Bennett testified that the bullet hit Mial. Further, the offense was committed when defendant aimed the gun at Mial and pulled

the trigger. *People v. McCoy*, 25 Cal.2d 177, 192, 153 P.2d 315.

[4-10] Defendant argues that there are many inconsistencies and contradictions in the testimony of Bennett, and that it was inherently improbable. It was the function of the trial court, not this court, to resolve inconsistencies and contradictions, if any, in the testimony of Bennett. The trier of fact may believe and accept a portion of the testimony of a witness and disbelieve the remainder. On appeal that portion which supports the judgment must be accepted, not that portion which would defeat, or tend to defeat, the judgment. *People v. Hills*, 30 Cal.2d 694, 701, 185 P.2d 11; *People v. Amy*, 100 Cal.App.2d 126, 223 P.2d 69. A judgment cannot be set aside on appeal unless it clearly appears that on no hypothesis whatever is there sufficient substantial evidence to sustain it. *People v. Wolfeart*, 98 Cal.App.2d 653, 655, 220 P.2d 778. The testimony of Bennett does not appear to be inherently improbable. Testimony is not inherently improbable unless it appears that what was related or described could not have occurred. *Trancoso v. Trancoso*, 96 Cal.App.2d 797, 798, 216 P.2d 172. "To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions." *People v. Huston*, 21 Cal.2d 690, 693, 134 P.2d 758, 759; see also *People v. Robinson*, 87 Cal.App.2d 772, 774, 197 P.2d 776.

[11] At the close of the People's case, defendant made a motion to dismiss, which was denied. She claims error. After the motion was denied, defendant introduced in evidence the testimony taken at the preliminary examination and testified in her own behalf. If she was satisfied that there was a total lack of evidence upon some essential issue she could have submitted the case on the evidence of the prosecution. On appeal from the judgment where insufficiency of the evidence is asserted our only function is to determine whether there is sufficient substantial evidence to support the conclusion reached in

the court below. *People v. Lewis*, 124 Cal. 551, 553, 57 P. 470, 45 L.R.A. 783; *People v. Jackson*, 78 Cal.App. 442, 450, 248 P. 1061.

The appeal from the sentence is dismissed. The judgment is affirmed.

SHINN, P.J., and WOOD, J., concur.



103 Cal.App.2d 589

RICHFIELD OIL CORP. v. BLOOMFIELD et al.
Civ. 18205.

District Court of Appeal, Second District,
Division 2, California.

April 19, 1951.

Action by the Richfield Oil Corporation, a Delaware corporation, against Henry F. Bloomfield, Jr. and others, to quiet title. From a judgment for plaintiff in the Superior Court for Santa Barbara County, Charles F. Blackstock, J., the defendants appealed. The District Court of Appeal, Moore, J., held that under a mineral lease of the "unless" type, where the lessees never commenced drilling operations nor paid nor tendered any rentals prior to commencement of the action to cancel, failure of the lessee to commence drilling operations within the time specified or to pay rentals provided for resulted in an automatic termination of the lease without the lessors serving notice of a default.

Judgment affirmed.

I. Mines and minerals ⇨78(3)

Under a mineral lease of the "drill or pay" type, the lessee covenants to commence drilling operations or perform the alternative obligation to pay rent, and a notice of default is indispensable when the writing contains a provision requiring notice to be given of the default of the lessee to drill or pay the stipulated rent and the lessor may by action enforce the payment thereof.

See publication Words and Phrases, for other judicial constructions and definitions of "Drill or Pay Lease".

2. Mines and minerals ⇨78(3)

Under the "unless" type of mineral lease, failure to drill or pay rent is merely a condition precedent whose occurrence terminates all rights of the lessee, though the lessee's refusal either to drill or to pay does not give rise to a cause of action against him, and such lease carries with it, its own phraseology, and automatic termination which operates when the lessee fails to commence drilling operations within the time specified and fails to exercise his privilege of paying delay rentals in advance, even though lease contains a provision requiring notice of default to be given the lessee upon a breach of the agreement.

See publication Words and Phrases, for other judicial constructions and definitions of "Unless Lease".

3. Mines and minerals ⇨78(1)

The duty to drill and explore property under a mineral lease of the "unless" type where no substantial cash consideration is involved, should be treated not as a mere covenant, but as a condition to the lease's continued existence, and the lessee should not be encouraged to hold the lease for speculative purposes only without making any attempt to develop the property's possible resources.

4. Mines and minerals ⇨78(3)

Under a mineral lease of the "unless" type, where the lessees never commenced drilling operations nor paid nor tendered any rentals prior to commencement of the action to cancel, failure of the lessee to commence drilling operations within the time specified or to pay rentals provided for, resulted in an automatic termination of the lease, without the lessors serving notice of a default.

Kornblum & Austrian and Grayce M. Smith, all of Los Angeles, for appellants.

Jack E. Woods and William D. Foote, Los Angeles, for respondents.

MOORE, Presiding Justice.

Defendants appeal from a decree quieting title, adjudging respondent Mary J. Connor to be the owner in fee simple of the

acres described in the complaint, situate in Santa Barbara County, and Richfield Oil Corporation to be the owner of "the sole and exclusive estate in and to said real property to explore for and extract therefrom oil, gas and other hydrocarbon substances;" and appellants to have no right or interest whatsoever in the land.

In January, 1948, Mrs. Connor executed and delivered to Richfield the oil and gas lease which has not been cancelled but still subsists. Appellants' claim of an interest in the property arises from a previous twenty-year lease executed by Mrs. Connor and her husband in 1937 to one Miggins, assignor of appellants. The Miggins lease contained two provisions which are important to an understanding of the issues. Paragraph 5 provided as follows: "If operations for the drilling of a well for oil or gas be not commenced on said land on or before one year from this date, this lease shall terminate as to both parties, unless the Lessee shall, on or before one year from this date, pay or tender to the Lessor * * the sum of Ten Cents per acre per year, which shall operate as rental and cover the privilege of deferring the commencement of drilling operations for a period of twelve months." Paragraph 18 is as follows: "Upon the violation of any of the terms or conditions of this lease by the lessee and the failure to remedy the same within sixty days after written notice from the lessor so to do, then at the option of the lessor this lease shall forthwith cease and terminate."

Appellants never commenced drilling operations; neither had they paid or tendered any rentals prior to the commencement of this action. The lessor has never given appellants any notice of default under the lease.

The question thus presented for decision is whether appellants' failure to commence drilling operations within one year or to pay the rentals provided for has resulted in an automatic termination of the Miggins lease, or whether, as appellants contend, no termination resulted by reason of the lessor's having failed to serve notice of default.

[1,2] The lease involved is of that variety known to the industry and to legalistic authors as the "unless" type, as distinguished from the "drill or pay" type. (See 13 SC LR 393, 402-06.) Under a lease of the latter category the lessee covenants to commence drilling operations or perform the alternative obligation to pay rent. Under that type of lease a notice of default is indispensable when the writing contains a provision requiring notice to be given of default on the part of the lessee to drill or pay the stipulated rent and the lessor may by action enforce the payment of rent. Conversely, under the "unless" lease, no such suit may be maintained. Failure to drill or pay the rent under that type of lease is merely a condition precedent whose occurrence unceremoniously terminates all rights of the lessee. But the latter's refusal either to drill or pay does not give rise to a cause of action against him. From the nature of the "unless" type of lease, it carries within its own phraseology an automatic termination which clicks when the lessee fails to commence drilling operations within the time specified and also fails to exercise his privilege of paying delay rentals in advance. *Wilcox v. West*, 45 Cal.App.2d 267, 270, 114 P.2d 39; *Summers, Oil and Gas*, Vol. 3, sec. 469, p. 163.

This is the rule even though the lease has a provision requiring notice of default to be given the lessee upon his breach of any term in the agreement. In the recent case of *Alexander v. Oates*, 100 Cal.App. 2d 266, 223 P.2d 264 where the lease provisions were similar to those involved herein, it was pointed out that the covenant requiring written notice of default applied only to the lessee's failure to perform other conditions in the lease and that such notice clause was not inconsistent with a provision for automatic termination, citing *Carlisle v. Lady*, 109 Cal.App. 567, 293 P. 686. In the latter decision a similar notice clause was held to refer to covenants to be performed by the lessee and not to a

provision that drilling was to be commenced within a set period under penalty of termination. See *Stetson v. Orland Oil Syndicate Ltd.*, 42 Cal.App.2d 139, 142, 108 P. 2d 463.

[3] It should be observed that this rule of automatic termination is correct not only as a matter of proper and reasonable interpretation of the lease agreements but is based on sound considerations of policy as well. The duty to drill and explore the property, where no substantial cash consideration is involved, should be treated not as a mere covenant but as a condition to the lease's continued existence for the reason that practically the entire consideration depends on the undertaking. Certainly, the lessee should not be assisted and encouraged to hold the lease for speculative purposes only without making any attempt to develop the property's possible resources. See *Caswell v. Gardner*, 12 Cal.App.2d 597, 601, 55 P.2d 1222.

[4] Appellants rely almost entirely on *Scheel v. Harr*, 27 Cal.App.2d 345, 80 P.2d 1035, where similar oil and gas lease provisions were involved, but the court refused to hold that the lease had terminated in the absence of notice of default by the lessor. However, in that decision drilling operations were actually commenced within the limited time prescribed in the lease. Moreover, the same limitation clause provided for "drilling * * * with due diligence and dispatch * * *" This latter phrase was viewed as a continuing covenant and separated from the condition of commencement of operations.

In view of the unavoidable conclusion that the lease has terminated by its own provisions it will not be necessary to discuss the trial court's finding and conclusion that the lease also terminated by reason of appellants' abandonment of their interest under the lease.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

103 Cal.App.2d 468

PEOPLE v. GUTHRIE.

Cr. 828.

District Court of Appeal, Fourth District,
California.

April 13, 1951.

Robert Garth Guthrie was convicted in the Superior Court of Tulare County, of assault with a deadly weapon with intent to commit murder and he appealed. The District Court of Appeal, Mussel, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Homicide $\hookrightarrow$ 158(4), 338(2)

In prosecution for assault with a deadly weapon with intent to commit murder, admission of testimony showing that at time prior to that alleged in information defendant following an altercation with another party went and obtained a gun and stated that he was going to kill such party, for limited purpose of what bearing, if any, it had on whether defendant was innocent or guilty of crime was not prejudicial error although it should have been excluded.

2. Criminal law $\hookrightarrow$ 369(2), 371(12), 372(1)

Evidence of other acts of a similar nature may be admitted, when not too remote, to prove a material fact or where they tend to show motive, scheme, plan or system, and such similar act may be either before or after perpetration of crime charged.

3. Criminal law $\hookrightarrow$ 369(2)

Evidence which is relevant in establishing guilt of crime charged is admissible notwithstanding fact that it tends to connect accused with an offense not included in charge.

4. Criminal law $\hookrightarrow$ 369(2)

Whenever case is such that proof of one crime tends to prove any fact material in trial of another, such proof is admissible, and fact that it may tend to prejudice defendant in minds of jurors is no ground for its exclusion.

5. Criminal law $\hookrightarrow$ 369(2)

The general test of relevancy is whether evidence tends logically, naturally and by reasonable inference to establish any

fact material for the state or to overcome any material matter sought to be proved by defense and if it does, then evidence is admissible whether it embraces commission of another offense and whether other crime be similar or dissimilar.

6. Criminal law $\hookrightarrow$ 369(15), 673(5)

Evidence of an independent and separate crime, while inadmissible to prove guilt of one on trial, for a criminal offense, is admissible where such evidence tends to aid in identifying accused as person who committed particular crime under investigation, but trial court should by proper instruction, limit consideration of such evidence to purposes for which it is received.

7. Homicide $\hookrightarrow$ 257(1)

Evidence sustained conviction of assault with a deadly weapon with intent to commit murder.

Allen L. Martin, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

A jury found the defendant guilty of assault with a deadly weapon with intent to commit murder and he appeals from the judgment thereafter pronounced and the denial of his motion for a new trial.

On the morning of June 23, 1950, at about 11:00 o'clock, the defendant and his wife entered a restaurant known as "Drake's Cafe" in Terra Bella. Neal Drake (the proprietor of the cafe), Carl Trigg (the victim of the assault in the instant case) defendant and his wife all drank from a bottle of whiskey furnished by the defendant. The defendant induced Drake and Trigg to go with him to visit his home in the rural part of Tulare county. Shortly thereafter the three men and the defendant's wife left in defendant's station wagon, and with Trigg at the wheel, drove to the city of Porterville, where they stopped at another cafe and where more drinks were ordered and consumed. They

then went to a liquor store in Porterville and bought a fifth of whiskey, and proceeded to Guthrie's house. Upon arrival, Mrs. Guthrie went in the downstairs bedroom to lie down and the three men went into the living room. Defendant turned on the radio and when he sat down, "bumped" into Trigg. Trigg "bumped" him back and said "Why you little squirt." The defendant then said "You hurt my arm. You are a lot stronger than me but I have got a gun." Drake then went out of the room and was asleep in another part of the house when the shooting took place.

Trigg testified that after Drake left the room, the defendant got up, started across the room and stated that he was going to get a drink; that he, Trigg, went over to the radio to turn it on and then walked over to the mantel where the whiskey was; that while he was standing there reaching for the bottle, he heard the defendant say "You son of a bitch, I am going to kill you;" that he wheeled around and saw the defendant standing there pointing a gun at him and at this time the defendant shot him twice.

The defendant testified that immediately preceding the shooting, Trigg started moving out of the room and he asked Trigg where he was going; that Trigg said he was going to see Mrs. Guthrie; that the defendant said "Please don't disturb her" and Trigg replied "I will go any damn place I please;" that the defendant got up from the radio, faced Trigg and said "Over my dead body;" that they started scuffling and that Trigg threw him on the floor and held him a while and that he (the defendant) got up, went upstairs and there got the revolver; that he then started down the stairway and said "Get away from the door;" that when nearly to the foot of the stairway, he shot his gun in the general direction of Trigg; that Trigg was standing facing him with his arms outspread at the time; that the first shot didn't seem to move Trigg, so he shot him again.

When Drake returned to the room after hearing the shots, Trigg said "Bob shot me." The defendant replied "You damn right I shot him. He was roughing me up and hurt my arm." Drake then called the

sheriff's office. Captain Anderson of that office testified that when he arrived at the scene of the shooting, the defendant said that he had shot Trigg; that he had "done wrong, knew that he did and should not have done it."

A physician testified that Trigg suffered two bullet wounds; that when treated, he was suffering from shock and that without medical treatment, he would have died; that one lead slug was recovered from the body and was lodged below the right shoulder blade; that the other bullet went through the body and came out above the thigh bone.

Defendant does not question the sufficiency of the evidence to sustain the judgment but contends that his substantial rights were prejudiced by the admission of certain testimony relating to an incident involving the defendant and one I. C. Young. This incident occurred about nine months prior to the date of the offense herein charged and the testimony regarding it was to the effect that the defendant, while intoxicated, threatened to kill Young with a gun of the same make and caliber as that used in the instant case. This testimony was admitted for a limited purpose and the trial court gave the following instruction concerning it:

"Evidence is offered in this case for the purpose of showing that at a time prior to that alleged in the Amended Information, the defendant, following an altercation with Ike Young, went and got a gun and stated he was going to kill Ike Young.

"Such evidence will be received for a limited purpose only: Not to prove distinct offenses or continual criminality, but for such bearing if any, as it might have, on the question whether the defendant is innocent or guilty of the crime charged against him in this action.

"You are not permitted to consider that evidence for any other purpose, and as to that purpose you must weigh such evidence as you do all other in the case.

"The value, if any, of such evidence depends on whether or not it tends to identify the defendant as the perpetrator of the offense of which he is now accused by the

Amended Information, and for which he is on trial in this action, namely, Assault with a deadly weapon with intent to commit murder as to Carl Trigg."

[1-4] Under the circumstances shown by the record we see no prejudicial error in the admission of the testimony to which objection was made. Evidence of other acts of a similar nature may be admitted, when not too remote, to prove a material fact or where they tend to show motive, scheme, plan or system, *People v. Henderson*, 79 Cal.App.2d 94, 119, 179 P.2d 406, and such similar acts may be either before or after the perpetration of the crime charged. *People v. Weir*, 30 Cal.App. 766, 767, 159 P. 442.

As was said in *People v. Dabb*, 32 Cal. 2d 491, 499, 197 P.2d 1, 6:

"Evidence which is relevant in establishing guilt of the crime charged is admissible notwithstanding the fact that it tends to connect the accused with an offense not included in the charge. *People v. Peete*, 28 Cal.2d 306, 314, 315, 169 P.2d 924; *People v. McMonigle*, 29 Cal.2d 730, 741, 177 P.2d 745. As stated in *People v. Peete*, supra, 28 Cal.2d at page 315, 169 P.2d at page 930, quoting from *People v. Walters*, 98 Cal. 138, 141, 32 P. 864, 'whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion.'

"The general test of relevancy is whether the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the people or to overcome any material matter sought to be proved by the defense. If it does, then the evidence is admissible whether or not it embraces the commission of another offense and whether the other crime be similar or dissimilar. *People v. Peete*, 28 Cal. 2d 306, 315, 169 P.2d 924."

[5] Evidence of an independent and separate crime, while inadmissible to prove the guilt of one on trial for a criminal offense, is admissible where such evidence tends to aid in identifying the accused as

the person who committed the particular crime under investigation. 1 Wharton, Criminal Evidence, § 348, p. 507; see Annotation: 63 A.L.R. 602. The trial court should, however, by proper instructions, limit the consideration of such evidence to the purposes for which it is received. *People v. James*, 40 Cal.App.2d 740, 746, 105 P.2d 947.

[6,7] Evidence of the "Young" incident should have been excluded. Without such testimony there was an abundance of proof of the identity of the defendant as the perpetrator of the offense charged. However, in view of the overwhelming evidence of the defendant's guilt, including his own testimony, the evidence covering the "Young" incident and the instruction given concerning it, obviously did not affect the verdict of the jury. The errors complained of did not result in a miscarriage of justice.

Judgment and order affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



103 Cal.App.2d 326

PEOPLE v. BABB et al.

Cr. 4599.

District Court of Appeal, Second District,
Division 3, California.

April 9, 1951.

Edwin E. Babb was charged in one count with the infamous crime against nature and he was convicted by the Superior Court of Los Angeles County, Ellsworth Meyer, J., of vagrancy as an offense necessary included within offense charged and defendant appealed from judgment and order denying his motion for a new trial. The District Court of Appeal, Vallée, J., held that statute insofar as it defined a vagrant as a lewd or dissolute person, defined an offense which was necessarily included within infamous crime against nature.

Judgment and order affirmed.

1. Vagrancy ☞1

Within certain broad limitations legislature may by statute define vagrancy and provide that those who come within definition shall be punished as statute ordains. Pen.Code, § 647, subd. 5.

2. Criminal law ☞1

A general course of conduct, practices, habits, mode of life, or status which is prejudicial to public welfare may be prohibited by law and punishment therefor may be provided by the state, and every course of conduct or practice or habit or mode of life or status falling within that class of wrongs is connoted by term "crime".

See publication Words and Phrases, for other judicial constructions and definitions of "Crime".

3. Criminal law ☞1

Word "crime" in its more extended sense comprehends every violation of public laws.

4. Criminal law ☞13

A statute which imposes punishment for a course of conduct, practices, habits, mode of life, or a status is sufficient to make same a crime without any express declaration to that effect.

5. Vagrancy ☞1

Statute defining a vagrant as a lewd or a dissolute person insofar as it provides that every lewd or dissolute person is a vagrant and prescribes a punishment therefor, states a public offense. Pen.Code, § 647, subd. 5.

6. Indictment and Information ☞191

The test of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, latter is a necessarily included offense.

7. Indictment and Information ☞191

A proper ground of distinction between included and non-included offenses is whether they involved essentially the same or different elements of conduct and if they have a common basis the greater is usually deemed to include the lesser.

8. Sodomy ☞1

Under statute providing that every person who is guilty of the infamous crime against nature is punishable by imprisonment, offense is synonymous with that of "sodomy". Pen.Code, § 286.

See publication Words and Phrases, for other judicial constructions and definitions of "Sodomy".

9. Sodomy ☞1

Infamous crime against nature must be committed per anum. Pen.Code, § 286.

10. Sodomy ☞1

One cannot commit infamous crime against nature without being lewd and dissolute, and lewdness and dissoluteness are necessary elements of that offense. Pen.Code, § 286.

11. Vagrancy ☞1, 4

A single act of lewdness or dissoluteness may be sufficient to constitute a person a vagrant if it is of such a nature as reasonably to justify an inference that no one not of lewd or of dissolute character would do such an act even once and whether inference may be drawn from evidence of a single act is a question for trier of fact. Pen.Code, § 647, subd. 5.

12. Indictment and Information ☞191

Offense of vagrancy insofar as a vagrant is defined by statute as a lewd or dissolute person is included within infamous crime against nature. Pen.Code, §§ 286, 647, subd. 5.

William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Howard S. Goldin, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was charged in one count with the infamous crime against nature. He was convicted by the court sitting without a jury of vagrancy as an offense necessarily included within the offense charged. He appeals from the judgment and the order denying his motion for a new trial.

Defendant's assignments of error are:

1) Subdivision 5 of section 647 of the Penal Code does not state an offense under the law. 2) Subdivision 5 of Penal Code section 647 is not an offense necessarily included within the infamous crime against nature as defined by section 286 of the Penal Code.

Penal Code section 647, subdivision 5, provides: "Every idle, or lewd, or dissolute person, or associate of known thieves;
* * *

"Is a vagrant, and is punishable by a fine of not exceeding five hundred dollars (\$500), or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment." Defendant argues that the quoted provision does not forbid or command any act; that it refers to a state of being or status;¹ that therefore it does not define a crime because Penal Code section 15 defines a crime as "an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: * * *."

[1] All that is meant by saying that vagrancy is a status is that it is a present condition; that the statute can be applied only to the persons who meet the description at the time the offense was committed. *People v. Craig*, 152 Cal. 42, 47, 91 P. 997; *People v. Lund*, 137 Cal.App.Supp. 781, 27 P.2d 958; 66 C.J. 401, § 4. It is generally conceded that within certain broad limitations the legislature may by statute define "vagrancy" and provide that those who come within the definition shall be punished as the statute ordains. In *re Cutler*, 1 Cal.App.2d 273, 280, 36 P.2d 441; *Ex parte Hudgins*, 86 W.Va. 526, 103 S.E. 327, 9 A.L.R. 1361, 1363, cited with approval in *People v. Scott*, 113 Cal.App.Supp. 778, 780, 296 P. 601; *State v. Harlowe*, 174 Wash. 227, 24 P.2d 601, 603; *Morgan v. Commonwealth*, 168 Va. 731, 191 S.E. 791, 111 A.L.R. 62; *Ex parte Strittmatter*, 58 Tex.Crim. 156, 124 S.W. 906, 907, 137 Am.St.Rep. 937, 21 Ann.Cas. 477; 66 C.J. 399, § 2; Anno. 111 A.L.R. 68.

[2-4] A general course of conduct, practices, habits, mode of life, or status which is prejudicial to the public welfare may be prohibited by law and punishment therefor may be provided by the state. 14 Am.Jur. 754, § 2. Every course of conduct or practice or habit or mode of life or status which falls within this class of wrongs is connoted by the term "crime." *Bopp v. Clark*, 165 Iowa 697, 147 N.W. 172, 52 L.R.A.,N.S., 493, 495, Ann.Cas.1916E 417, 419. The word "crime" in its more extended sense comprehends every violation of public laws. *Callan v. Wilson*, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223, 226. The doctrine is well settled that a statute which imposes punishment for a course of conduct, practices, habits, mode of life, or status is sufficient to make the same a crime without any express declaration to that effect. *People v. Kennedy*, 21 Cal.App.2d 185, 193, 69 P.2d 224; *State v. Peterson*, 81 Utah 340, 17 P.2d 925, 926; *State v. Brown*, 221 N.C. 301, 20 S.E.2d 286, 289; *Morgan v. Commonwealth*, 168 Va. 731, 191 S.E. 791, 111 A.L.R. 62, 66; *State v. Central Lumber Co.*, 24 S.D. 136, 123 N.W. 504, 507, 42 L.R.A.,N.S., 804, aff. 226 U.S. 157, 33 S.Ct. 66, 57 L.Ed. 164; 7 Cal.Jur. 839, § 3; Anno. 14 A.L.R. 1482.)

In *Dyer v. County of Placer*, 90 Cal. 276, 27 P. 197, the statute read: "Every person who shall fraudulently evade, or attempt to evade, the payment of his fare for traveling on any railroad, shall be fined not less than five nor more than twenty dollars". The trial court held that a violation of the statute did not constitute a public offense. In reversing the judgment, it was said, 90 Cal. at page 278, 27 P. at page 197, "We think a violation of said section 9 constitutes a public offense, within the definition of section 15 of the Penal Code, which reads as follows: '* * *' To hold that a law which makes it a finable offense to fraudulently evade the payment of railroad fare does not make such evasion a public offense, would we think, be going but skin deep into its meaning."

In *State v. Harlowe*, 174 Wash. 227, 24

1. It has been so held by the appellate department of the superior court of the county of Los Angeles in an unpublished

opinion. (*People v. Cook*, Crim.A.No. 1629.)

P.2d 601, 602, the defendant was charged with being a vagrant. Part of the statute defined vagrants as "lewd, disorderly or dissolute persons." On appeal the defendant's criticism was "that the statute is not leveled against any act, but merely against a state of being." The court held, 24 P.2d at page 603; "Society recognizes that vagrancy is a parasitic disease, which, if allowed to spread, will sap the life of that upon which it feeds. To prevent the spread of the disease, the carrier must be reached. In order to discourage, and, if possible, to eradicate, vagrancy, our Legislature has enacted a statute defining vagrant persons and penalizing them according to its terms. Other Legislatures have pursued the same course. We see no reason why this cannot, or should not, be done as a valid exercise of the police power."

[5] We conclude that subdivision 5 of section 647 of the Penal Code states a public offense insofar as it provides that every lewd or dissolute person is a vagrant and prescribes a punishment therefor.

[6-9] "The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense. *People v. Krupa*, 64 Cal.App.2d 592, 598, 149 P.2d 416." *People v. Greer*, 30 Cal.2d 589, 596, 184 P.2d 512, 516. "A proper ground of distinction between included and non-included offenses is whether they involve essentially the same or different elements of conduct. If they have a common basis the greater is usually deemed to include the lesser." *People v. Gossman*, 95 Cal.App.2d 293, 295, 212 P.2d 585, 587. Penal Code section 286 provides that every person who is guilty of the infamous crime against nature is punishable by imprisonment. The offense is synonymous with that of sodomy. *People v. Battilana*, 52 Cal. App.2d 685, 694, 126 P.2d 923. It must be committed per anum. *People v. Boyle*, 116 Cal. 658, 48 P. 800. "Lewd" and "dissolute" are terms often used interchangeably. Each applies to the unlawful indul-

gence in lust whether in public or private. In *re McCue*, 7 Cal.App. 765, 766, 96 P.110. "Lewd" is defined to mean: "4. Lustful; libidinous; lascivious; unchaste." "Dissolute" is defined to mean: "2. * * * loose in morals and conduct; wanton; lewd; debauched." Webster's New Inter. Dict., 2d Ed.

[10, 11] One cannot commit the infamous crime against nature without being lewd and dissolute. Lewdness and dissoluteness are necessary elements of that offense. The infamous crime against nature and vagrancy, where the offense is that of a lewd and dissolute person, involve essentially the same elements of conduct. They have a common basis. It is true that a person can be lewd and dissolute without committing the infamous crime against nature, but the converse is not true. In *People v. Greer*, 30 Cal.2d 589, 184 P.2d 512, it was held that every violation of Penal Code sections 261 (1) (statutory rape) and 288 (lewd and lascivious act on a child under 14) necessarily constitutes a violation of the Welfare and Institutions Code section 702 (contributing to the delinquency of a minor). A single act of lewdness or dissoluteness may be sufficient to constitute a person a vagrant if it is of such a nature as reasonably to justify an inference that no one not of lewd or dissolute character would do such an act even once; and whether the inference may be drawn from the evidence of a single act is a question for the trier of fact. *People v. Scott*, 113 Cal.App.Supp. 778, 784, 296 P. 601. That defendant's conduct was lewd and dissolute is not denied; that the evidence was such as to warrant the inference that he was a vagrant is not debatable.

[12] We hold that subdivision 5 of section 647 of the Penal Code insofar as it defines a vagrant as a lewd or dissolute person is necessarily included within the infamous crime against nature defined by section 286 of the Penal Code.

Judgment and order affirmed.

SHINN, P. J., and WOOD, J., concur.

SCHNIDER et ux. v. STATE.

Civ. 18133.

District Court of Appeal, Second District,
Division 2, California.

April 17, 1951.

Rehearing Granted May 3, 1951.

See 231 P.2d 177.

Louis Schnider and wife brought an inverse condemnation proceeding against the State. From a portion of a judgment of the Superior Court of Los Angeles County, Jesse E. Frampton, J., plaintiffs appealed. The District Court of Appeal, McComb, J., held that alleged error in the trial court's instruction to the jury that plaintiffs had no easements of access to and from a boulevard when defendant erected a permanent fence along the boundary line between such boulevard and plaintiffs' lots would not be considered, in the absence of a record showing that plaintiffs offered any evidence or made an offer to prove that they had such easements and obtained a ruling by the trial court on such an offer.

Judgment affirmed.

Wilson, J., dissented.

1. Appeal and error ⇨499(3)

On plaintiffs' appeal from judgment in inverse condemnation proceeding against State alleged error in trial court's instruction to jury that plaintiffs had no easements of access to and from boulevard when defendant erected permanent fence along boundary line between boulevard and plaintiffs' lots will not be considered, in absence of record showing that plaintiffs offered evidence or made offer to prove by competent evidence that they had such easements and obtained ruling by trial court on such offer.

2. Appeal and error ⇨205, 242(4)

To predicate error on trial court's failure to receive evidence, party aggrieved must make offer of proof by excluded evidence at time of trial and obtain ruling by trial court on such offer.

3. Appeal and error ⇨713(1)

Plaintiffs' attorney's written statement of plaintiffs' objections to trial court's refusal to receive their offer of proof in evidence and such attorney's written offer of proof, filed in clerk's office, constituted no part of record on plaintiffs' appeal from

portion of judgment rendered, though copied into clerk's transcript.

4. Appeal and error ⇨173(2)

Eminent domain ⇨68, 293(4)

The State Highway Commission's resolution, declaring that public interest and necessity require acquisition of certain real property for public improvements, is conclusive of facts recited therein, and they may not be disputed, in absence of pleading in trial court specifically charging Commission's fraud, bad faith or abuse of discretion, and such question may not be first raised on appeal.

5. Appeal and error ⇨173(2)

In inverse condemnation proceeding against State by one claiming easements of access to and from boulevard, along boundary line between which and plaintiffs' lots defendant erected permanent fence, plaintiffs waived objection, not presented to trial court, that procedure followed in establishing and constructing boulevard as freeway, pursuant to State Highway Commission's resolution declaring that public interest and necessity required acquisition of realty involved for public improvement, was defective.

Reuben Rosensweig, Los Angeles, for appellants.

Robert E. Reed, Sacramento, George C. Hadley, John N. McLaurin, Herbert J. Williams, Los Angeles, and Harry S. Fenton, Sacramento, by George C. Hadley, Los Angeles, for respondent.

McCOMB, Justice.

[1] From a portion of a judgment rendered in an inverse condemnation proceeding after trial before a jury, plaintiffs appeal, predicated error upon the trial court's instruction to the jury that plaintiffs had no easements of access to and from Olympic Boulevard at the time defendant erected a permanent wire fence along the line forming the south boundary of Olympic Boulevard and the north boundary of plaintiffs' lots.

Plaintiffs' contention is without merit for the reason that the record fails to disclose

that (1) they offered any evidence to show that they had such easements or (2) made an offer to prove to the trial court by competent evidence that they had an easement of access to and from Olympic Boulevard and obtained a ruling of the trial court upon such offer of proof.

[2] The law is settled that before error may be predicated upon the failure of a trial court to receive evidence, the party aggrieved must (1) at the time of trial make an offer of proof of the evidence the exclusion of which he claims to be erroneous (*Conrad v. Conrad*, 66 Cal.App.2d 280, 289[6], 152 P.2d 221; *Dougherty v. Ellingson*, 97 Cal.App. 87, 98, 275 P. 456; *Merz v. Poole*, 82 Cal.App. 12, 15, 254 P. 914. See cases cited in 5 West's Cal.Dig. (1951) Appeal and Error, ¶ 205, page 264 et seq.); and (2) obtain a ruling from the trial court upon his offer of proof (*Campbell v. Genshlea*, 180 Cal. 213, 220, 180 P. 336; *Smith v. Smith*, 163 Cal. 630, 631, 126 P. 475; *Flynn v. Young*, 25 Cal.App. 2d 614, 619, 78 P.2d 245).

[3] In the instant case the record on appeal consists of the reporter's transcript, the clerk's transcript and a supplemental clerk's transcript. None of these documents discloses that any offer of proof was made to the trial court. The only reference to an offer of proof consists in two documents signed by plaintiffs' attorney and filed in the clerk's office denominated "Statement of plaintiffs' objections to court's refusal to receive their offer of proof in evidence," and "Offer of proof."

Such documents although copied into the clerk's transcript constitute no part of the record on appeal. (*Magee v. Mokelumne Hill Canal & Mining Co.*, 5 Cal. 258, 259; *Smith v. Halstead*, 88 Cal.App.2d 638, 640 [3], 199 P.2d 379; *Worth v. Emerson*, 3 Cal.App. 158, 160, 85 P. 664; *Duncan v. Atchison, T. & S. F. R. Co.*, 9 Cir., 72 F. 808, 812. See also cases cited in 5 West's Cal.Dig. (1951) Appeal and Error, ¶ 713 (1), page 677.) Since plaintiffs have not complied with the rule above stated the alleged error will not be considered by us.

Likewise there is no merit in plaintiffs' contention that the procedure followed in establishing and constructing Olympic Boulevard as a freeway was defective. There was received in evidence without objection a resolution of the California Highway Commission declaring that the public interest and necessity required the acquisition of the real property here involved for a public improvement.

[4] When the State Highway Commission adopts a resolution declaring that public interest and necessity require the acquisition of certain real property for public improvements, such resolution becomes conclusive of the facts recited therein, and the same may not be disputed in the absence of a pleading in the trial court specifically charging fraud, bad faith or an abuse of discretion of such commission. Such question may not be raised for the first time on appeal. (*People v. Milton*, 35 Cal.App.2d 549, 552, 96 P.2d 159.)

[5] In the instant case the objection now made was not presented to the trial court and was therefore waived by plaintiffs.

Affirmed.

MOORE, P. J., concur.

WILSON, Justice.

I dissent.

1. Notwithstanding the assertion to the contrary, the statement of plaintiffs' objections and the offer of proof to which reference is made in the majority opinion are a part of the record on appeal. They were filed in the superior court and are among the records of that court. They were made a part of the record on appeal by appellants' notice to the clerk of the superior court to incorporate such documents in the record on appeal pursuant to Rule 5(a) of Rules on Appeal in force in August, 1950, when the appeal was taken, 22 Cal.2d 4,¹ and by their inclusion in the record certified to this court by the clerk as required by Rule 5(d). The cases cited (some of them decided before the Rules on

1. The Rules on Appeal as amended which became effective January 1, 1951, will be found in 36 Cal.2d 1 ff.

Appeal became effective) do not, by any stretch of language or imagination, sustain the statement in the opinion that the documents referred to are not a part of the record on appeal. The cases in which appellate courts have rejected portions of a purported record have reference to papers and other matters contained in the transcript but not authorized by law or rule to be included therein or to those not properly authenticated. Since pursuant to Rule 5(a) the documents in question were requested by appellants to be inserted in the transcript and are copied therein and certified by the clerk of the superior court, Rule 5(d), they are a part of the record before us. Decisions rendered prior to the adoption of the Rules on Appeal are of no effect upon subjects which are covered by the rules. For example, the opinion of the trial court formerly was not considered a part of the record even though copied in the transcript. Rule 5(a) now makes it a part of the record if designated by either party as one of the papers to be included.

2. The point on which the opinion is based, to wit, that an offer of proof was not presented in the trial court and a ruling made thereon, has not been raised by either party to this action and is mentioned for the first time in the majority opinion. On several previous occasions I have declined to concur in an opinion that rests on a question not raised by the parties and which they have not had an opportunity to consider or argue. I shall not join in such an injustice now.

3. The cause has been argued in the briefs in this court on the theory that the offer of proof was made by plaintiff to the trial court and ruled upon adversely. Plaintiff relies on it in his brief. Not only does defendant fail to question its having been presented to the court but repeatedly refers to it, states the evidence proposed in the offer, and argues against its admissibility. Under such circumstances the appeal should not be brushed off with nonchalance and with indifference to the real question of law presented to us, because perchance it is easier to evade than to decide it.

4. Since the absence of the offer of proof from the record is mentioned for the first time in the majority opinion and appellant will not have had an opportunity of discussing the question until he has read the conclusion of the majority, and since the briefs of both parties show that they have deemed the offer of proof to have been made in the trial court and to be properly before this court, appellant should be given leave, if he requests it, to have the reporter's transcript augmented so as to include the offer and the court's ruling thereon.

5. The point raised on the appeal is of importance not only to the litigants in this action but to the State and to owners of property that may be similarly situated in future proceedings. To the end that the law may be definitely determined, the question should be decided on its merits. The offer of proof should be considered as having been made and ruled upon by the court. By such action this court would not be subject to criticism, which will no doubt be abundantly expressed, for having failed by reason of a technicality to determine the sole question presented by the appeal.



103 Cal.App.2d 278

**O. T. JOHNSON CORP. et al. v. SUPERIOR
COURT OF STATE, IN AND FOR LOS
ANGELES COUNTY.**

Civ. 18453.

District Court of Appeal, Second District,
Division 2, California.

April 5, 1951.

Petition by the O. T. Johnson Corporation, and another, to secure a writ of review to annul an order of the Superior Court of the State of California in and for the County of Los Angeles fixing security for immediate possession of property and an order for immediate possession of realty belonging to petitioners. The District Court of Appeal, Mc-

Comb, J., held that constitution did not confer upon the Superior Court the right to order immediate possession of property in a condemnation proceeding when such property was being taken for the purpose of drilling a water well and right to take water from the land sought to be condemned.

Orders annulled.

Eminent domain ☞187

Under the Constitutional provision providing the right of eminent domain, the Superior Court had no right to order immediate possession of property in a condemnation proceeding when such property was being taken for the purpose of drilling a water well and right to take water from the land sought to be condemned. Const. art. 1, § 14.

Cosgrove, Cramer, Diether & Rindge, Los Angeles, for petitioners.

Clyde Woodworth, City Atty., Inglewood, and Robert E. Roskopf, Sp. Counsel, Beverly Hills, for City of Inglewood, real party in interest.

Harold W. Kennedy, County Counsel and William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

McCOMB, Justice.

This is a petition for a writ of review to annul (1) "Order fixing security for immediate possession," and (2) "Order for immediate possession" of real property belonging to petitioners.

In the petition it is alleged that petitioners are the owners of certain real property located in the city of Inglewood; that the city of Inglewood commenced an action against petitioners seeking to have their real property condemned for the purpose of *drilling a water well* upon said property and the right to take water from the land sought to be condemned; that thereafter respondent made an "order fixing security for immediate possession," and an "order for immediate possession."

Question: Does the Constitution of the State of California confer power upon the Superior Court to grant immediate possession on the filing by a municipality of a complaint in condemnation for the purpose

of drilling a water well and the right to take water from the land sought to be condemned?

No. The section of the State Constitution conferring the right of the court to order immediate possession of property taken in an eminent domain action is Article I, section 14 which reads as follows: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law; *provided*, that in any proceeding in eminent domain brought by the State, or a county, or a municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that

there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings. The taking of private property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier."

A reading of the foregoing section discloses that the Constitution does not confer upon the court the right to order immediate possession of property in a condemnation proceeding when such property is being taken for the purpose of drilling a water well or taking water from the lands sought to be condemned.

Therefore the two orders here in question were beyond the jurisdiction of the trial court and were void. They are annulled.

MOORE, P. J., and WILSON, J., concur.



103 Cal.App.2d 434

RECORD et al. v. INDEMNITY INS. CO.
OF NORTH AMERICA.
No. 14624.

District Court of Appeal, First District,
Division 1, California.
April 13, 1951.

Harold Record recovered judgment from third parties for injuries sustained in scope of his employment because of a defective instrumentality manufactured and supplied by third parties and the judgment was, by stipulation, made subject to lien of Indemnity Insurance Company of North America for compensation paid by it to plaintiff as his

employer's insurance carrier and thereafter Johnson, Harmon, Stirrat & Henderson, plaintiff's attorneys, moved for an order awarding them reasonable attorney's fees out of the share of the judgment to be received by the insurance company. The Superior Court, in and for the City and County of San Francisco, Preston Devine, J., denied the motion and plaintiff and his attorneys appealed. The District Court of Appeal, Bray, J., held that where trial of suit against third parties took place after effective date of statute giving employee's attorneys a fee to be paid from amount actually received by employer on account of service rendered in effecting recovery for benefit for employer, plaintiff's attorneys were entitled to fees from insurer's share in employee's recovery and that in so doing statute was not being applied retrospectively.

Order reversed and case remanded with instructions.

1. Workmen's compensation  58, 2251

Where trial of employee's personal injury suit against third parties for injuries sustained in scope of employment because of defective instrumentality manufactured and supplied to employer took place after effective date of statute authorizing the deduction from amount of employee's judgment to be credited to employer for compensation previously paid employee of attorney's fee rendered in effecting recovery for benefit of employer, employee's attorneys were entitled to an allowance from amount of judgment on which employer's insurer had lien for previous payments to employee and such allowance did not give statute retrospective effect. Labor Code,   3856.

2. Workmen's compensation  1, 9

Liability under Workmen's Compensation Act is incident to status of employment and is neither in tort nor in contract.

3. Workmen's compensation  2251

Amount of employer's right to reimbursements, credits or lien on or from amount of recovery by employee from third party does not attach until employee effects a settlement or recovers a judgment against a third party and it is recovery which fixes employee's obligation to reimburse and employer's duty to contribute to employee's attorneys for services rendered in effect-

ing a recovery for benefit of employer. Labor Code, §§ 3854, 3856.

4. Contracts ⇨169

An agreement must be considered in light of conditions as they existed at time it was entered into.

5. Stipulations ⇨14(1)

Where interest of employer's insurer in employee's recovery of damages from third party was not subject to any reduction for attorney's fees, statement in stipulation between employee and insurer that insurer would be reimbursed for all expenditures made by it could not be held to be a waiver by employee and his attorneys of a right which did not then exist. Labor Code, § 3856.

6. Estoppel ⇨53, 54

The primary essentials of a waiver is knowledge and intent, and before one may be deemed to have waived a right granted by statute he must be shown to have knowledge of right and an intent to waive or forego it.

7. Appeal and error ⇨1008(3)

An appellate court is not bound by a construction of a contract based solely on terms of written instrument without aid of evidence where there is no conflict in evidence, or a determination has been made on incompetent evidence, and under such circumstances it is duty of appellate court to make final determination in accordance with applicable principles of law.

8. Stipulations ⇨14(1)

Stipulation by employee and employer's insurer that, in consideration of insurer's forbearance in filing a lien for benefits paid employee in action brought by employee against third parties, employee agreed to reimburse insurer for all expenditures made or to be made by insurer under provisions of Workmen's Compensation Act, such reimbursements to be made out of and only in event that employee recovered judgment or entered into voluntary settlement with approval of insurer, did not preclude any right to attorneys' fees by employee's attorneys which might have been legislated into existence in future. Labor Code, §§ 3854, 3856.

Johnson, Harmon & Henderson, San Francisco, for appellants.

Healy & Walcom, San Francisco, for respondent.

BRAY, Justice.

The superior court in a personal injury action denied a motion for attorneys' fees brought by plaintiff's attorneys pursuant to section 3856 of the Labor Code. Plaintiff and his attorneys appeal.

Question Presented.

(1) Does the 1949 amendment of section 3856 apply to actions brought for injuries occurring before the effective date of the amendment? (2) Did plaintiff stipulate away his right to attorneys' fees? Facts.

In 1947 plaintiff was injured in the scope of his employment by the Dow Chemical Company because of a defective instrumentality manufactured and supplied by third parties. He brought suit against those parties for damages for his injuries. In December, 1948, a stipulation was entered into between plaintiff and respondent insurance company, the insurance carrier for the Dow Chemical Company, which stated that plaintiff had sustained an industrial injury and that respondent as carrier for his employer had furnished plaintiff hospital, surgical and medical aid in addition to weekly indemnity benefits and was continuing to do so, as prescribed by the Workmen's Compensation Act. It then set forth the amount then paid and stated that further payments were anticipated, and that "in consideration of the" respondent's "forbearance in filing a lien" for these expenditures in the action brought by plaintiff against said parties, plaintiff "agrees to reimburse" respondent "in the sum of all expenditures made or to be made by" respondent "under the provisions of the Workmen's Compensation Act * * * Such reimbursements being made out of and only in the event that" plaintiff "recovers judgment or enters into voluntary settlement with the approval" of respondent.

The action was tried in February and March of 1950, and plaintiff recovered a \$30,000 judgment, which with plaintiff's

consent, was made expressly subject to respondent's lien for \$3,140.50, the amounts paid by respondent. Thereafter plaintiff's attorneys, who had brought and prosecuted the action, moved on proper notice for an order awarding them reasonable attorneys' fees out of the share of the judgment to be received by respondent, said fees to be for their services in effecting a recovery of the amount for which respondent had a lien. In opposition to the motion, respondent filed the affidavit of Scott, its assistant superintendent of claims, in which he stated that on July 2, 1948, Johnson, one of plaintiff's counsel, called upon affiant and asked him to authorize a contribution by respondent of a share of the expenses incurred in the prosecution of the action and to agree to pay plaintiff's attorneys a fee for services in the event a recovery was had in the pending action. Affiant advised that respondent would neither make a contribution nor pay any attorneys' fees and that in the event of recovery, respondent expected full reimbursement of all sums it might pay for plaintiff. In the discussion, affiant pointed out that under the sections of the Labor Code dealing with subrogation then in effect, there was no provision requiring respondent to pay any fees; that if the employment of counsel were necessary to recover respondent's expenditures for which a lien was asserted, respondent would retain its own counsel and make its own arrangement for fees with such counsel.

Plaintiff filed a counter-affidavit of Johnson giving his version of the conversation with Scott. Johnson stated that Scott, because the Labor Code made no provision for attorneys' fees on a recovery for the insurer, refused to share in the expenses and attorneys' fees, and stated respondent would expect all that the law would allow under the Labor Code. Affiant had no recollection of Scott stating, and to affiant's best recollection Scott did not state, that if an attorney were necessary to recover the insurer's expenditures, respondent would employ its own counsel. Affiant then denied that the stipulation which was prepared by Scott and signed by plaintiff and his attorneys had anything to do with

attorneys' fees or that in any way it was a waiver of any rights of plaintiff or his attorneys for fees; that about ten months after this conversation and about four days before Scott sent the stipulation to be signed, Scott phoned affiant, and without alluding to that conversation, called his attention to the Labor Code provisions giving the insurer a lien on any judgment plaintiff might obtain to reimburse respondent for all disbursements made by it on plaintiff's behalf, and asked if it would be necessary to file a notice of lien in the action or if plaintiff would be willing to enter into a stipulation recognizing respondent's right to reimbursement. Affiant said that plaintiff would be willing to stipulate to respondent's lien to the full extent of what the law allowed respondent, and suggested that Scott submit a stipulation to that effect, which Scott did, and which is the stipulation in question here. Affiant attached a copy of respondent's letter of transmittal of said stipulation which states, "In accordance with our telephone conversation of Dec. 3, 1948" there is forwarded a stipulation "with regard to the protection of the subrogation rights" of respondent.

At the hearing respondent took the position that (1) the 1949 amendment to section 3856 did not apply, and (2) that if it did, plaintiff by the stipulation had waived his right to attorneys' fees.

1. Does Section 3856 Apply?

That section, as amended effective October 1, 1949, provides: "The court shall first apply, out of the entire amount of any judgment for any damage recovered by the employee, a sufficient amount to reimburse the employer for the amount of his expenditures for compensation. If the employer has not joined in the action or has not brought action, or if his action has not been consolidated, the court, on his application shall allow, as a first lien against the entire amount of any judgment for any damages recovered by the employee, the amount of the employer's expenditures for compensation; provided, however, that where the employer has failed to join in said action and to be represented therein by his own attorney, or where the employer has

not made arrangements with the employee's attorney to represent him in said action, the court shall fix a reasonable attorney's fee, which shall be fixed as a share of the amount actually received by the employer, to be paid to the employee's attorney on account of the service rendered by him in effecting recovery for the benefit of the employer, which said fee shall be deducted from any amounts due to the employer."

The attorneys' fees requested here were only for services rendered at the trial, which took place after the effective day of the act.

In *Dodds v. Stellar*, 30 Cal.2d 496, at page 503, 183 P.2d 658, at page 663, decided prior to the above amendment, the court said: "The Workmen's Compensation Act, as carried into the Labor Code, gives the employer or its insurance carrier, upon paying or becoming obligated to pay compensation to the employee for disability suffered in the course of employment as the result of negligence of a third party, the right of reimbursement for such expenditure. This right the employer or its insurance carrier may exercise in any one of three ways: It may bring an independent suit (Labor Code, sec. 3852); it may join in an action brought by the injured employee (Labor Code, sec. 3853); or 'if [it] has not joined in the action or has not brought action, or if [its] action has not been consolidated,' it may claim in the employee's action 'as a first lien against the entire amount of any judgment for any damages recovered by the employee, the amount of [its] expenditures for compensation. * * *, Labor Code, sec. 3856.'" It is in the latter instance where, if the employer chooses not to join or contribute, the amendment in issue gives attorney's fees.

Under section 3854 of the code the employer is entitled to deduct reasonable attorney's fees from the employee's portion of the award when the employer has prosecuted the action alone. A 1949 amendment states that the attorney's fee "shall be based solely upon the services rendered by the employer's attorney in effecting recovery for the benefit of the

employee * * *." Prior to the subject amendment no corresponding right was given the employee when his attorney effected recovery for the employer.

Respondent's argument on the question of retrospectivity may be paraphrased as follows: The 1949 amendment to section 3856 was a substantive amendment. It imposes a new and additional liability upon the insurance carrier. Prior to it he had the right to recover all expenditures at the employee's expense. Afterwards his recovery is diminished by the costs of litigation. "Since the carrier's obligation is measured by the statute in force at the time of the industrial injury, any derogation of its rights as of that time by subsequent statutory amendment" would be a retrospective application of the law contrary to the intention of the Legislature and to constitutional due process.

The only authority respondent cites for this proposition is *Aetna Casualty & Surety Co. v. Industrial Accident Comm.*, 30 Cal.2d 388, 182 P.2d 159. In that case an employee had sustained an injury which ultimately resulted in both temporary and permanent disability. At the time of the injury, Labor Code section 4661 allowed him to receive only the greater of the two payments; at the time of permanent disability the statute had been amended so as to allow cumulative benefits. The commission awarded him the increased amount. The Supreme Court annulled the award. It was held that the injury is the basis of the right to be compensated for resulting disability, and the law in force at the time of that injury is the measure of the right to recover. In granting the increased award under the amendment the commission enlarged the employee's rights and the employer's obligations, thus giving a retrospective operation to the statute. Statutes are not to be applied retroactively in the absence of a clear legislative intent. It did not appear from the language of the amended statute or by necessary implication that the Legislature intended to give this amendment a retrospective operation. "The prior industrial injury was not a mere antecedent fact relating to the permanent disability ensuing there-

from; on the contrary, it was the basis of the right to be compensated for such disability." 30 Cal.2d at page 392, 182 P.2d at page 160. Applying the above language to the immediate case, respondent contends, the time of injury fixed his non-liability for attorneys' fees in the employee's action, and there is nothing in section 3856 which states that it was intended to apply retrospectively.

Appellants argue that the Aetna rationale has nothing to do with our problem. The basis for recovery for attorneys' fees is not the injury to the employee, but "*for the services rendered*. It is specifically provided by section 3856 as amended that attorney's fees shall be paid to the employee's attorney '*on account of the services rendered by him* in effecting recovery for the benefit of the employer.'" They conclude that there is, therefore, no question of retrospective operation of a statute involved in this case. Appellants seek only a fair award of attorneys' fees for services they rendered *after the effective date of the amendment*.

In Savitt v. L. & F. Const. Co., 1940, 124 N.J.L. 173, 10 A.2d 728, modifying 123 N.J.L. 149, 8 A.2d 110, dismissing certiorari 4 A.2d 692, 17 N.J.Misc. 65, modifying Feinsod v. L. F. Const. Co., 2 A.2d 357, 16 N.J.Misc. 514, affirming a judgment of the New Jersey Department of Labor, 1 A.2d 752, 16 N.J.Misc. 462, the *precise question* here posed by this phase of the appeal was decided by the highest court of New Jersey. The legislative history of the statute there in issue is so strikingly similar to the one here that it merits repetition.

Judge Hartshorne, of the Court of Common Pleas, 4 A.2d 692, 17 N.J.Misc. 65, reviews it as follows: "Originally there was uncertainty whether the employee could obtain a double recovery when an accident occurred during, and in the course of, the employment, for which a third party was responsible, one, under the Workmen's Compensation Act from his employer, the other, at common law from the tortfeasor. This unsettled

situation led to the enactment of certain statutes [citations], the 1931 act providing that the employee's recovery from the third party should be credited on the award against the employer." 4 A.2d at page 693. (See California Labor Code § 3861 for a counterpart provision.) "In the case of Deuchar v. Standard Accident Ins. Co., 117 N.J.L. 375, 189 A. 61, this act was construed to give the employer the benefit of the full amount of such third party recovery, up to the full amount of the award itself, despite the fact that the employee had been compelled to pay his attorney a very substantial attorney's fee to obtain this third party recovery, which went to benefit the employer, not the employee." 4 A.2d at page 694. (He might well be speaking of Dodds v. Stellar!) "The policy of thus cutting down the award to the employee, by the amount of the fee which benefited the employer, naturally caused further question. So we find the legislature thereafter enacting the 1936 statute in question, providing for these attorney's fees to be charged against the employer, who primarily benefited from the work done, and not against the employee." 4 A.2d at page 694.

Against this background stand facts virtually identical to those in this appeal. In 1936, prior to the statute, Savitt, a carpenter, sustained compensable injuries due to the actionable negligence of third party tortfeasors. He instituted a suit against them which was settled in 1937, after the effective date of the statute. The employer claimed that the credit to which he was entitled in such recovery, to be applied against his liability for compensation, should not be diminished by the deduction of reasonable attorney's fees as was provided in the amended statute. The Department of Labor ruled against the employer and allowed the fees. On appeal the employer claimed both impairment of the obligation of contract and violation of due process.

In 4 A.2d 693, at page 695, the Court of Common Pleas held that the employer did not acquire, at the time of injury, a vested

right to have the attorney's fees in question charged against the employee and not himself. The employer's right to a credit did not vest until the employee recovered against a third party. Such being the case, the Bureau did not give the statute of 1936 a retroactive effect, impairing the contractual obligation or violating due process, since the act was in effect when the employer's right to the credit arose.

In 8 A.2d 110, at page 114, the Supreme Court affirmed (modifying in an immaterial particular) and stated that " * * the challenged act * * * affects 'no enlargement of the primary statutory liability; no new or additional burden is imposed.' It does not affect the employer's liability towards his employee. It tends merely further to assure the employee his unquestionable right, under our workmen's compensation act, to compensation in full for the disability which he sustained."

The Court of Errors and Appeals, in 10 A.2d 728, at page 729, affirmed the lower court's decision and definitively disposed of the problem in the following words: "[T]he statute concerns the remedy rather than substantive contractual rights. Evidently, its purpose was to correct a manifest and unintentional injustice in the earlier statute, under which the injured employee could receive substantially less compensation where there was a recovery from a third-party tortfeasor than where there was none. In essence, the statutory provision under review merely places upon the employer the burden of the counsel fee payable for service rendered in the third-party action to his ultimate profit. After all, these provisions have nothing to do with the compensation to be paid under the basic statutory scheme of compensation. Clearly, it was not the legislative purpose to vary the compensation payments, i. e., to create two classes with essentially different rights—one where a third-party recovery is had and the other where there is none such. The design of all these provisions relating to credit for a third-party recovery was to advantage

the employer—to give him the benefit of the moneys thus paid. The regulation of this incidental phase of the compensation statute cannot reasonably be said to impair the obligation of the basic contract."

Respondent contends that the Savitt cases do not apply because there the award of attorney's fees was made, not by the court, but by the Department of Labor, equivalent in New Jersey to our Industrial Accident Commission; secondly, it did not concern a lien on a judgment, but a credit on the insurer's liability to the employee given by the department for the recovery received by the employee from a judgment against third persons, which credit was reduced by the amount of attorney's fees allowed. These are distinctions without a difference. Whether the allowance of attorney's fees on the insurer's portion of the recovery from third persons is made by a court or a commission is immaterial. The basic question passed upon was whether the statute providing a charge for attorney's fees on the insurer's share, enacted after the injury, applied in cases where the injury occurred prior to its adoption. The same contentions of unconstitutionality and impairment of contract were made there as respondent makes here. Respondent ingeniously contends that the litigation in the Savitt cases was merely to determine what constitutes "payment" from a third person, and therefore, deducting attorney's fees from the amount recovered by suit from a third person, even though such deduction was not allowable at the time of the injury, was in no wise analogous to the situation here. We fail to follow the logic of this contention.

Although the Aetna case contains some very broad language, it is apparent that the Supreme Court was not asserting that every detail incident to the status becomes immutably fixed as of the date of injury. The extent of its holding as to retrospectivity was clarified in *Gregory v. State of California*, 32 Cal.2d 700, 197 P.2d 728, 4 A.L.R.2d 924. In that case an action to recover a gift tax paid under protest was pending at the time the gift tax statute was amended so as to allow in-

terest on the amount of overpayment. The Supreme Court held that the taxpayer was entitled to such interest from the date of the amendment and that such payment did not give a retroactive effect to the amendment. The Aetna case was distinguished on the ground that there the compensation payable for past injuries was increased by a subsequent amendment and *nothing new occurred in that case after the effective date of the act which would make the statute operate prospectively*, while in the Gregory case the statute operated on the *future condition or action of the state in withholding overpayment from the taxpayer*.

[1] This is the preferable construction in our case. The amendment specifically states that the fee is to be paid "on account of the service rendered by [the attorney] in *effecting recovery* for the benefit of the employer * * *." (Emphasis added.) Where, as here, recovery follows the amendment, it seems clear that an allowance should be made for those future services.

This law does not give a previous transaction some different legal effect from that which it had under the law when it occurred. It does give a different effect to a future failure to join in or contribute to the employee's action—but this new obligation is not based on a past transaction but rather on a future omission. Such a statute is necessarily prospective in its operation. See *City of New York v. Foster*, 148 App.Div. 258, 133 N.Y.S. 152, 155.

[2,3] Furthermore, the reasoning in the Savitt case is clearly applicable. In California the liability under the Workmen's Compensation Act is incident to the status of employment and is neither in tort nor in contract. *Quong Ham Wah Co. v. Industrial Acc. Comm.*, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190. Regardless of what this basic relationship is termed, the employer's right to reimbursement, credit, or lien does not attach until the employee effects a settlement or recovers a judgment against a third party. Until then any theoretical contingent

"rights" are at best inchoate. It is the recovery which fixes the employee's obligation to reimburse and, under the situations described in the amendment, the employer's duty to contribute—just as, under the Aetna case, it is the date of injury which fixes and defines the employer's obligation to compensate.

2. The Stipulation.

[4-7] In a letter constituting his opinion in the case, the trial judge stated, in effect, that the stipulation required reimbursement of all expenditures "without deduction of any amount." However, in construing the agreement it must be considered in the light of conditions as they existed at the time it was entered into. The interest of the insurer in the recovery from third persons was not subject to any reduction for attorneys' fees, see *Dodds v. Stellar*, supra, 30 Cal. 2d 496, 183 P.2d 658, and hence the statement in the stipulation that respondent be reimbursed for all expenditures made by it cannot be held to be a waiver by appellants of a right which did not then exist. As said in *Re De Neef*, 42 Cal.App.2d 691, 694, 109 P.2d 741, 742: "* * * primary essentials of a waiver are knowledge and intent. Before one may be deemed to have waived a right granted by statute he must be shown to have knowledge of the right and an intent to waive or forgo it." Both parties contend that the agreement is not ambiguous, but do not agree upon the construction to be placed upon it. If it is not ambiguous, and we are of the opinion it is not, the language in *Estate of Platt*, 21 Cal.2d 343, 352, 131 P.2d 825, 830, applies: "An appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence [citations], where there is no conflict in the evidence [citation], or a determination has been made upon incompetent evidence [citation]. Under these circumstances, there is no issue of fact, and it is the duty of an appellate court to make the final determination in accordance with the applicable principles of law."

[8] It is clear from the agreement itself that it is nothing more than an agreement not to file the lien to which the insurer was entitled in return for plaintiff's assurance that he would pay the company from any recovery from third parties, those sums to which under the Labor Code the insurer was entitled. Thus, it did not contemplate or preclude attorneys' fees which constitute an item separate and distinct from any adverted to in the agreement; and this is true, whether the original conversation between Scott and Johnson as claimed by Scott is correct or not. There is no evidence from which a reasonable inference can be drawn that the parties intended to preclude any right to attorneys' fees which conceivably might be legislated into existence in the future.

The order is reversed and the case is remanded with instructions to the trial court to fix attorneys' fees in accordance with the views herein expressed.

PETERS, P. J., and FRED B. WOOD, J., concur.



103 Cal.App.2d 664

MULLIGAN et al. v. WILSON et al.
Civ. 18255.

District Court of Appeal, Second District,
Division 3, California.
April 20, 1951.

Hearing Denied June 18, 1951.

Action by James H. Mulligan and another against Philip L. Wilson and wife and others for declaratory relief, to quiet title and impress a trust on realty and for damages. The Superior Court of Los Angeles County, Wm. B. McKesson, J., entered judgment in favor of named defendant and wife after sustaining their demurrer to second amended complaint without leave to amend and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that plaintiffs were precluded by former judgment from claiming that defendants were obligated to carry ex-

pense of holding and protecting from foreclosure realty purchased by defendants under option obtained by plaintiffs and transferred to defendants pursuant to written agreement to share the profits to be derived from sale of the realty and that complaint alleging sale of the realty to the defendants under trust deed given by defendants as security for purchase money notes failed to disclose any basis for holding defendants accountable to plaintiffs for an interest in the realty or profits as constructive trustees.

Judgment affirmed.

1. Contracts ⇨189

Written contract to share with transferees of option profits to be derived from sale of realty purchased by transferees under option did not obligate purchasers to pay purchase-money notes secured by trust deed given by them or bear the expense of carrying the realty until maturity of last note or for any other time.

2. Judgment ⇨744

Plaintiffs were bound by judgment declaring that they had only the rights granted by written agreement to share the profits to be derived from realty purchased by defendants under option obtained by plaintiffs and transferred to defendants and plaintiffs could not in subsequent action assert that defendants were obligated to carry the expense of holding the property and protecting it from foreclosure, where written agreement imposed no such obligation upon defendants, since under judgment defendants were under no duty toward plaintiffs other than those expressed in agreement.

3. Judgment ⇨713(2)

A judgment declaring the rights of plaintiffs under written agreement with defendants precluded plaintiffs from claiming in subsequent action any greater rights which could have been asserted in former action.

4. Conspiracy ⇨18

Fraud ⇨41

General allegations of fraud, bad faith, and conspiracy by defendants to acquire realty with the specific intent of depriving plaintiffs of all interest therein had no potency beyond that to be derived from the

facts alleged in support of such general allegations.

5. Trusts ☞99

Complaint alleging written contract to share profits to be derived from sale of realty purchased by defendants under option obtained by plaintiffs and transferred to defendants, failure of defendants to pay purchase-money notes and sale of realty to defendants under trust deed given as security for notes disclosed no basis for holding defendants accountable to plaintiffs for an interest in realty or profits as constructive trustees, in absence of allegation of facts showing fraud or that defendants had any contractual duty to protect plaintiffs' interest in the profits.

6. Pleading ☞254

Where second amended complaint failed to allege facts showing that plaintiffs had any legal or equitable interest in realty, purchased by defendants under option obtained by plaintiffs and transferred to defendants pursuant to written agreement to share profits to be derived from sale of the realty and subsequently sold to defendants under trust deed given by defendants as security for purchase-money notes, or that plaintiffs had any right to damages and plaintiffs stated at time of submission of demurrer that they would not amend if demurrer were sustained, demurrer to second amended complaint was properly sustained without leave to amend.

Charles L. Nichols and George Acret, Los Angeles, for appellants.

Wood, Crump, Rogers & Arndt and Stanley M. Arndt, all of Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiffs appeal from a judgment in favor of Philip L. Wilson and wife, herein called defendants, after the sustaining of a demurrer to the second amended complaint without leave to amend. Other persons were named defendants but were not served. Plaintiffs denominated their action as one for declaratory relief to quiet title, to impress a trust, and for damages.

Their claims arise out of an agreement with defendants concerning two city lots in Los Angeles.

On February 20, 1946, plaintiffs paid \$500 for an option to purchase the lots from Mary C. Durant for \$50,000, payable \$10,000 down and \$40,000 within 5 years at 5 per cent interest. Plaintiffs sold the option to defendants for \$500 and in further consideration of an agreement which recited that the Wilsons had deposited in escrow \$9,500 in cash and had executed a trust deed in the amount of \$40,000 securing 5 promissory notes each in the amount of \$8,000 with interest at 5 per cent per annum "said cash and deed of trust being in full payment of the purchase price of the real property hereinbefore described." Plaintiffs were to receive on a sale of the property one-half of the profits. The option agreement and the agreement between plaintiffs and defendants are set out in the opinion of the court rendered upon a former appeal by plaintiffs from a judgment declaring the rights of the parties under the same agreement. *Mulligan v. Wilson*, 94 Cal.App.2d 286, 210 P.2d 526. Upon completion of the escrow \$9,500 was paid to the seller and defendants' 5 notes for \$8,000 each payable in 1, 2, 3, 4 and 5 years after August 20, 1946, also were delivered to the seller. The note which fell due August 20, 1947, was paid by defendants. The principal and interest which fell due August 20, 1948, were not paid. Shortly before the due date defendants demanded of plaintiffs that they pay one-half of the note, which plaintiffs refused to do, claiming that it was the duty of defendants to pay the notes and interest as they fell due. On August 18, 1948, plaintiffs brought an action in which they sought a judgment declaring that it was the duty of defendants to pay the notes and to act in good faith in carrying out the agreement. The judgment rendered in that case declared the rights of the parties and was affirmed on the former appeal. It declared that defendants owned the property and that plaintiffs had no rights therein except those created by the agreement; defendants had a right to sell the property for \$85,000, or more, or could

purchase the same through an agent or dummy for \$85,000, or more, and could purchase the rights of plaintiffs on the basis of \$85,000 for the entire property, provided no available purchaser known to the defendants would pay more for the property; defendants had invested \$20,815.08 which should be returned to them plus 7 per cent interest before a division of profits; that there had been no bad faith on the part of the defendants and "there is an obligation on all of the parties to said agreement to use good faith in carrying out said agreement." That judgment was affirmed August 26, 1949. The note, which fell due August 20, 1949, was not paid. January 17, 1950, the property was sold under the trust deed to defendants for \$65,000 and they received from the trustee the difference between that sum and the amount of their debt, plus expenses of selling.

[1-3] Defendants by their agreement with plaintiffs did not obligate themselves to pay the notes or the expenses of carrying the property for 5 years or for any other time. Nevertheless, plaintiffs allege "that by the agreement aforesaid it was the mutual intent of the parties that in consideration of plaintiffs transferring said option to the defendants Wilson that the defendants Wilson would pay the principal of each of said trust deed notes, together with all interest thereon, together with all necessary expenses in the carrying of said property extending if necessary through said period of 5 years." It is apparent that if plaintiffs were to succeed in imposing upon defendants the duty to pay the notes as they fell due it would have to be through reformation of the agreement or by means of evidence other than that furnished by the agreement itself. If they had or claimed such additional rights they had an opportunity and a duty to assert them in the former action, but they stood on the agreement alone, and as a consequence the court declared that they had the rights granted by the agreement, and none other. This declaration means also that defendants were under no duty toward plaintiffs other than those expressed in the writing. Plaintiffs are bound

by this adjudication. They have not invoked any principle of law or equity under which defendants would be obligated to carry the expenses of holding the property and paying the sums necessary to protect it from foreclosure. This was strictly a matter of contract. It is scarcely necessary to say that the judgment which declares the rights of plaintiffs bars them from claiming any greater rights which could have been asserted by them in the former action. *Andrews v. Reidy*, 7 Cal.2d 366, 60 P.2d 832.

[4, 5] It would have been possible, of course, for defendants by reason of their subsequent conduct to preclude themselves from claiming for themselves the entire title which they acquired through foreclosure. Plaintiffs have sought to allege facts which would call for a declaration that defendants hold the property to the extent of plaintiffs' interest under a constructive trust. Their complaint is replete with charges of fraud, bad faith and conspiracy to acquire the property with the specific intent of depriving plaintiffs of all interest therein. These general characterizations of defendants' conduct and motives do not have any potency beyond that to be derived from the facts alleged. The factual allegations may be summarized as follows: Defendants stood in a relation of trust and confidence toward plaintiffs; plaintiffs had no money with which to pay any part of the trust deed indebtedness, which fact was known to the defendants; it was the purpose of defendants in allowing the payments to become delinquent to bring about a foreclosure, and to bid in the property for themselves at the lowest possible price; they represented to plaintiffs that they intended to act fairly and in good faith toward plaintiffs; due to improvements in the neighborhood and the opening of a through highway adjacent to the property the value of the property was increased to the sum of \$185,000; defendants failed and refused to grade the lots to the street level as they had agreed to do and thereby prevented enhancement of value which the grading would have accomplished, and made it necessary for the State to acquire a right

to terrace the property down to the street level; they refused to pay more than \$65,000 when another bidder had bid \$64,500; at the time of the sale the trustee did not call attention of the bidders to the improvements in the vicinity which had increased the value of the property. When these allegations are put together and examined it becomes apparent that plaintiffs are assuming that the relation of the parties was such as to preclude defendants from acquiring the property for themselves. Plaintiffs do not point out where-in defendants had any contractual duty to protect plaintiffs' interest in the profits. Surely the fact that plaintiffs were financially unable to protect themselves did not make it the duty of defendants to protect them. Plaintiffs knew of the delinquencies, knew that defendants were not going to cure them, knew the property was to be sold and had an equal opportunity to find a purchaser. Defendants did nothing to interfere with any efforts plaintiffs might have wished to put forth and made no promises to plaintiffs of whatsoever nature. They did not prevent the attendance at the sale of bidders nor discourage bidding. The allegations as to their alleged acts which it is claimed depressed the market value of the property are discounted by the allegation that the property was worth \$185,000. Plaintiffs do not allege that they were deceived in any manner. If all the facts alleged by plaintiffs had been proved they would have been insufficient to support a finding of fraud. The allegation that plaintiffs reposed great confidence and trust in defendants until October 31, 1949, when they discovered defendants' intention to allow the land to be sold under foreclosure, does not strengthen the complaint. Admittedly plaintiffs had known for more than a year that defendants expected them to pay one-half of the notes and they learned long before the sale that defendants intended to bid in the property for themselves. Such are their allegations. Defendants did not acquire the property through any breach of trust. The fact that one business associate takes a selfish advantage of another does not make a law-

Cal.Rep. 229-230 P.2d-25

suit, if it is taken legally. There is no basis in the facts alleged for the contention that defendants are accountable to plaintiffs for an interest in the property, or profits, as constructive trustees.

[6] Plaintiffs having failed to allege facts to establish either a legal or equitable interest in the property or a right to damages were not entitled to a declaratory judgment in their favor. Their demurrer to the second amended complaint was properly sustained. Plaintiffs at the time of the submission of the demurrer stated that they would not amend if the demurrer were sustained. It was proper to sustain it without leave to amend.

The judgment is affirmed.

WOOD, J., concurs.

VALLÉE, J., did not participate.



103 Cal.App.2d 710

WHARTON v. MOLLINET et al.

Civ. 4310.

District Court of Appeal, Fourth District,
California.

April 23, 1951.

Action for partition of realty by Ellen Clausen Wharton against Mabel Clausen Mollinet, and others. The Superior Court of Kern County, Norman F. Main, J., decreed partition, and defendants appealed. The District Court of Appeal, Barnard, P. J., held that condition in decree of distribution confirming fee simple title in cotenants and which purported to restrain power of alienation of such property for 20 years in accordance with provision in will, was void and not binding on distributees under will.

Judgment affirmed.

1. Executors and administrators ☞315(6)

A decree of distribution, when final, is conclusive as to the interpretation and

validity of will, rights of legatees, property included or covered by will, and as to incidental things necessarily involved in determining all matters properly within its scope.

2. Executors and administrators ⇨315(5)

A decree of distribution confirms title of legatees to such interest or estates as may be given to them by will and as are permitted by law to exist, but decree cannot create a new estate, or, having confirmed title in fee simple, suspend power of alienation contrary to provisions of statute. Civ.Code, §§ 711, 761, 762.

3. Perpetuities ⇨6(5)

Under statute rendering void conditions restraining power of alienation when repugnant to interest created, decree of distribution confirming fee simple title of cotenants to realty and purporting to restrain alienation of such property by tenants for a period of 20 years was void on its face as to portion purporting to restrain alienation, and condition was not binding on distributees. Civ.Code, §§ 711, 761, 762.

4. Perpetuities ⇨6(1)

Statute rendering void conditions restraining power of alienation when repugnant to interest created, is one of conditions of ownership established by law, and governs future effect of any such attempted restriction appearing in any instrument creating a fee simple estate whether such estate be created by deed, agreement or will. Civ.Code, §§ 711, 761, 762.

5. Perpetuities ⇨4(22)

Under statute rendering void conditions restraining power of alienation when repugnant to interest created, restriction of right of alienation in instrument conveying title in fee simple is separable from fee simple title and does not impair validity of such fee simple title. Civ.Code, §§ 711, 761, 762.

BARNARD, Presiding Justice.

This is an action for a partition, as between the three owners, of a described 40 acres of land in Kern Company.

The land formerly belonged to Nels P. Clausen. In the second, third and fourth paragraphs of his will he gave full title of this land to his three nieces, respectively, giving a one-half interest to one of them and a one-fourth interest to each of the other two. The fifth paragraph appointed one of the nieces as executrix. In the sixth paragraph he stated that if he was still in possession of this land at the time of his death "I hereby decree that my heirs do not sell or dispose of the same for twenty (20) years after my demise."

A decree of distribution was entered on March 18, 1948, in which the court found that the property in question was devised and bequeathed by the will to the three nieces, one-half to the one and one-fourth to each of the others, and further found that Paragraph 6 of the will read as above described. Thereafter, it was ordered and decreed that the property in question be distributed to the three nieces in the proportions above named "subject, as to (the property in question) to the decree of Nels B. Clausen, that they do not sell or dispose of the same for twenty years after his death."

On March 3, 1949, after the decree of distribution had become final, this action for partition was brought by one of the nieces. The court found that the three nieces are the owners of the property as tenants in common; that one of the nieces is the owner in fee simple of a one-half interest in the land and each of the other two nieces is the owner in fee simple of a one-fourth interest therein; and that they acquired their title to the property through the provisions of said will and the decree of distribution which was entered. The court then further found "that the provisions of said will and said decree restraining the sale or disposition of the above property for a period of twenty (20) years is a restraint on alienation and is void under section 711 of the Civil Code",

T. R. Claffin, Bakersfield, for appellant.
Dorsey, Campbell & Bultman and Henry E. Bianchi, Bakersfield, for respondent.

and that the devisees took the property free from that restriction. An interlocutory decree was entered providing for a partition of the property between the three nieces, or in the event this could not be fairly done for a sale of the property and a division of the proceeds. From this interlocutory decree one of the nieces has appealed.

The appellant contends that the decree of distribution, having become final, is conclusive even though it may have erroneously included a condition in violation of the statute, citing *Manning v. Bank of California*, 216 Cal. 629, 15 P.2d 746; *Estate of Loring*, 29 Cal.2d 423, 175 P.2d 524; *Estate of White*, 69 Cal.App.2d 749, 160 P.2d 204; and *Goad v. Montgomery*, 119 Cal. 552, 51 P. 681. It is further contended that the decree of distribution is a contract between the distributees and that partition of the property would be a sale thereof contrary to such contract.

The respondent contends that the attempted restraint on alienation both in the will and the decree of distribution, is void under the statute and relies on the well-established rule that a void judgment or part of a judgment is a mere nullity and may be attacked at any time.

[1,2] Without doubt a decree of distribution, when final, is conclusive as to the interpretation and validity of the will, the rights of legatees, the property included or covered by the will, and as to incidental things necessarily involved in determining all matters properly within its scope. It serves to confirm the title of the legatees to such interests or estates as may be given them by the will, and which are permitted by law to exist. A decree of distribution cannot create a new estate or, having confirmed a title in fee simple, control what the distributee may thereafter do with the property, when a contrary provision is made by statute.

[3-5] The decree of distribution, in accordance with the will, conveyed or confirmed a fee simple or absolute title in the distributees. (Civ.Code, Secs. 761,

762.) It also contained a clause, quoted from the will, purporting to restrain alienation for a period of twenty years. While this decree was conclusive as to what the will contained, it was not conclusive on the future effect of the restricting clause. This condition is inconsistent with and repugnant to the interest created by the will and confirmed in the decree, and such a condition is absolutely forbidden by section 711 of the Civil Code. That section is a codification of an established rule of the common law, and is founded on grounds of clear public policy for the purpose of clarifying and protecting titles for the benefit of the public at large, as well as of the grantees. Section 711 is one of the "Conditions of Ownership" established by law, and governs the future effect of any such attempted restriction appearing in an instrument creating a fee simple estate. The right to own property in fee simple, but with a restricted right to sell it, cannot be created either by deed or by agreement. Any such restriction of the right of alienation in an instrument conveying a title in fee simple is void, and the void provision is separable from the title created. *Murray v. Green*, 64 Cal. 363, 28 P. 118. *Title Guarantee & Trust Co. v. Garrott*, 42 Cal.App. 152, 183 P. 470; *Bonnell v. McLaughlin*, 173 Cal. 213, 159 P. 590. Such a limitation on a fee simple estate can no more be created by a will than by a deed. A decree of distribution, confirming a fee simple title, can have no greater effect and cannot be conclusive as to a repugnant condition which is absolutely void, and which cannot be made valid by any contract or judgment. The decree of distribution was conclusive as to the passing of a fee simple title to the distributees, but the decree itself was void on its face with respect to that part of it which purports to restrict their future right of alienation for a period of years. That part of the decree being void on its face the restriction named therein is not binding on the distributees.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

103 Cal.App.2d 507

**SHANANDER v. WESTERN LOAN
& BLDG. CO. et al.**
Civ. 17833.

District Court of Appeal, Second District,
Division 3, California.

April 17, 1951.

As Corrected on Denial of Rehearing
May 1, 1951.

Hearing Denied June 14, 1951.

Connie Shanander sued Western Loan and Building Company, a corporation, and others to recover for damage to personal property in plaintiff's apartment resulting from an overflow of water from defective plumbing on an upper floor of the apartment building owned by defendants. The Superior Court, Los Angeles County, Charles E. Haas, J., rendered judgment upon a jury verdict for plaintiff, and defendant corporation appealed. The District Court of Appeal, Bartlett, Justice pro tem., held that the landlord could not be held liable in the absence of a showing of negligence or malfeasance on his part.

Reversed.

1. Negligence ⇨58

Where one, in conduct and maintenance of enterprise lawful and proper in itself, deliberately does act under known conditions, and with knowledge that injury may result to another, proceeds, and injury is done to other as direct and proximate consequence of act, however carefully done, one who does act and causes injury should, in all fairness, be required to compensate other for damage done.

2. Landlord and tenant ⇨124(1), 166(5)

Rule, that one who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it confined at his peril, is not applicable to act of landlord in providing his building with artificial means for supplying it with water, since such introduction of water is ordinary and natural use, and where landlord has not been guilty of any negligence in construction or maintenance of water appliances in his building, he is not liable for damage sustained by his tenants by reason of overflow.

3. Landlord and tenant ⇨166(1)

Landlord is not insurer of safety of his tenant's property and is not liable to tenant for defective condition of his premises in absence of negligence or some malfeasance on his part, and to hold landlord liable upon warranty for any injury resulting from latent defect in equipment or furnishings leased with furnished apartment would be to make landlord virtually an insurer of safety of tenant.

4. Landlord and tenant ⇨166(5)

In action by tenant to recover from landlord for damage to personal property of tenant resulting from an overflow of water from defective plumbing on an upper floor, landlord could not be held liable in absence of showing of negligence or malfeasance on his part.

Cushman & Wetherbee, Los Angeles, for appellant.

Maurice J. Hindin, Los Angeles, for respondent.

BARTLETT, Justice Pro Tem.

This is an appeal from a judgment in an action wherein a jury rendered a verdict against appellant for damages to personal property in the sum of \$1,500.

The facts are not in dispute and are briefly these. Respondent was a lessee of an apartment in an apartment house which contained 72 units. Water was supplied to the tenants which was brought to this building by pipes. When respondent left her apartment on September 18, 1948, at about 6:15 p. m., her apartment was dry and in good order. She returned between 2 and 3 o'clock in the morning and found her apartment dripping wet as were her personal effects located there. The manager of the apartment house, between 2 and 3 o'clock of that same morning, was called to the apartment above the one occupied by respondent and found water pouring out of a break in the cold water pipe leading from the floor to the faucet in the bathtub. He immediately shut off the water in the entire apartment house. An examination disclosed that the break had taken place underneath a curving edge of the

bathtub where it was hidden from view. A metal flange concealed in a nut into which the pipe fitted had broken permitting the pipe to pull out and water to flow out of the pipe onto the floor. The appellant had had no notice of any fault in this plumbing up to this time.

The complaint was based on two causes of action. The first one was on negligence of the landlord in the manner in which it managed, operated and maintained its apartment building. The second did not allege negligence but alleged that appellant maintained on its premises large quantities of water and other fluids which, on the date of the accident, it "suffered, caused and permitted" to flow upon and over the personal effects kept by respondent in her apartment.

The court refused all instructions offered relating to negligence and instructed the jury that, as a matter of law, the defendant was liable for damages suffered as a proximate result of the accident and that the only question submitted to them was the amount of respondent's damages, if any. The only question, therefore, before us on this appeal was whether or not this was a case of absolute liability. Respondent's theory as to why it was, is clearly set forth in an instruction which the court, including the words in Latin, gave to the jury. It was as follows: "You [are] instructed that the water which did the injury to plaintiff, if any, was not a natural stream flowing across defendant's premises, but was brought upon the premises by artificial means. And the rule is general that, where one brings a foreign substance upon his premises, he must take care of it and not permit it to injure his neighbors. The law upon the subject is tersely expressed in the maxim, *sic utere tuo ut alienum non laedas*. "It is the rule that where an injury arises out [of], or is caused directly and proximately by the contemplated act or thing in question, without the interposition of any external or independent agency which was not or could not be foreseen, there is an absolute liability for the consequential damage, regardless of any element of negligence either in the doing of the act or in the construction, use or maintenance

of the object or instrumentality that may have caused the injury.'"

The first paragraph of this instruction is taken verbatim from one of the cases upon which respondent relies to support the judgment. *Parker v. Larsen*, 86 Cal. 236, 238, 24 P. 989. This was an action for an injunction and damages where the defendant was an adjoining landowner to the plaintiff. Defendant so irrigated his land that by reason of the means employed the excess of water not absorbed, formed a pool 200 or 300 feet in length and from 6 to 10 inches in depth. There was sufficient slope to the property so that water would flow from the land of defendant to that of plaintiff and by percolation it saturated plaintiff's land to such an extent that he was damaged in the sum of \$100.

[1] The second paragraph of the quoted instruction is an exact quotation from another case relied upon by respondent, that of *Green v. General Petroleum Corp.*, 205 Cal. 328, 334, 270 P. 952, 60 A.L.R. 475. This was an action to recover damages for injuries to property occasioned by "blowing out" of an oil well during drilling operations. When the well erupted a stream of oil, gas, mud and rocks shot into the air and onto respondent's property about 200 feet from the well. It was held that there was no negligence on the part of respondent in this drilling operation. In considering the question of liability the court said 205 Cal. at page 331, 270 P. at page 953, 60 A.L.R. 475: "It is matter of common knowledge that the inner earth contains powerful gaseous forces, frequently found in proximity to and in connection with deposits of petroleum substances. It was a known fact that a tremendous pressure of gas underlay the particular locality in which appellant was carrying on its drilling operations. It proceeded with full knowledge of the situation." The court later promulgated the rule applicable to such cases as follows, 205 Cal. at pages 333, 334, 270 P. at page 955, 60 A.L.R. 475: "Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds,

and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done." The same principle is stated in Restatement of the Law of Torts, Volume III, sections 519 and 520, pages 41 and 42: "Section 519. Misconduct of Ultrahazardous Activities Carefully Carried On. Except as stated in sections 521-4, one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable misconduct of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm."

"Section 520. Definition of Ultrahazardous Activity. An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage." Under comment on clause (a) of section 520 we find the following example given in the text on page 44: "Again, there is always a chance that in drilling an oil well a gusher will be struck which while ultimately profitable to the owner of the well will do serious harm to the lower lands in its vicinity." This was the exact situation in the case of *Green v. General Petroleum Corp.*, supra, 205 Cal. 328, 334, 270 P. 952, 60 A.L.R. 475.

The factual situation in *Nola v. Orlando*, 119 Cal.App. 518, 6 P.2d 984, and the other cases upon which the respondent relies are similar to those we have referred to in discussing *Parker v. Larsen*, supra, 86 Cal. 236, 238, 24 P. 989, and the court applied to them the same principle of law. There is a sharp distinction between these cases wherein the doctrine of absolute liability has been applied and those in the case before us. This is a case of a tenant against the landlord. There was nothing in defendant's conduct which necessarily involved a risk of injury to the tenant's property. No act of defendant corpora-

tion was under known conditions or knowledge that damage to its tenant might result. The landlord's conduct in furnishing water to its tenant was a matter of common usage and an ordinary and natural use. It was fulfilling a duty imposed upon it by law. Health and Safety Code, section 17450, provides: "Every plumbing fixture installed in any building shall be provided with running water."

[2] The law applicable to cases shown by the facts in this one, is set forth in 32 American Jurisprudence, pages 626 and 627, as follows: "The rule that one who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it confined at his peril is not applicable to the act of a landlord in providing his building with artificial means for supplying it with water. Such introduction of water is an ordinary and natural use, and where the landlord has not been guilty of any negligence in the construction or maintenance of the water appliances in his building, he is not liable for damage sustained by his tenants by reason of an overflow."

[3] It is established law in California that a landlord is not an insurer of the safety of his tenant's property and is not liable to the tenant for a defective condition of his premises in the absence of negligence or some malfeasance on his part. 15 Cal. Jur. 704. And as said in *Forrester v. Hoover Hotel & Inv. Co.*, 87 Cal.App.2d 226, 231, 232, 196 P.2d 825, 828; "We are persuaded that to hold the landlord liable upon warranty for any injury resulting from a latent defect in the equipment or furnishings leased with a furnished apartment would be to make the landlord virtually an insurer of the safety of the tenant."

[4] We have not been referred to any cases in this or any other jurisdiction where it has held that the act of a landlord in providing his building by artificial means with water and supplying it to his tenants makes the landlord the insurer of the property of occupants on a lower floor. In each of the cases we are about to call attention to from foreign jurisdictions, facts

were involved relating to the overflow of water from defective plumbing, bathtubs or toilets from the space let to a tenant on an upper floor onto the personal property of a tenant of a lower floor. That is just the case we have here. In each of these cases it was held that the landlord could not be held liable in the absence of a showing of negligence or malfeasance on his part. The cases referred to are: *Mendell v. Fink*, 8 Ill.App. 378; *Greene v. Hague*, 10 Ill.App. 598, 602; *Tentzer v. Erlanger*, Sup., 117 N.Y.S. 158; *Mendelson v. Bona*, Sup., 63 N.Y.S.2d 410; *Cohen v. Cotheal*, 156 App.Div. 784, 142 N.Y.S. 99; *Narbonne v. Storer*, 121 Minn. 505, 141 N.W. 835; *Haizlip v. Rosenberg*, 63 Ark. 430, 39 S.W. 60; *Rosenfield v. Newman*, 59 Minn. 156, 60 N.W. 1085; *White and Co. v. Montgomery*, 58 Ga. 204; *Franklin Fire Ins. Co. v. Noll*, 115 Ind.App. 289, 58 N.E. 2d 947, 951.

The judgment is reversed.

SHINN, P. J. and VALLÉE, J., concur.



103 Cal.App.2d 491

COSTA v. REGENTS OF UNIVERSITY OF CALIFORNIA et al.

District Court of Appeal, First District,
Division 2, California.

April 17, 1951.

Action by Joseph H. Costa against Regents of the University of California, and others. The Superior Court in and for the City and County of San Francisco, Franklin A. Griffin, J., granted the motion of William E. Carter and Anastasia Emerson for a nonsuit, during the course of the trial, which order was entered in the minutes. After a jury failed to reach a verdict as to the other defendants, and was discharged, the court by minute order granted such defendants' motion for judgment. Later the court entered formal judgments of nonsuit and for defendants in accordance with the minute orders. Plain-

tiffs appealed. The District Court of Appeal, Dooling, J., held that the minute order, granting motion for nonsuit as to defendants Carter and Emerson, was the appealable order from which time for appeal started to run, but that with respect to the motion for judgment after disagreement of jury, time commenced to run from entry of formal judgment.

Appeal dismissed as to Carter and Emerson, and motion of other defendants to dismiss appeal denied.

1. Appeal and error ☞428(2)

Notice of appeal filed on October 14 was too late with reference to an order made on June 28. Rules on Appeal, rule 2(a, b).

2. Appeal and error ☞345(1)

Notice of motion for new trial filed more than 60 days after entry of minute order granting motion for nonsuit, could not extend time for appeal from that order. Rules on Appeal, rule 3(a).

3. Appeal and error ☞78(4)

Minute order granting a motion for nonsuit is order from which appeal must be taken, not formal judgment entered later. Code Civ.Proc. §§ 581, 581c, 581d.

4. Appeal and error ☞78(4)

The code section providing that a dismissal when entered in minutes shall be "effective for all purposes" required construction that minute order of nonsuit, rather than subsequent formal judgment, was the appealable order. Code Civ.Proc. § 581d.

5. Dismissal and nonsuit ☞80

In face of statutory and judicial history in which nonsuit had always been treated as one form of dismissal, court could not assume that Legislature in 1947, in recasting section 581 of the Code of Civil Procedure into several sections, intended to treat a nonsuit as no longer being a dismissal, particularly in view of arrangement of new sections. Code Civ.Proc. §§ 581, 581c, 581d.

6. Dismissal and nonsuit ☞79

The fact that statute was amended to make a judgment of nonsuit an adjudication on the merits unless court otherwise

specified did not require formal entry of such judgment elsewhere than in minutes. Code Civ.Proc. § 581c.

7. Appeal and error ⇨133

A minute order for judgment in accordance with a previous motion for directed verdict after jury was discharged without having rendered a verdict is not an appealable order. Code Civ.Proc. § 630.

8. Appeal and error ⇨347(2)

Where by minute order on August 12, court granted defendants' motion for judgment in accordance with their earlier motion for directed verdict, the jury having been discharged without reaching a verdict, and formal judgment was entered August 18, notice of appeal filed on October 14, was timely, since in such case time ran from entry of formal judgment. Code Civ.Proc. § 630.

Ernest I. Spiegl, Belli, Ashe & Pinney, San Francisco, for appellant.

Dana, Bledsoe & Smith, San Francisco, for respondents.

DOOLING, Justice.

Respondents move to dismiss the appeal. Two separate questions are involved which for clarity of treatment must be considered separately.

The Motion of Respondents Carter and Emerson.

These respondents during the course of trial made a motion for nonsuit which was granted by the court, the order granting their motion being entered in the minutes of the court on June 28, 1949 and reading so far as material here: "Thereupon counsel for defendants * * * made a motion for a nonsuit, which said motion the court granted as to William E. Carter and Anastasia Emerson * * *."

Thereafter the trial proceeded as to the other defendants and after its conclusion a formal judgment of nonsuit as to defendants Emerson and Carter was signed by the trial judge and entered on August 19, 1949. Plaintiff made a motion for new

trial which was ordered "dismissed because of defective notice" on October 6, 1949. Notice of appeal was filed on October 14, 1949.

[1] It is clear that if the minute order of June 28, 1949 granting the motion for nonsuit was the appealable order the notice of appeal was filed too late. Rules on Appeal, Rule 2(a) and (b).

[2] The notice of motion for new trial was filed on September 3, 1949. This was more than 60 days after the entry of the minute order granting the motion for nonsuit and hence could not operate to extend the time for appealing from that order, Rules on Appeal, Rule 3(a), if that is the appealable order.

[3,4] Under the long established rule the minute order granting a motion for nonsuit was the order from which the appeal must be taken. *Nicholson v. Henderson*, 25 Cal.2d 375, 378, 153 P.2d 945; *McColgan v. Jones, Hubbard, etc., Inc.*, 11 Cal.2d 243, 245-246, 78 P.2d 1010. This was not always the rule, *Kimple v. Conway*, 69 Cal. 71, 10 P. 189, but in 1897 section 581 Code of Civil Procedure, dealing with dismissals and nonsuits was amended to provide: "The dismissals mentioned in subdivisions three, four, five and six of this section, shall be made by orders of the court entered upon the minutes thereof, and *shall be effective for all purposes when so entered * * **" (Emphasis ours.) Stats. 1897, p. 98.

Subdivision 5 of this section covered orders granting nonsuits and by reason of the italicized language in this amendment the order granting a nonsuit entered in the court's minutes was thereafter held to be the appealable order. *Commings v. Guaranty Oil Co.*, 29 Cal.App. 139, 154 P. 882; *Brown v. Sterling Furniture Co.*, 175 Cal. 563, 166 P. 322.

In 1947 sec. 581, Code Civ.Proc., was recast into several sections, i. e. secs. 581, 581c and 581d. Stats.1947, p. 2256. Sec. 581d provides in part: "All dismissals ordered by the court shall be entered upon the minutes thereof * * * and such orders when so entered shall constitute judg-

ments and be effective for all purposes
* * *."

In recasting sec. 581 the legislature put the provision for nonsuits into a separate section, sec. 581c, reading in part: "After the plaintiff has completed his opening statement or the presentation of his evidence, the defendant * * * may move for a judgment of nonsuit. If the motion is granted, unless the court in its order for judgment of nonsuit otherwise specifies, such judgment operates as an adjudication upon the merits."

It is appellant's contention that by placing the provision for a judgment of nonsuit in a separate section the legislature indicated an intention that it should no longer be considered a "dismissals ordered by the court" which "shall be entered upon the minutes" and "be effective for all purposes".

This argument ignores the statutory history of this state for an even one hundred years. The Practice Act in section 148, Stats.1851, p. 73, treated a judgment of nonsuit as one form of dismissal. We quote:

"An action may be dismissed, or a judgment of nonsuit entered, in the following cases:

* * *

"5th. By the Court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. * * *"

This section of the Practice Act became sec. 581, Code Civ.Proc., when the codes were enacted in 1872. From 1897 until 1947 a judgment of nonsuit was expressly referred to as a dismissal in the language above quoted: "The dismissals mentioned in subdivisions * * * five * * * of this section shall be made by orders of the court entered upon the minutes * * *."

In *McColgan v. Jones, Hubbard, etc., Inc.*, supra, Justice Seawell said, speaking for the court, 11 Cal.2d at page 246, 78 P.2d at page 1011: "A nonsuit is but a form of dismissal of an action."

[5] In the face of the long statutory and judicial history of this state in which a judgment of nonsuit has always been

treated as one form of dismissal we cannot assume that the legislature in 1947 in recasting sec. 581 into four sections intended such a radical departure from established practice as to treat a judgment of nonsuit as no longer being a dismissal, particularly in view of the fact that they placed the new sec. 581d after the new sec. 581c and provided in sec. 581d that: "All dismissals ordered by the court shall be entered upon the minutes thereof * * * and such orders when so entered shall constitute judgments * * *." The italicized language expressly making such minute entries judgments was newly added and was a legislative recognition of existing law. See *Brown v. Sterling Furniture Co.*, supra, 175 Cal. at page 564, 166 P. at page 323, where the court said that "the order of nonsuit entered upon the minutes of the court constitutes this judgment of nonsuit, since the law declares that such an order so entered is 'effective for all purposes.'"

[6] Appellant emphasizes that sec. 581c now makes a judgment of nonsuit an adjudication on the merits unless the court otherwise specifies. This is a legislative question and if the legislature sees fit to make that form of dismissal known as a nonsuit an adjudication on the merits that is within its province. That such a judgment may carry costs does not require its formal entry elsewhere than in the minutes. Dismissals and nonsuits entered in the minutes were held to entitle the defendant to costs under sec. 581, Code Civ.Proc., before it was recast in 1947. *Spinks v. Superior Court*, 26 Cal.App. 793, 148 P. 798; *Matson v. Fortuna High School Dist.*, 54 Cal.App. 586, 202 P. 167; and see *Schubert v. Bates*, 30 Cal.2d 785, 790, 185 P.2d 793.

We are satisfied that the order granting respondents Carter and Emerson a nonsuit entered in the minutes was the appealable order and that the motion to dismiss as to those two respondents must be granted.

The Motion of the Other Respondents.

The case against the other respondents went to the jury, the jury failed to arrive

at a verdict and was discharged. These respondents then moved under Code Civ. Proc. sec. 630 for judgment in their favor. The motion was ordered granted by minute order entered August 12, 1949. A formal judgment in accordance with this order was signed by the court and entered on August 18.

The notice of appeal from this judgment was timely if the formal judgment of August 18 was the appealable judgment, but not if the minute order was the appealable order.

Code Civ.Proc. sec. 630 provides: "When a motion for a directed verdict, which should have been granted, has been denied * * * and the jury for any reason, has been discharged without having rendered a verdict * * * the court * * * may order judgment to be entered in accordance with the motion for a directed verdict."

[7,8] The minute orders under sec. 630 are not by the language of that sec-

tion or otherwise made, as they are by sec. 581d, Code Civ.Proc., "judgments * * * effective for all purposes". Since it is only because of the language of section 581d and similar language in sec. 581 before its amendment in 1947 that orders of dismissal entered in the minutes are held to be appealable orders, we are satisfied that the minute order granting the motion for judgment under sec. 630 is not appealable, and that the appeal was timely taken from the judgment entered on August 18. *Ross v. O'Brien*, 1 Cal.App. 2d 496, 36 P.2d 1108; *Integral Land Corp. v. Anderson*, 62 Cal.App.2d 770, 145 P.2d 364; *Egan v. McCray*, 220 Cal. 546, 31 P.2d 1041.

For the reasons given the motion to dismiss the appeal is granted as to respondents Carter and Emerson and denied as to all other respondents.

NOURSE, P. J., and SCHOTTKY, Justice, pro tem., concur.

CALIFORNIA REPORTER

230 PACIFIC REPORTER

SECOND SERIES

103 Cal.App.2d 724

**BO KAY CHAN et al. v. GERDON LAND
CO. et al.**
Civ. 14727.

District Court of Appeal, First District,
Division 2, California.

April 24, 1951.

Hearing Denied June 18, 1951.

Suit by Bo Kay Chan and another, alias, etc., against Gerdon Land Co. and another to enjoin defendants from interfering with lessees' use of a light-well and to require defendants to restore light-well to its former condition. The Superior Court in and for the City and County of San Francisco, Theresa Meikle, J., entered an order granting a preliminary injunction and defendants appealed. The District Court of Appeal, Goodell, J., held that granting portion of injunction which was merely prohibitory was not abuse of discretion, but that whether air-well was part of leased premises and whether lessees were estopped from objecting to alteration of air-well after completion of alterations could be determined only after a trial on the merits and after findings had been made on every material issue and not on application for mandatory preliminary injunction requiring restoration of air-well to former condition.

Order affirmed in part and reversed in part.

1. Injunction ⇨151

In suit to enjoin landlord from interfering with lessees' use of a light-well and to require landlord to restore well to its former condition, whether lessees by use and occupancy had acquired an easement or right to use light-well area for ventilation and as a recreational area for employees, whether light-well was a part of leased premises and whether lessees were estopped from objecting to alteration of light-well after completion of alterations which prevented its use by lessees could be deter-

mined only after a trial on the merits and after findings had been made on every material issue and not on application for a preliminary injunction.

2. Injunction ⇨132

A preliminary injunction merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, defendant should be restrained from exercising the rights claimed by him and it does not amount to an adjudication of the ultimate rights in controversy.

3. Injunction ⇨133

The granting of a mandatory injunction pending trial and before the rights of the parties have been definitely ascertained is not permitted except in extreme cases, where the right to such injunction is clearly established and it appears that irreparable injury will flow from its refusal.

4. Injunction ⇨133

Granting a preliminary injunction restraining landlord, pending trial, from interfering with lessees' use of a light-well and from preventing ingress or egress to or from the light-well was not abuse of discretion, since such portion of injunction was merely prohibitory.

Charles McLaughlin, San Francisco, Alfred J. Harwood, San Francisco, of counsel, for appellants.

Russell P. Tyler, San Francisco, Harold L. Levin, San Francisco, of counsel, for respondents.

GOODELL, Justice.

This appeal was taken from an order granting a preliminary injunction.

Appellant Gerdon Land Co. is the owner of a piece of property in San Francisco on

the westerly side of Grant Avenue between Sacramento and Clay Streets, with a frontage of 45.10 feet on Grant Avenue and a depth of 110 feet running through to the easterly line of Waverly Place.

On September 30, 1946, a lease written in Chinese characters was made by the Land Co. to the plaintiffs, of a part of the premises for the term commencing October 1, 1946 and ending September 30, 1954, at the monthly rental of \$300, for restaurant purposes. The father of the plaintiffs had occupied the same premises as a restaurant for many years before 1946.

The property is divided into three main parts. The Grant Avenue frontage of 45.10 feet is, roughly, in three 15 foot subdivisions. The northernmost 15-foot frontage is a store numbered 729 Grant Avenue; the middle 15-foot frontage is a store numbered 727, and the southernmost 15-foot frontage, numbered 723-725, is the corridor entrance to plaintiffs' restaurant which occupies the westerly part of the building in the rear of all three 15-foot frontages.

There is a light-well near the center of the building, occupying an area 12 by 15 feet immediately back of the store numbered 727, which well the plaintiffs claim is part of their leased premises, while defendants claim the contrary.

For some time a screen door had led from the restaurant into the light-well, which among other things enabled the restaurant's employees to go into the well for a breath of air. In the wall opposite, a window opened from the kitchen into the light-well, supplying air and light to the kitchen. Sunken beneath the floor of the light-well were three concrete tanks which formerly were used by the restaurant for the storage of food.

The floor of the well was about 3 feet below that of the stores and restaurant, and steps connected the higher with the lower level at the doorway. In October, 1948, defendants extended the floor of the store at 727 Grant Avenue across the light-well, thereby raising the floor of the well about 3 feet and cutting off access to the 3 concrete storage tanks. Defendants also boarded up the door-way into the well,

thereby cutting off access thereto from the restaurant and removing one source of air, and they also made a change in the window. Over the well they built a new ceiling or roof.

The plaintiffs, claiming these acts to be a clear breach of the implied covenant of quiet enjoyment and an invasion in other respects of their rights as lessees filed this suit for an injunction. A restraining order was issued which was purely prohibitory in its terms. On the hearing for a preliminary injunction oral testimony was taken, supplemented by affidavits. The court in the preliminary injunction made a "finding" that the plaintiffs, by their use and occupancy of the light-well area, "have acquired an easement and legal right to use said area for the purposes hereinabove mentioned" (ventilation and as a recreational area for the employees of plaintiff) and enjoined the defendants (1) from in any wise interfering with the rights of the plaintiffs to use such area "and from preventing egress or ingress from said light well area in and to the demised premises in possession of the said plaintiffs" and (2) ordering the defendants to "forthwith remove all structures and other buildings, pertinances [sic] and property from said lightwell area and shall restore and reconstruct the former entrance from the said demised premises in and to said area and the windows separating the said demised premises from said lightwell, all of which shall restore the said lightwell in the same position and condition as it existed prior to the erection of the building and addition in said lightwell area by said defendants, as more particularly referred to in the complaint on file herein."

The part of the injunction numbered (1) is, of course, purely preventive and prohibitory, while (2) is entirely mandatory.

[1] Whether the light-well was part of the leased premises was the basic issue in this case and one which could be decided only after a trial on the merits and after findings had been made on every material issue. Upon the solution of that question hinges the question of the landlord's right to make the changes in the light-well.

The injunction contains the "finding" of the acquisition by plaintiffs of certain rights in the light-well, and that question, likewise, could be decided only after a trial.

There is another issue which could be decided only after a trial, namely, that raised by the plea of estoppel based on the allegation that the plaintiffs stood by without remonstrance while the defendants were at work on the light-well. The importance of such issue, and the necessity for a finding thereon, need not be stressed.

The record shows that all alterations of a structural nature had been completed by defendants before this suit was filed. It is true that the wall was painted thereafter and a movable counter installed but no structural change was made. The net result of the mandatory part of the injunction was to require the defendants, before trial, to rip out parts of the property in litigation, and but for the taking of this appeal, that presumably would have been done.

Appellants' principal contention is that the injunction order "is erroneous because it requires the defendants to remove a structure erected by them * * * which structure was in existence at the time of the commencement of this action."

[2] In *Miller & Lux v. Madera Canal & Irrigation Co.*, 155 Cal. 59, 62-63, 99 P. 502, 511, 22 L.R.A.,N.S., 391, the court said: "The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the rights claimed by him. *When the cause is finally tried, it may be found that the facts require a decision against the party prevailing on the preliminary application.*" (Emphasis added.)

[3] In *Hagen v. Beth*, 118 Cal. 330, 331, 50 P. 425, a preliminary injunction ordered the removal of certain trade signs. In reversing that part of the order the court said: "To the extent that the injunction is mandatory it was erroneously granted.

The granting of a mandatory injunction pending the trial, and before the rights of the parties * * * have been definitely ascertained by the chancellor, is not permitted except in extreme cases, where the right thereto is clearly established, and it appears that irreparable injury will flow from its refusal. High, Inj. § 2; *Gardner v. Stroever*, 81 Cal. 148, 22 P. 483 [6 L.R.A. 90]. The showing in the record before us is not such as to entitle respondents to have the objectionable signs removed pending the final determination of the rights of the parties in the disputed name. *It cannot be determined therefrom what the final judgment as to those rights may or should be upon a trial of the action.*" (Emphasis added.)

In *Gardner v. Stroever*, 81 Cal. 148, 150, 22 P. 483, 484, 6 L.R.A. 90, it was said: "But, without regard to statutory provisions, it seems to be well settled that a very strong and urgent case is required to justify a mandatory preliminary injunction. A clear case of prospective injury for which the plaintiff will have no adequate remedy at law is indispensable."

There is no such showing in this record.

Other cases on the same general subject are cited in *Allen v. Hotel etc. Alliance*, 97 Cal.App.2d 343, 347-349, 217 P.2d 699. See, also, *Flood v. E. L. Goldstein Co.*, 158 Cal. 247, 250, 110 P. 916; *Wright v. Board of Public Works*, 163 Cal. 328, 330, 125 P. 353, and 14 Cal.Jur. p. 178.

Appellants' second contention is that "A part of the relief granted by the injunction * * * is not within the issues raised by the complaint."

The injunction contains a declaration in the nature of a finding that the plaintiffs "have acquired an easement and legal right to use said [light-well] area" for the purposes of ventilation and for the recreation of the restaurant employees. Obviously such determination is premature. No claim of easement is alleged in the complaint, hence no such issue was properly before the court. However, it is not necessary to pass upon appellant's second point in view of our holding that no determination respecting the claimed easement could

have been made in the injunction even if that issue had been raised by the complaint. *Miller & Lux v. Madera Canal & Irrigation Co.*, supra.

[4] What was said in *Hagen v. Beth*, supra, is applicable to this case, i. e.: "As to the merely preventive features of the injunction, we cannot say that the showing was insufficient to invoke the discretionary power of the court, and the order in that respect should stand."

Accordingly, the order is affirmed as to its preventive provisions.

It is reversed with respect to all parts thereof purporting to make findings of fact, including the statement "that the said plaintiffs have acquired an easement and legal right to use said area for the purposes hereinbefore mentioned;" also as to paragraph numbered "(2)" containing the mandatory provisions.

Appellants to recover their costs on appeal.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; CARTER, J., dissenting.



103 Cal.App.2d 782

PEOPLE v. MERCER.

Cr. 901.

District Court of Appeal, Fourth District,
California.

April 25, 1951.

Charles R. Mercer and Carl Shockley were convicted in the Superior Court of San Bernardino County, Martin, J. Coughlin, J., of second degree burglary, and they appealed. The District Court of Appeal, Griffin, J., held that evidence sustained conviction.

Judgment and order denying new trial affirmed.

1. Criminal law ⇨552(1)

A crime may be established entirely by circumstantial evidence.

2. Burglary ⇨42(3)

Possession of stolen property, coupled with false statements as to manner in which property came into possession of accused, may be sufficient evidence to sustain burglary conviction.

3. Criminal law ⇨742(1)

In burglary prosecution, question whether defendant was telling the truth at time of trial as to manner in which he came into possession of stolen property, was solely for jury.

4. Criminal law ⇨554

In burglary prosecution, jury was justified in rejecting explanation of defendant as to his possession of stolen property.

5. Burglary ⇨36

In burglary prosecution, fact that defendant was familiar with burglarized premises was a circumstance that could be considered by jury.

6. Burglary ⇨41(1)

Evidence sustained second degree burglary convictions.

7. Criminal law ⇨739(2)

In burglary prosecution, question whether defendants sufficiently established an alibi was a factual question for determination of jury.

8. Criminal law ⇨752

In burglary prosecution, burden was on defendants to prove their alibis to such a degree of certainty as would, on a consideration of all of the evidence, leave a reasonable doubt of defendants' guilt in minds of jury.

9. Criminal law ⇨1159(5)

Finding of jury against defendants' claimed defense of alibi in burglary prosecution could not be disturbed on appeal.

10. Criminal law ⇨1172(1)

In burglary prosecution, instruction that a conviction for burglary may be had on circumstantial evidence though no witness actually saw defendants break and enter burglarized premises, or saw them in that vicinity about time of burglary, and that if jury found that defendants broke and entered burglarized premises or found that defendants were in that vicinity about

time of alleged burglary, conviction for burglary could be had, was not reversibly erroneous.

11. Criminal law §822(1)

A single instruction or a portion of instruction cannot be considered separately from the entire charge.

Richard J. Weller, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., Gilbert Harelson, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendants Charles R. Mercer and Carl Shockley were convicted by a jury of the crime of burglary (second degree) of a night club known as "Club Towers", near Colton. This appeal is based specifically on the questions of (1) the insufficiency of the evidence to support the verdict; (2) misdirection of the jury on a question of law; and (3) denying the motion for a new trial.

The fact that the night club was burglarized is not disputed. The facts tending to connect defendants with the commission of the crime are circumstantial. The building which was burglarized consisted of a cafe and cocktail lounge. Adjoining this room was a small office room in which was located a small safe about 11½ inches wide and 21 inches in height, weighing about 340 pounds. It was mounted in concrete. On the night of March 31, 1950, one of the partners placed in it about \$1100 in money, which was contained in three separate sacks. A revolver, an inventory, and a lease of the premises were also in the safe. About 2:35 a. m. on April 1st, after the business closed, the door to the safe was locked, as well as the doors to the building. About 10:30 on the morning of April 1st one of the proprietors entered the front door and found that the office door had been pried open with a jimmy. The safe had been broken loose from the cement and removed. Apparently, from the tracks on the floor, it was taken out by way of the front door.

Four tracks from automobile tires, at the entrance to the front door, indicated that an automobile had been backed up to a cement walkway leading to the front door, and that the safe and its contents had been loaded into it. The rear door of the cafe had been pried open from the outside with a jimmy. Footprints around the building and the weight of the safe indicated that at least two persons were involved in the burglary.

Upon discovering the facts related the proprietor called the sheriff's office and reported the burglary. Defendant Carl Shockley, who was then a deputy sheriff assigned to the burglary detail under a Lieutenant White, responded to the call. After examining the situation he remarked: "They did it again". There had been an attempted burglary at the club about one year previous, at which time the safe was battered. Defendant Shockley investigated that attempted burglary but no one was charged with it. The revolver belonging to one of the proprietors, Peter Albano, was the subject of investigation on a previous occasion and its serial number was taken at that time by another deputy sheriff (Keene). Albano told Shockley about the revolver being in the safe. Shockley called Keene to obtain the serial number. An identification officer arrived and photographed tire marks made by the car backing up to the front walkway. He started to photograph other tire marks nearby but was told by Shockley not to bother with them because they were just "routine tracks". He started to photograph certain footprints near the tire marks and Shockley told him not to do so because they were only footprints made by him (Shockley) and the proprietor.

About that time Deputy Sheriffs Keene and Waite arrived. They saw the footprints directly in front of the dining room entrance. Shockley was asked by these officers if photographs had been taken of these footprints. Shockley replied: "Yes". The heel prints were very clearly defined and close together. After other pictures were taken Shockley left and the other two deputies continued with their investigation. They found drill

shavings near the place where the safe had been. Pictures were taken of the casings and doors where indentations were made by the jimmy.

On April 10, two scrap dealers found the mutilated safe a few miles east of San Bernardino near the City Dump. They reported this find to Lieutenant White who accompanied defendant Shockley and the two scrap men to that area. When the safe was found the inventory, lease, a small punch, and three empty money bags were also located near it. White saw some tire marks which he told Shockley appeared to resemble the tire tracks Shockley had previously described to him. Shockley replied: "No, that isn't it." The next day White saw the photograph of the tire marks taken at the Club Towers and told Shockley he believed the tire marks he saw at the City Dump were the same and suggested to him that he go out and check them. Defendant Shockley told him that he had done so that morning.

After a search of the area the safe was loaded into the sheriff's car by three men. On the way back one officer stated that whoever committed the burglary must have been pretty "hefty" and Shockley replied: "Any safe can be broken into. That one out at the Club Towers, it popped open like a cocoanut when you hit it with a sledge hammer". The property that was recovered was turned back to Albano. Albano asked Shockley if he had seen anything of the gun and Shockley replied in the negative.

On April 15, about 12:30 a. m. defendant Shockley was stopped in Riverside while driving alone in defendant Mercer's automobile and was taken to the police station by a police officer. The turtle back on the car was pried open. A kit of car tools, an electric drill, some clothing including a sweater and tennis shoes, a group of other tools such as chisels, punches, Ball Peen hammer, sledge hammer, etc. were found in it. There was a large plywood board lying horizontally on the spare tire which reflected deep gouges and scratch marks on its face. Pictures were taken of it as well as pictures of inked tire marks of the tires found on the car.

Samples of debris found in the turtle back were taken. The photographs and many other articles were examined by the director of the Scientific Crime Investigation Laboratory. He made microscopic examinations and spectro-chemical tests, exemplars, photographs, photomicrographs and transparencies. He explained about his examination of the articles in detail. As a result he concluded that the indentations made on the plywood were made by the safe stolen from the Club Towers being "walked" across the board, and that the two kinds of paint found on the plywood board were similar in color and constituency to the rust-brown and blue-green paint found on the safe; that the four brackets from the safe all contained wood fiber contamination; that the center punch made the tool marks and holes on the safe plate; that the section of wire removed from the turtle back was contaminated with rust-brown paint of the same color and texture as the rust-brown paint from the safe; that the cord attached to the electric drill had a reddish brown material on it similar in color and constituency to that found on the safe; that the right rear tire, which the people contended was in the turtle back at the time, had reddish-brown paint on it of pigment similar to the shade of the reddish-brown paint on the safe; that the debris contained chips of paint characteristic of the paint found on the safe; that the cold chisel was contaminated with a *rust-brown* material similar in nature and principal elements to that found on the safe; that the pinch bar fitted the "moulage" cast of the jimmy marks on the club office door perfectly; that Mercer's sweater contained particles of paint similar to that on the safe; that a metal bit had been broken off in an effort to drill through the top of the safe, and that the hole appeared to have been made with a one-half inch bit. (The electric drill would have taken a one-half inch bit.) Photos of the peculiar tread of the tires corresponded quite favorably with the photo of the tire marks made at the Club Towers.

A chemist and engineer, called as an expert by the defendants, also examined

the plywood board and the safe. He, too, stated that the marks made on the board were made by a bracket that came off of the front of the safe. He concluded that the top of the safe had been headed toward the front of the car while on the plywood board. The width of the turtle back of Mercer's car was 40 inches at its narrowest point and the length was about 44 inches.

An officer of the police department in Riverside testified that at the time of Shockley's arrest he asked him what he was doing cruising around that city at that hour of the morning and that Shockley replied that he brought a colored informant with him and was working on the "Winn murder case", helping a Riverside deputy named Vivian. Vivian testified that Shockley had not informed him of this fact and he did not know Shockley was in Riverside on that evening. At the trial Shockley changed his story and testified he went to Riverside with defendant Mercer and one Curry; that they had trailed a car to a certain home; that Mercer and Curry got out and he continued to follow the car but lost it just before he was apprehended.

Shockley's wife ran a private detective agency, the office of which was in Shockley's residence. In the filing cabinet of that office a deputy sheriff found the revolver stolen from the Club Towers. He asked Shockley if it was his gun and Shockley replied: "Yes, I bought it from a Negro." When asked the Negro's name he stated: "He lives down on South Waterman". When later interviewed by the sheriff, Shockley stated he had lied to the deputies about buying the gun from a Negro but that he had picked it up on April 11, while he and the other officers were searching the area where the safe was found; that it was then in a money bag and that he hid it in his pants pocket out of sight. When asked "Why?" he stated: "Well, I thought I could get away with it."

On April 16, Mercer was questioned by the officers. He stated he was on duty on March 31, until about 5 a. m. of April first as a yard watchman at a night club in Colton; that he had his car with him at that place all of that night and had not loaned it to anyone. He admitted the car

driven by Shockley on the 15th of April was his car and stated that he had never switched the tires.

After the preliminary examination, according to the evidence, Mercer asked the deputy what would be the outcome if he told him of eight or ten burglaries, and also asked the deputy district attorney what he could do if he (Mercer) admitted eight or ten burglaries. After some inquiry about how many burglaries defendant committed, he stated that if he told him it would implicate others and that he would rather not say anything; that as far as the Club Towers burglary was concerned, they had sufficient evidence and had produced such evidence at the preliminary hearing "that he could not deny that burglary". He said that no doubt when it got to the Superior Court he would plead guilty.

The manager of the club where defendant Mercer was employed testified that about 9:30 p. m. on March 31, he called and inquired of Mercer as to who was out there with him; that Mercer replied "Shockley", and that he (the proprietor) did not recall seeing Mercer after that hour on that evening.

Both defendants testified in their own behalf and denied the charges. Shockley said he found the gun, as previously related, but testified it was wrapped in a blue handkerchief inside of a bag and that it was then apparent to him it was Albano's gun; that he did not show it nor tell of finding it but took it home and placed it in the files "until he checked on his own personal ideas as to his investigation". He admitted he made no check of fingerprints on the gun and did not report it to the sheriff's office or turn it over to the identification bureau for examination, as was the custom.

As to the tools, the electric drill, hammers, etc. found in defendant Mercer's car, which Shockley was driving, at the trial for the first time Shockley accounted for their presence in Mercer's car as follows: He testified that the next day after the safe was found he came home in the sheriff's car which was generally assigned to him and told Mercer, who lived on the

back of the lot, about finding the safe; that he asked Mercer if he would like to go with him and see where the safe was found; that they drove there in Mercer's car even though the sheriff's car was available to him if he was working on a case; that they searched the area and found this bundle of tools wrapped in a rug; that he dumped them on the plywood board in the turtle back of Mercer's car and told Mercer to lock the trunk; that he left them there because there was not sufficient room in the official car; that he never told the sheriff or any of his deputies about this find.

Both defendants, at the trial, denied generally and specifically the claimed conversations with the officers, professed their innocence of the charge and introduced evidence which, if believed by the jury, would have established an alibi.

[1] The fact that the commission of a crime may be adequately established entirely by circumstantial evidence is not open to question. *People v. Green*, 13 Cal.2d 37, 87 P.2d 821; *People v. Godlewski*, 22 Cal. 2d 677, 140 P.2d 381. The possession of the revolver stolen from the Club Towers was one of the important facts proving defendant Shockley's guilt. Admittedly, he gave a false explanation of the fact that he bought it from a Negro. Likewise, he was found in possession of the car which contained the tools which undoubtedly were used in the commission of the offense.

[2-6] The law is established in California that possession of stolen property, coupled with false statements as to the manner in which the property came into defendant's possession may be sufficient evidence to sustain a conviction of burglary. *People v. Buratti*, 96 Cal.App.2d 417, 419, 215 P.2d 500. The question as to whether Shockley was telling the truth at the time of trial as to the manner in which he came into possession of the stolen property was solely for the jury. *People v. Russell*, 34 Cal.App.2d 665, 669, 94 P.2d 400. In view of the evidence here produced the jury was justified in rejecting Shockley's explanation of his possession of the stolen property. False and incon-

sistent statements made by Shockley, aside from those regarding his possession of the gun, indicate consciousness of guilt. *People v. Cooper*, 81 Cal.App.2d 110, 117, 183 P.2d 67. When questioned as to what he was doing in Riverside when picked up on April 15, he stated that he had brought a colored informant from San Bernardino. His story was later changed and he then admitted that he went to Riverside with defendant Mercer and one other. The familiarity of Shockley with the burglarized premises is a circumstance which may be considered by the jury. *People v. Bennett*, 93 Cal.App.2d 549, 552, 209 P.2d 417. The jury had the right to believe that Shockley made the statement that "Any safe can be broken into. That one out at the Club Towers, it popped open like a cocoanut when you hit it with a sledge hammer". If true, this clearly points to guilty participation. Shockley's explanation of how the tools happened to be in Mercer's car is quite unsatisfactory. The evidence clearly shows that the safe was placed in the back of Mercer's car and that the tools there found were used in the commission of the burglary. The direction of Shockley to the photographer not to take a photograph of certain tire tracks and certain footprints at the scene of the crime which defendant Shockley conceded were his footprints and those of the proprietor, and falsifying about photographs having been made of them, may be considered quite inconsistent with the actions of an innocent man.

We conclude that the facts related sufficiently tend to connect both Shockley and Mercer with the commission of the crime and are sufficient to support their convictions. *People v. Colletta*, 100 Cal.App.2d 1, 222 P.2d 922; *People v. Lloyd*, 98 Cal.App.2d 305, 220 P.2d 10; *People v. Lyle*, 91 Cal.App.2d 45, 204 P.2d 356; *People v. Bisbines*, 132 Cal.App. 239, 22 P. 2d 762; *People v. Taylor*, 4 Cal.2d 495, 50 P.2d 796; *People v. Flynn*, 73 Cal. 511, 15 P. 102; *People v. Godlewski*, 22 Cal.2d 677, 140 P.2d 381.

As to the claimed alibi, defendant Shockley and Mrs. Mercer testified that Shockley was in bed on March 31, at 9 p. m. in

his home. Mrs. Shockley testified that she came home about one a. m. on April 1st accompanied by another woman and that her husband was in bed at that time and that she slept with him until 5 a. m., at which time she returned to Barstow.

[7-9] It is defendant Mercer's contention that he was employed at the parking lot that entire night. The question whether or not the defendants sufficiently established an alibi under the evidence was a factual question for the determination of the jury. The burden is upon the defendants to prove their alibis to such a degree of certainty as would, upon a consideration of all of the evidence, leave a reasonable doubt of defendants' guilt in the minds of the jury. *People v. Peterson*, 66 Cal.App.2d 420, 423, 152 P.2d 347; *People v. Lyle*, 91 Cal.App.2d 45, 49, 204 P.2d 356. The jury having found against the defendants' claimed defense of alibi, such finding cannot be disturbed on appeal. *People v. Alexander*, 92 Cal.App.2d 230, 206 P.2d 657; *People v. Cannon*, 77 Cal.App.2d 678, 176 P.2d 409; *People v. Huizenga*, 34 Cal.2d 669, 213 P.2d 710.

The next complaint pertains to an instruction proposed by the prosecution and modified by the trial court. It reads in part: "You are instructed that a conviction for burglary may be had on circumstantial evidence, although no witness actually saw the defendants break and enter the burglarized premises, or saw them in that vicinity about the time the burglary was committed, (if you find that the defendants did break and enter the burglarized premises, or if you find that the defendants were in that vicinity about the time the alleged burglary was committed.)" [The portion in parenthesis added by the court.]

[10] The argument is that the instruction, as modified, advised the jury that it was not necessary for a witness to actually see the defendants break into and enter the burglarized premises but it was sufficient if they believed that the defendants or either of them "were in the vicinity" about the time the burglary was committed. The added portion may well have been omitted

as it tended to confuse the statement of law set forth in the first portion thereof which specifically instructed the jury that a conviction for burglary may be had on circumstantial evidence although no witnesses actually saw the defendants break and enter the premises or actually saw them in the vicinity about the time the burglary was committed. The defendants testified that they were not in the burglarized premises or in the vicinity thereof about the time the burglary was committed. The circumstantial evidence not only placed them in the vicinity of the burglarized premises but also established the fact that whoever burglarized the premises were actually in the premises. The jury was otherwise instructed that if it believed from the evidence beyond a reasonable doubt that the defendants wilfully and feloniously entered the building occupied by the Club Towers with intent thereby and therein to commit the crime of theft then it should find the defendants guilty of the crime of burglary as charged. The jury was also instructed in the language of CALJIC Instruction No. 201, p. 153, to the effect that every person who enters any shop or other building with intent to unlawfully steal the personal property of another is guilty of burglary and that the essence of the burglary is entering a place with such specific intent, and that the crime is complete as soon as the entry is made.

[11] A single instruction or a portion of an instruction cannot be considered separately from the entire charge. *People v. Frazier*, 88 Cal.App.2d 99, 198 P.2d 325. From a consideration of the entire instructions given on the subject it is apparent that the defendants were found guilty by the jury of breaking and entering the premises with intent to commit theft and not merely of being in the vicinity thereof. No prejudicial error resulted.

The motion for new trial predicated upon these same grounds was properly denied. Judgment and order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

103 Cal.App.2d 677

DORCICH et al. v. TIME OIL CO.

Civ. 14531.

District Court of Appeal, First District,
Division 1, California.

April 23, 1951.

Action by Roy L. Dorcich and another against Time Oil Company, a corporation to recover balance of rentals alleged to be due under a lease of a gasoline service station. The Superior Court in and for the County of Monterey, H. G. Jorgenson, J., rendered judgment for defendant and plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that evidence that after abandonment of lease by defendant when plaintiffs rented premises to sub-lessee and accepted rent from him for four months without notifying defendant of what they were doing and that plaintiffs entered into lease with sub-lessee for balance of term and did not notify defendant until lease was executed, sustained finding that such acts were inconsistent with defendant's absolute dominion over leased premises and resulted in surrender by operation of law.

Judgment affirmed.

1. Landlord and tenant ⇨109(1)

A surrender is the yielding up of an estate for years by tenant to landlord.

2. Landlord and tenant ⇨109(1)

A surrender by operation of law occurs when parties do something which would not be valid unless lease was terminated, and which estops them from disputing surrender.

3. Landlord and tenant ⇨109(1)

Whether, in a given case, there has been a surrender of lease is a question of fact.

4. Landlord and tenant ⇨110(1), 172(2)

Where there has been an abandonment of premises by tenant, and landlord thereafter does any material act so as to interfere with right of tenant to absolute dominion of premises, there is an eviction and tenant is released and that operates as a surrender by operation of law.

5. Landlord and tenant ⇨231(8)

In action by lessors against lessee to recover balance of rentals alleged to be

due under lease after abandonment of lease by lessee, evidence that after abandonment of lease by lessee, lessors rented premises to sub-lessee and accepted rents from him for four months without notifying lessee of what lessors were doing and that thereafter lessors entered into lease with sub-lessee for balance of term and did not notify lessee until lease was executed, sustained finding that acts were inconsistent with lessee's absolute dominion over leased premises and resulted in surrender by operation of law.

6. Landlord and tenant ⇨194(2)

On a surrender of possession by lessee before expiration of leased term, lessor may consider lease as still in existence and sue for unpaid rent as it becomes due for unexpired portion of term, or treat lease as terminated and retake possession for its own account, or retake possession for lessee's account and relet premises, holding lessee for difference between lease rentals and what it was able in good faith to procure by reletting.

7. Landlord and tenant ⇨109(4)

If landlord takes possession of premises on surrender of possession by tenant before expiration of lease term, and relets them at lower rent, such act is inconsistent with absolute dominion of tenant, and constitutes an acceptance of implied offer to surrender, and terminates lease but if landlord notifies tenant that re-taking is on behalf of tenant, and that he intends to sublet to another on behalf of tenant to mitigate damages, reletting does not operate as an acceptance of abandonment, and no surrender by operation of law results.

8. Landlord and tenant ⇨110(2)

If tenant abandons premises before expiration of leased term and landlord relets to another on behalf of tenant to mitigate damages, some notification to tenant is required because, although he has abandoned premises, his title to term nevertheless continues, unless landlord accepts the surrender.

9. Landlord and tenant ⇨204

A landlord does not have legal right to negotiate with a subtenant and to ac-

cept rent from him without consent or knowledge of tenant.

10. Landlord and tenant ☞231(8)

In action by lessors to recover balance of rentals due under lease after lessee abandoned premises before expiration of term, evidence sustained finding that execution of lease by lessors to sublessee on November 22, 1948 which lease was to become effective on December 1, 1948, amounted to acceptance of lessee's proffered surrender.

11. Landlord and tenant ☞195(2)

Where lessee of gasoline service station deliberately tried to abandon its lease without cause or legal justification, and tried to take advantage improperly of lessors' acts in levelling premises by claiming an eviction, despite those acts, lessee was still in legal possession of premises and when lessors elected to relet and try to hold lessee for loss sustained and exerted dominion over leased premises by accepting rent from sublessee and by thereafter leasing premises to sublessee, fact that lessee may have been guilty of reprehensible conduct had no relation to legal consequences flowing from lessors' own conduct in accepting surrender of premises from lessee.

Mandl & Atteridge, Salinas, for appellants.

Evans & O'Gara, and Albert G. Evans, all of San Francisco, for respondent.

PETERS, Presiding Justice.

The basic question on this appeal is whether the key finding that after an abandonment of a lease by the tenant the landlord accepted a surrender, is supported by the evidence.

The premises in question are owned by Roy and Katherine Dorcich, the plaintiffs, are located near Salinas in Monterey County, and are improved with a gasoline service station and some large gasoline storage tanks. The plaintiffs leased the premises to the Time Oil Company, the defendant, for five years commencing September 12, 1947, and ending September

11, 1952, at a rental of \$250 per month. In October of 1947, Time Oil sublet the premises to one Holt, who occupied the property under this sublease until May 14, 1948, paying rent directly to Time Oil. During Holt's occupancy certain work was done on the premises by plaintiffs, which was done under the following circumstances: When the premises were leased to Time Oil the surface was covered with rock and gravel which was not entirely level, there being high places and some chuck holes. Holt, in March or April, 1948, asked Dorcich if the premises could not be levelled. Dorcich, without notifying Time Oil, brought in a driveway roller equipped with a levelling blade and proceeded to scrape and roll the surface of the premises, thus filling in the chuck holes and cutting down the high spots. The work took only a couple of hours and the gasoline station remained open while the work was being done. There is a conflict in the evidence as to whether or not this work improved the premises. Some of the witnesses for Time Oil testified that the work resulted in loosening the hard surface of the ground so that when it rained the area became very muddy. Dorcich's witnesses testified that the effect of this work was substantially to improve the premises.

On or about May 14, 1948, Time Oil and Holt cancelled their sublease, and one Smith sublet the premises from Time Oil for a term ending July 31, 1952, at a rental of \$250 per month. The sublease was signed by Smith, but all copies of the agreement were kept by Time Oil. Smith asked Dorcich to black top the driveways. In the latter part of July, 1948, Dorcich, without securing the consent of Time Oil, had the premises rolled, gravelled and oil topped.

In the meantime, there had been some correspondence between Time Oil and plaintiffs. On June 15, 1948, Time Oil addressed a formal notice to plaintiffs demanding that they, as landlords, restore the surface of the premises to its original condition. The notice stated that the surface of the premises had been destroyed and that this constituted an interference

with the quiet, peaceful and uninterrupted operation of the premises by Time Oil. The notice concludes with the statement that unless the premises are restored within ten days from the date of the notice, the lease would be terminated.

The attorney for plaintiffs replied to this notice by a letter dated June 21, 1948, in which it is stated that the challenged work did not change the surface of the leased premises but merely improved the surface at the request of Holt "your representative on the premises." The letter stated that the plaintiffs do not accept the proffered surrender but will hold Time Oil to a strict performance of all of the provisions of the lease. The attorneys for plaintiffs sent another letter to Time Oil, which letter is dated June 22, 1948, notifying Time Oil that the sublessee of Time Oil, Smith, wanted some work done on the surface of the leased premises; that plaintiffs were willing to do this work at their own expense provided that Time Oil agreed that Smith was its sublessee; that the tenant would cancel its notice of June 15, 1948; and that Time Oil would agree that the work could be done and would not constitute an interference with the possession of Time Oil.

By letter dated July 2, 1948, Time Oil, through its attorney, stated that since the repairs requested by its letter of June 15, 1948, had not been made, it considered the lease terminated. The letter also demanded \$3,500 as damages because of defendant's claimed inability to operate the station because the plaintiffs refused to restore the premises to their original condition.

Smith paid some rentals to Time Oil under his sublease, the last payment being dated July 15, 1948. Whether this payment was for back or current rent is not clear. In the meantime, Time Oil was paying the plaintiffs \$250 a month as called for by the lease. Plaintiffs received the last check from Time Oil for \$250 on June 7, 1948, which check was for rent until July 14, 1948.

After July 15, 1948, Smith dealt directly with Dorcich and paid to him \$175 a

month for the next four months. The precise background of these payments by Smith to Dorcich is somewhat obscure. By its letter dated July 2, 1948, Time Oil had notified Dorcich that it considered the lease terminated, and Smith had heard of Time's attitude in this regard, but just when Smith secured this information is not clear. At any rate, Smith was desirous of remaining in possession of the premises, and testified that he entered into the arrangement with Dorcich to pay him \$175 a month to protect his interests. Smith and plaintiffs contemplated that a lease calling for \$175 a month rental would be drafted, but such a lease was not signed because a certain deal Smith had pending failed to materialize. After this deal fell through, Smith continued to negotiate with Dorcich for a lower rental, and finally Dorcich agreed to accept \$100 a month. A lease between plaintiffs and Smith so providing was executed on November 22, 1948, the lease to become effective December 1, 1948, and to continue until September 15, 1952.

Dorcich testified that he accepted the \$175 a month from Smith from July to November because Smith was uncertain whether the Dorcich-Time Oil Company lease was still in effect. He admitted that at no time did he notify Time Oil that he was accepting \$175 from Smith for the benefit of Time Oil. After the lease negotiated with Smith for \$100 per month was executed on November 22, 1948, on November 23, 1948, the attorneys for plaintiffs formally notified Time Oil of the subletting. This letter states that plaintiffs are subletting to Smith on behalf of Time Oil in order to mitigate the damages; that Dorcich had tried to release the premises at a higher rent, but was unsuccessful; that Dorcich had collected \$175 a month from Smith for four months, which sums have been credited on plaintiffs' claim against Time Oil; that the Dorcich-Smith lease was entered into to protect and on behalf of Time Oil; that Dorcich intends to hold Time Oil for the balance due after deducting what is received from Smith.

The complaint filed by the plaintiffs is based on the theory that the re-letting to Smith was on behalf of Time Oil to mitigate damages, and prays for the difference for the balance of the term between the \$100 a month secured from Smith and the \$250 per month provided in Time Oil's lease. The answer, as amended, admits the execution of the lease; admits receipt on November 23, 1948, of the notification that Dorcich had leased to Smith for \$100 per month; alleges that it received no notice of the subletting to Smith at \$175 per month starting July 15, 1948; denies the other material allegations of the complaint; alleges that its lease was terminated and Time Oil was evicted on June 15, 1948, when Dorcich failed to restore the premises to their original condition after scraping the premises in April, 1948, at the request of Holt. Time Oil also cross-complained for damages caused by the claimed eviction, but the trial court found against defendant on this issue, and, since defendant has not appealed, the issues presented by the cross-complaint are not now involved.

So far as pertinent here, the trial court found that on June 25, 1948, Time Oil surrendered the premises and refused to pay any further rent to the plaintiffs; that during July, 1948, the plaintiffs rented the premises to Smith for \$175 per month on a month-to-month basis; that Smith paid the plaintiffs rent at \$175 per month until December 1, 1948; that on November 22, 1948, there was executed a written lease between Smith and the plaintiffs at a rental of \$100 per month for a term commencing December 1, 1948, and ending September 15, 1952; that it is untrue that the rental to Smith at \$175 and the \$100 a month lease were on behalf or for the benefit of Time Oil, but said rentals were received by the plaintiffs for their own benefit; that plaintiffs did not suffer any damage by reason of the abandonment of the premises by defendant; that it is untrue that plaintiffs notified defendant that they were leasing the premises to Smith as alleged in the complaint; that plaintiffs failed to notify

defendant that they were leasing the premises to Smith for \$175 a month or for \$100 a month. The court concluded that the acts of renting the premises to Smith at \$175 per month, and entering into the lease with him for \$100 a month without first notifying defendant that such acts were being done for its benefit, constituted an acceptance of the surrender of the premises and thus terminated the lease. Judgment was entered denying plaintiffs any relief on their complaint and denying defendant any relief for its cross-complaint, and plaintiffs appeal.

[1-4] The key question is whether the evidence supports the finding that plaintiffs accepted a surrender of the lease from Time Oil. A surrender is the yielding up of an estate for years by the tenant to the landlord. A surrender by operation of law occurs when the parties do something which would not be valid unless the lease was terminated, and which estops them from disputing the surrender. Whether, in a given case, there has been a surrender is a question of fact. These principles are well settled. See collection of cases 15 Cal.Jur. p. 792, § 209. It is equally well settled that where there has been an abandonment of the premises by the tenant, and the landlord thereafter does any material act so as to interfere with the right of the tenant to the absolute dominion of the premises, there is an eviction and the tenant is released. That operates as a surrender by operation of law. See cases collected 15 Cal.Jur. p. 797, § 214.

[5] In the present case we have a clear abandonment by Time Oil, and the trial court so found. The question is whether the plaintiffs thereafter did any act inconsistent with the tenant's absolute dominion over the leased premises. The trial court has found that when the plaintiffs rented the premises to Smith in July, 1945, for \$175 a month and accepted rent from him for four months without notifying Time Oil of what they were doing, and when, on November 22, 1948, they entered into a lease with Smith for \$100 per month for the balance of the term and

did not notify Time Oil until the lease was executed, such acts were inconsistent with defendant's absolute dominion over the leased premises and resulted in a surrender by operation of law. We are of the opinion that the evidence supports this interpretation of the facts.

[6] When a tenant abandons the premises the landlord has several remedies. In *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal.2d 664, 671, 155 P.2d 24, 28, the court summarized these remedies as follows: "Upon surrender of possession by the lessee before the expiration of the lease term, the lessor had three remedies: (1) To consider the lease as still in existence and sue for the unpaid rent as it became due for the unexpired portion of the term; (2) to treat the lease as terminated and retake possession for its own account; or (3) to retake possession for the lessee's account and relet the premises, holding the lessee for the difference between the lease rentals and what it was able in good faith to procure by reletting." See, also, *Siller v. Dunn*, 103 Cal.App. 154, 284 P. 232.

[7,8] It is in connection with the third remedy enumerated above that most of the cases have arisen. The landlord, upon an abandonment by the tenant, may retake possession of the premises on behalf of the tenant, re-let the premises for the tenant's account, and hold the tenant for the difference. If the landlord simply takes possession of the premises and relets them at a lower rent, such act is inconsistent with the absolute dominion of the tenant, and constitutes an acceptance of the implied offer to surrender, and terminates the lease. But if he notifies the tenant that the retaking is on behalf of the tenant, and that he intends to sublet to another on behalf of the tenant to mitigate damages, the re-letting does not operate as an acceptance of the abandonment, and no surrender by operation of law results. Some notification to the tenant is required because, although he has abandoned the premises, his title to the term nevertheless continues, unless the landlord accepts the surrender. These

principles are well settled. See annotations 3 A.L.R. 1080; 52 A.L.R. 154; 61 A.L.R. 773; 110 A.L.R. 368.

One of the leading cases in this state is *Welcome v. Hess*, 90 Cal. 507, 27 P. 369. There, a tenant with a five-year lease abandoned the premises and returned the keys to the landlord after remaining in possession and paying rent for less than a year. The landlord sued the tenant for several months' accrued rent as it fell due, and then requested the tenant to return. The tenant refused, whereupon the landlord took possession of the premises and re-leased them at a rental less than provided in the original lease, and for a term in excess of that provided in that lease. The court held this to constitute an acceptance of the surrender. It stated, 90 Cal. at page 514, 27 P. at page 371: "In taking possession, the landlord did not announce his intention to continue to hold the tenants. He relet without notifying the defendants that he should do so on their account. He relet for a period longer than the remainder of their term, thus showing plainly that he was acting in his own right, and not as their self-constituted agent. Under such circumstances, he cannot say that he did not accept the surrender."

The rule of *Welcome v. Hess*, supra, has frequently been followed. In *Bernard v. Renard*, 175 Cal. 230, 165 P. 694, 3 A.L.R. 1076, a ten-year lease was executed to commence after the completion of a building to be erected on the leased premises by the landlord. Before the building was completed the parties got into a disagreement, and the tenant gave notice of rescission. When the building was completed a short time later the landlord tendered the keys to the tenant, who refused to accept them or to pay rent. The lessor tried to secure another tenant, placed "to-let" signs on the building, listed it for rent with various brokers, rented it for short intervals to third persons, and, two years after completion, sold it. At no time after tendering the keys did the landlord communicate with the tenant. In an action brought to recover rent the court held that the doctrine of *Welcome*

v. Hess, supra, was applicable, and stated, 175 Cal. at page 233, 165 P. at page 695: "Upon these facts, as to which there is no conflict, it seems clear to us that the doctrine of *Welcome v. Hess*, * * * is applicable. It is true that the facts of this case differ in some particulars from those of *Welcome v. Hess*, supra; but they differ in no such way as to make the conclusion arrived at there inapplicable here. The real thing there decided was that where the premises are abandoned by the tenant, who avows his intention not to be bound by his lease, the assumption of actual possession and absolute control of the premises by the lessor, including efforts to let and the actual reletting thereof to others, without saying or doing anything to so qualify his acts as to indicate that he is not acting in his own right and for his own benefit as owner entitled to possession, without saying or doing anything to indicate that he is acting for the benefit of the lessee or reletting on the lessee's account and for his benefit, he will not be heard thereafter to say that he has not accepted a surrender of the term."

Boswell v. Merrill, 121 Cal.App. 476, 9 P.2d 341, is another case in point. It involved a lease of a gasoline station for a fixed term. During this term the tenant served a notice of termination and delivered up the keys. The landlord notified the tenant that he refused to recognize the tenant's right to terminate, demanded back rent, and stated that he intended to hold the tenant liable under the lease. A few days after the tenant abandoned the premises the landlord leased them to a third person for the balance of the original term, but at a rental substantially below that in the original lease. No notice was given to the tenant of the re-letting. The court held that the rule announced in *Rehkopf v. Wirz*, 31 Cal.App. 695, 696, 161 P. 285, was applicable, and quoted from that case as follows, 121 Cal.App. at page 478, 9 P.2d at page 342: "Where a tenant abandons the leased property and repudiates the lease, the landlord may accept possession of the property for the benefit of the tenant and relet the same, and thereupon may maintain an action

for damages for the difference between what he was able in good faith to let the property for and the amount provided to be paid under the lease agreement. [Citing a case.] But a lessor who chooses to follow that course must in some manner give the lessee information that he is accepting such possession for the benefit of the tenant and not in his own right and for his own benefit. If the lessor takes possession of property delivered to him by his tenant and does so unqualifiedly, he thereby releases the tenant. [Citing 2 cases, including *Welcome v. Hess*.] An unqualified taking of possession by the lessor and reletting of the premises by him as owner to new tenants is inconsistent with the continuing force of the original lease. If done without the consent of the tenant to such interference, it is an eviction, and the tenant will be released. If done pursuant to the tenant's attempted abandonment, it is an acceptance of the surrender and likewise releases the tenant."

[9] Appellants argue that these cases do not establish that notice must be given to the tenant before the re-letting, but simply hold that notice must be given within a reasonable time. Even if that were the rule, the basic question is the intent with which the landlord retakes possession and re-lets. If, objectively, he performs any act inconsistent with the continuance of the lease and in violation of the dominion of the tenant over the property, a surrender results. These are basically factual matters. If the evidence is subject to two possible and reasonable inferences, the trial court's interpretation is conclusive on this court. Here, the landlord, after the abandonment, retook possession and rented to Smith on a month-to-month basis for four months. No notice was given to Time Oil that this was being done on its account. There is some confusing evidence about a conversation between the counsel of the two parties in which it is claimed that counsel for Time Oil suggested that Dorcich lease to Smith, but there is no evidence that counsel for Time Oil agreed that this could or should be done on account

of Time Oil. Appellants urge that until the formal lease with Smith was executed, Smith was holding the property under his sublease with Time Oil, and that unless they accepted the rent from Smith, they would be accused of failing to mitigate damages. This contention assumes the very point at issue. The trial court found that Time Oil abandoned the premises in June of 1948, so that dealings thereafter with Smith could not be predicated on the theory that Time Oil recognized that Smith was holding as its subtenant. A landlord does not have the legal right to negotiate with a subtenant and to accept rent from him without the consent or knowledge of the tenant. The trial court could have interpreted the evidence as showing that Time Oil knew or should have known what Dorcich was doing, but it was not compelled to accept that interpretation. It chose to find that the renting to Smith for four months at \$175 a month was an act inconsistent with the continuance of the lease, and amounted to an acceptance of the proffered surrender. That is a possible and reasonable interpretation of the evidence, and is binding upon us.

[10] Appellants placed much stress on their notice to Time Oil dated November 23, 1948, and point out that notice was given before the lease to Smith was to become effective. Of course, the execution of the lease on November 22, 1948, amounted to a completed binding contract even though it was not to become effective until December 1, 1948. The notice was not given until after the lease was executed. Normally, the notice must be given before the re-letting to allow the tenant to object or make other arrangements if he so desires. The court found that the execution of the lease on November 22, 1948, amounted to the acceptance of the proffered surrender. That finding is supported, so that what happened thereafter is immaterial.

The trial judge at the conclusion of the trial, and before findings were prepared, filed a well reasoned memorandum opinion. In that opinion he stated: "The Court

finds on the issue of acceptance of the surrender by the plaintiff, that under the facts and the law of this state the Court is compelled, although very reluctantly, to find that the plaintiff must be held to have legally accepted the surrender by Time Oil Company. This was done by first letting the premises to Smith from month to month, and secondly by letting the premises to Smith by written lease for the remainder of the term before notifying Time Oil Company that they would do so to mitigate the damages and hold Time to its lease."

[11] The appellants make much of the fact that the trial judge expressed his "reluctance" to find a surrender, and contend that he did so solely because he felt that the prior decided cases had determined that the notice from the landlord must be sent to the tenant notifying him of the re-leasing *before* the second lease is executed, and that because the notice was sent on the 23rd and the lease executed on the 22nd, the notice here involved was sent too late. Neither the trial court's opinion nor its findings are based on any such narrow theory. Both are based on the conclusion that, because Dorcich rented to Smith for four months after July 15, 1948, and because the notice of the 23rd was too late, the landlord had accepted the surrender. The trial judge was reluctant to come to this conclusion because, as he stated in his opinion, he felt that Time Oil's action in claiming an eviction based upon the smoothing of the surface of the premises by Dorcich at the request of Holt and without permission of Time Oil, was "a clear subterfuge and such claim has no basis in fact." It is undoubtedly true that Time Oil deliberately tried to abandon its lease without cause or legal justification, and tried to take advantage improperly of Dorcich's acts in levelling the premises by claiming an eviction. But in spite of those acts it was still in legal possession of the premises. Plaintiffs could have sat back and sued for each month's rent as it fell due. This, they elected not to do. They elected to re-let and to try to hold Time Oil for the loss

sustained. To be entitled to this remedy they had to be careful not to exert dominion over the leased premises. They actually exerted such dominion in two respects. This amounted to a surrender by operation of law. The fact that Time Oil may have been guilty of reprehensible conduct has no relation to the legal consequences flowing from their own conduct.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



103 Cal.App.2d 643

BERNHEIMER v. BERNHEIMER et al.
Civ. 17825.

District Court of Appeal, Second District,
Division 3, California.

April 20, 1951.

Hearing Denied June 18, 1951.

Action by Verone O. Bernheimer against Earle J. Bernheimer, and others. A cross-complaint for annulment was filed against the plaintiff. The Superior Court of Los Angeles County, Byron J. Walters, Judge Assigned, entered orders denying the wife's application for support, counsel fees and costs pendente lite, and granted the plaintiff's motion for support of the minor child and the wife appealed. The District Court of Appeal, Bartlett, J., Pro Tem., held that in view of the undisputed facts of the conditions under which the parties lived up to the time of their separation, the income which the husband had during the past year and which he conceded he would have in the future, and in view of the necessities of the wife, and in the absence of any income whatever on her part, the denial of her application for support, counsel fees and costs pendente lite was abuse of discretion, but the allowance of \$300 per month to the wife for the support of the child was not an abuse of discretion.

Orders reversed in part and affirmed in part.

230 P.2d—2

1. Marriage ⇨50(2, 4)

Wife's testimony that marriage took place and husband's statement in answer that such a ceremony took place was sufficient proof of marriage to entitle wife to receive attorney's fees, suit money and costs pending the trial, and the burden of proof was then on husband to show invalidity of marriage.

2. Divorce ⇨255

The validity of a divorce decree cannot be contested by a party who has procured the decree or a party who has remarried in reliance thereon, or by one who has aided another to procure the decree so that the latter will be free to remarry.

3. Estoppel ⇨68(4)

Where husband aided former wife to procure Missouri divorce decree and on strength of such decree married present wife and took the position in pending Missouri proceedings in which decree was collaterally attacked that decree was valid, husband was estopped, whether or not Missouri decree was invalid, from collaterally attacking Missouri decree and from claiming invalidity of marriage to present wife seeking support, counsel fees and costs pendente lite, notwithstanding that present wife married husband in reliance on Missouri decree.

4. Divorce ⇨209, 221

The manifest purposes of pendente lite allowances to a wife are to enable her to live in her accustomed manner pending disposition of action and to provide her with whatever is needed by her to litigate properly her side of the controversy, and if she possesses independent means sufficient for such purposes the allowances should not be granted, but she is not required first to impair the capital of her separate estate.

5. Divorce ⇨286

Where there was conflict in testimony as to husband's means and income, testimony should be taken in the light most favorable to husband on wife's appeal from order denying wife's application for support, counsel fees, and costs pendente lite.

6. Divorce ☞211, 212

The court's discretion on wife's application for support pendente lite is not an arbitrary discretion and must be exercised along legal lines taking into consideration the parties' former manner of living, their respective incomes, and their financial abilities. Civ.Code, § 137.

7. Divorce ☞212, 224

The denial of wife's application for support, counsel fees and costs pendente lite was abuse of discretion in view of the conditions under which husband and wife lived up to the time of their separation, the husband's income, the necessities of the wife, and the absence of any income whatever on her part. Civ.Code, § 137.

8. Divorce ☞308

The allowance of \$300 to wife for support of minor child was not abuse of discretion in view of husband's income and needs of wife in respect to child. Civ.Code, § 137.

Pacht, Warne, Ross & Bernhard and Bernard Reich, all of Beverly Hills, for appellant.

Gold & Needleman, J. George Gold and James J. Needleman, all of Beverly Hills, for respondent.

BARTLETT, Justice pro tem.

This is an appeal from orders which denied appellant's application for support, counsel fees and costs pendente lite and granted appellant's motion for the support of the minor child and fixed the sum for that support at \$300 per month.

Among other reasons advanced by appellant as to why these orders should be reversed, appellant contends that the court erred in holding that a decree rendered August 21, 1943, by the court of Jackson County, Missouri, divorcing respondent from a former wife, Sally Bernheimer, was invalid. We do not deem it necessary to determine that question for the reason that we are of the opinion that on account of the facts to which we will hereafter refer and the law applicable to those facts, the respondent was estopped from making a

collateral attack on his own divorce in Missouri and in claiming the invalidity of his marriage to appellant.

The transcript of oral testimony taken at the hearing and the affidavits of the parties showed that for some time prior to December, 1941, respondent had been married to Sally Bernheimer; that on December 19, 1941, he filed an action for divorce against Sally Bernheimer in Juarez, Mexico; that on December 30, 1941, Sally Bernheimer filed suit against respondent in Los Angeles, California, to enjoin him from obtaining this Mexican divorce, which relief was granted. Notwithstanding this injunction respondent proceeded with his action in Mexico and was granted a decree of divorce on January 30, 1942. The respondent testified that at the time he went to Juarez, Mexico, he was accompanied by the attorney who now represents him and who has represented him in all the proceedings in this case and that he went to Juarez on this attorney's advice. Respondent, accompanied by this same lawyer and appellant, thereafter went to Las Vegas, Nevada, and married appellant on the 4th of February, 1942. On February 9, 1942, the son of appellant and respondent was born.

On July 28, 1943, respondent entered into a property settlement agreement with Sally Bernheimer and thereafter gave her \$1,500 to pay her travelling expenses to go to Kansas City, Missouri, and file suit for divorce which she did on August 5, 1943. Respondent testified that he, accompanied by his present attorney, also went to Kansas City and entered an appearance in the action upon the advice of this attorney. A decree of divorce was granted to Sally Bernheimer on August 13, 1943. On September 4, 1943, appellant and respondent were again married in a church in Reno, Nevada. Respondent's attorney again accompanied them on this trip. The appellant had knowledge of all of the foregoing facts. Respondent further testified that until a few months before the hearing in this case appellant never had an attorney other than his lawyer " * * * but he certainly gave her very good advice."

According to the affidavit of respondent, on April 11, 1944, he filed suit in Missouri

on behalf of the son of appellant and respondent against the First National Bank of Kansas City for declaratory relief concerning the meaning and intent of a will which had been executed by respondent's mother. He states further in this affidavit that the validity of his Missouri marriage was collaterally attacked in this action and that a decree of the lower court in the action was reversed by the Supreme Court of Missouri but that a rehearing *en banc* had been granted and that the action was still pending at the time of the hearing in this case. So far as the question which we are considering now is concerned, this matter is of importance by reason of respondent's statement in his affidavit that he has taken the position throughout the proceedings before the Missouri courts that the divorce decree rendered in Missouri on August 13, 1943, was valid. It further appears that up to July 28, 1949, the parties were living together as man and wife.

[1,2] At the hearing in this case, the appellant testified to the marriage which took place at Reno, Nevada, on September 4, 1943. The respondent, in his answer, stated that such a ceremony took place. That was sufficient proof of marriage to entitle appellant to receive attorney's fees, suit money and costs pending the trial and the burden of proof was then upon respondent to show the invalidity of this marriage. *Bancroft v. Bancroft*, 9 Cal.App.2d 464, 50 P.2d 465; *Thomas v. Thomas*, 66 Cal.App. 2d 818, 153 P.2d 389. This burden he attempted to meet by attempting to attack collaterally his own divorce from Sally Bernheimer in Missouri in which proceeding he had participated and entered an appearance. The principle which we are applying here was stated clearly in *Rediker v. Rediker*, 35 Cal.2d 796, at page 805, 221 P.2d 1, at page 6, in this language: "Even if the Cuban decree were invalid, defendant cannot contest its validity. The validity of a divorce decree cannot be contested by a party who has procured the decree or a party who has remarried in reliance thereon, or by one who has aided another to procure the decree so that the latter will be free to remarry." Respondent seeks to avoid the application of the law as stated in

the preceding quotation in the following statement which we quote from his brief: "Factually the Rediker case is a classical example of the situations where (1) the husband attempts to blow hot and cold at the same time, (2) where the husband seeks the aid of the court of equity to enable him to reverse a former position to the injury of another, and (3) where a husband has first invoked the exercise of a jurisdiction within the general powers of a court and then later seeks to reverse the effect of its jurisdiction." Factually the case before us is a perfect example of the situations just stated. Here, the husband aided his former wife, Sally, to procure the very decree he now seeks to declare invalid so that he could marry his present wife. On the strength of that decree he did marry her. When the validity of the decree was attacked collaterally in Missouri he tells us in his affidavit that he took the position throughout the proceedings there that the Missouri decree was valid and he further tells us that those proceedings are still pending so we have a situation where at the same time he contended in California that the Missouri decree was invalid he was maintaining its validity before the courts of the State of Missouri.

[3] Respondent makes the further contention that no court can concede the invalidity of a prior divorce decree and then apply this doctrine of estoppel. The answer to that is that in the event the court made a finding that the Missouri decree was valid there would be no occasion to apply this doctrine of estoppel and that contention is exactly contrary to the language which we have quoted in *Rediker v. Rediker*, supra, 35 Cal.2d 796, 805, 221 P.2d 1. What we are saying here is that a man in the position of respondent, as shown by the facts of this case, cannot raise any question as to the validity of such a decree and it does not matter whether or not the decree in question was invalid. That is the direct holding in *Bruguiere v. Bruguiere*, 172 Cal. 199, 155 P. 988; *Harlan v. Harlan*, 70 Cal. App.2d 657, 161 P.2d 490; *Krause v. Krause*, 282 N.Y. 355, 26 N.E.2d 290. Such being the case the only evidence properly before the court was the admittedly true

evidence of the ceremony performed in Reno, Nevada, September 4, 1943, which gave the court jurisdiction to grant the relief asked by the appellant. It is true that the appellant knew that her husband had been divorced in Missouri from his first wife. In fact, relying upon that decree, she married him and no logical reason is suggested as to how the mere fact of such knowledge could bar her under all the facts in this case, from maintaining that her husband is now estopped from asserting that this decree was invalid.

[4] The next question which concerns us is whether or not, in the light of the record before us, the court exercised the proper judicial discretion in denying the wife an order for her support pendente lite, in denying her any attorney's fees or court costs to maintain her own action, or to defend against the cross-complaint for annulment filed against her and denying her any attorney's fees to pursue her application for money to support the child of the parties pending the action. In *Loeb v. Loeb*, 84 Cal.App.2d 141, on pages 144 and 145, 190 P.2d 246, on page 248, the rule governing courts in such matters is set forth as follows: "The manifest purposes of pendente lite allowances to a wife are to enable her to live in her accustomed manner pending the disposition of the action and to provide her with whatever is needed by her to litigate properly her side of the controversy. *Mudd v. Mudd*, supra, 98 Cal. 320, 322, 33 P. 114; *Busch v. Busch*, 99 Cal.App. 198, 202, 278 P. 456; *Locke Paddon v. Locke Paddon*, 194 Cal. 73, 81, 227 P. 715. If she possesses independent means sufficient for these purposes the allowances should not be granted. *Mudd v. Mudd*, supra. However, she is not required first to impair the capital of her separate estate. *Farrar v. Farrar*, 45 Cal.App. 584, 586 188 P. 289." That brings us first to the manner in which the parties had lived up to the time of their separation. For seven years they had lived at an establishment in Brentwood, Los Angeles, California, consisting of over four acres, a 15-room house and a swimming pool. The servants consisted of two gardeners, a governess for their child, a

maid, a cook and a butler. At the time of the hearing the respondent was still living in this home which was his separate property. At that time the child was 7½ years of age.

[5] There was considerable conflict in the testimony as to respondent's means and income but this testimony should be taken in the light most favorable to him. Therefore we will look to the affidavit which he filed on the order to show cause. This affidavit states that his income during the preceding year from a trust estate, from which he secured a monthly income, was \$23,674 and that he also during that year received from the corpus of the trust the sum of \$15,000. That his present income amounts to \$1,973 per month. That in addition to this income he has a present net financial worth of \$103,300. He further states in the affidavit that his necessary expenses are \$3,500 per month and estimates the necessary expenses for the support of his wife and child at the sum of \$420 per month. The sum of \$103,300, stated in the affidavit to be his present financial worth, was shown by his testimony to be his estimate of the present net value of his house and did not include the furniture in it, silverware, oil paintings, art objects and the like, his automobile or his jeep or a collection of first editions which he had accumulated during the course of the preceding 32 years. No competent evidence was introduced of the value of this personal property.

In regard to appellant, the undisputed facts are that she had no income whatever, that she was 27 years of age, that during the 8 years she had lived with respondent she had earned no money and had the child of the parties to take care of. The only asset she had were furs and jewelry given to her by her husband during the 8 years they had lived together. The evidence regarding the value of this property was of the same type as that given in regard to the husband's personal property, that is, that he had carried insurance of \$12,000 on the furs and \$73,000 on the jewelry. There was not one word of tes-

timony as to the market value of this jewelry or these second-hand furs. P.2d 246; and Whelan v. Whelan, 87 Cal.App.2d 690, 197 P.2d 361.

[6] Respondent's contentions in regard to this phase of the case is set forth in his brief in this language: "The courts repeatedly say that the matter is always left to the sound discretion of the trial judge. The correct rule is that in some cases, under some circumstances, the judge may, in the exercise of a proper discretion, require the wife to exhaust the corpus of her own separate property before making a *pendente lite* award against her husband, but in other cases, the court may deem it proper to make an award without requiring the wife to impair or exhaust her separate property." It is true that a court has discretion in these matters. In fact section 137 of the Civil Code so provides. However, this discretion is not an arbitrary one and it must be exercised along legal lines taking into consideration the parties' former manner of living, their respective incomes and their financial abilities. *Smith v. Smith*, 147 Cal. 143, 145, 81 P. 411; *Kyne v. Kyne*, 70 Cal.App.2d 80, 160 P.2d 910; *Loeb v. Loeb*, supra, 84 Cal.App.2d 141, 145, 190 P.2d 246. In *Buchler v. Buchler*, 73 Cal.App.2d 472, at pages 475 and 476; 166 P.2d 608, at page 610, the court makes this declaration: "The law is settled in California that when a wife is the owner of nonincome producing property she is not required to have recourse to such property for her support before seeking support from her husband. (*Farrar v. Farrar*, 45 Cal.App. 584, 586, 188 P. 289; *Busch v. Busch*, 99 Cal.App. 198, 200, 278 P. 456.)" In addition to the cases cited in this opinion the same declaration is made in equally unequivocal language in *Westphal v. Westphal*, 122 Cal.App. 379, 384, 10 P.2d 119; *Cameron v. Cameron*, 85 Cal.App.2d 22, 29, 192 P.2d 89; *Loeb v. Loeb*, supra, 84 Cal.App.2d 141, 145, 190

[7] In view of the undisputed facts of the conditions under which the parties lived up to the time of their separation, the income which the husband had during the past year and which he concedes he will have in the future, and in view of the necessities of the wife, in the absence of any income whatever on her part and of the other undisputed circumstances shown by the record, we come to the conclusion that in denying the wife any sum whatever for her support and in denying her any attorney's fees or any costs whatever either to prosecute her own action or this one for her child's support or defend against the cross-complaint for annulment brought against her, that these orders cannot be sustained as an exercise of sound judicial discretion.

[8] The court allowed appellant \$300 for the support of the child. Considering her affidavit upon which the order to show cause was based and her statement of her needs in this respect we can see no abuse of discretion upon the part of the court in this award.

As it will be necessary for the court to determine the issues of fact in regard to alimony pending the trial, attorney's fees and costs, there is no reason to consider the other matters in which the appellant contends the court erred.

The orders of December 15, 1949 and December 30, 1949, are reversed except those portions of the orders which award the custody of the minor child to appellant and order respondent to pay appellant the sum of \$300 per month for the support of the child as to which matters the orders are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

MUCCI v. WINTER et al.

Civ. 14635.

District Court of Appeal, First District,
Division 1, California.

April 20, 1951.

Rehearing Denied May 19, 1951.

Hearing Denied June 18, 1951.

Stanley L. Mucci brought action against A. F. Winter (sued as A. S. Winters), and another, for damages sustained when plaintiff was struck by an automobile owned by the named defendant and driven by the other defendant. The Superior Court of the State of California in and for the county of San Mateo, Edmond Scott, J., entered judgment for plaintiff and the named defendant appealed. The District Court of Appeal, Bray, J., held that evidence was insufficient to prove that the named defendant had given the other defendant permission, either express or implied, to drive the automobile.

Judgment reversed.

1. Appeal and error ⇨989

On appeal from plaintiff's judgment on ground of insufficiency of evidence, only the evidence most strongly in favor of plaintiff would be considered and defendant's testimony and that of his witnesses would be disregarded.

2. Automobiles ⇨242(6)

Under statute making the owner of an automobile responsible for negligent operation by person using the automobile with owner's permission, express or implied, carelessness or negligence of the owner is not enough to raise an inference of implied permission. Vehicle Code, § 402.

3. Automobiles ⇨244(22)

Possession of an automobile by another person is not sufficient to establish that its possession was with the owner's permission, express or implied, so as to render owner responsible for negligent operation of the automobile by such other person. Vehicle Code, § 402.

4. Automobiles ⇨192(1)

In determining whether there has been an implied permission to use automobile

1. Williams was joined as a defendant, but apparently not served, as no further proceedings appear against him, although

so as to render owner liable for driver's negligent operation, it is not necessary that the owner have prior knowledge that the driver intends to use the automobile, but it must be under circumstances from which consent to use the automobile is necessarily implied. Vehicle Code, § 402.

5. Automobiles ⇨244(22)

In motorist's action for damages sustained when struck by defendant's automobile driven by another, evidence on issue of whether defendant had given the driver permission, either express or implied, to drive defendant's automobile was insufficient to sustain verdict for motorist. Vehicle Code, § 402.

6. Automobiles ⇨246(2)

In motorist's action for damages sustained when struck by defendant's automobile driven by another, instruction as to negligence did not bear on the question of permission, and there was no error in giving it.

Dana, Bledsoe & Smith, San Francisco,
for appellant.

Palmquist & Sugden, J. Adrian Palmquist, and Stanley C. Smallwood, all of Oakland, for respondent.

BRAY, Justice.

Plaintiff was injured and his car damaged when struck by an automobile owned by defendant Winter and being driven by one Williams.¹ A jury returned a verdict of \$6000 in favor of plaintiff. Defendant appealed, claiming (1) that the evidence was insufficient to prove that he had given Williams permission, either express or implied, to drive the car; and (2) that one of the instructions was erroneous.

Facts.

[1] As to most of the facts there is no conflict. The main conflict is in the inferences to be drawn from those facts. Defendant denied knowing Williams, ever

his deposition was taken in Alabama. Defendant Winter will be hereinafter referred to as "defendant."

having him in his car, ever allowing any person to drive his car. He also denied that any sailor ever took his car except the single unauthorized taking by Williams the night of the accident. As we are required to consider only the evidence most strongly in favor of plaintiff, we will disregard defendant's testimony and that of his witnesses.

1.

The sole evidence upon which the claim of permissive use is based is the testimony of Williams. He was a sailor, stationed at the San Bruno naval base. About a month and a half before the accident he met defendant, about midnight, at Pal's Club, a bar in East Palo Alto. After about a half hour's drinking, Williams asked defendant to take him to the base. Defendant allowed Williams to drive his car, with defendant along, back to the base, a distance of twelve or fifteen miles. About a week later Williams again met defendant. After drinking together they proceeded to San Francisco, with Williams driving defendant's car. After spending the evening there they started back to the base, Williams still driving. In San Francisco Williams saw a girl on a corner or in front of a cafe, got out of the car to talk to her, leaving defendant in the car. Williams was afraid defendant might leave him, so without defendant observing him, took the key out of the ignition and then off defendant's key ring and put it in his pocket, sticking another key on the same ring in the ignition. Defendant was "pretty high," and did not see Williams remove the key. In about ten minutes Williams returned with the girl. Defendant had started the engine. At Williams' request, defendant got in the rear seat. Williams drove the girl to her home and then drove to the base. On leaving the car Williams kept the key. Apparently defendant had not discovered its loss. Defendant then drove the car away. One night Williams asked defendant to use the car for a date, but could not "get any sense out of him. He talked in my favor and said we would talk it over later." Defendant never told him not to use the car.

The third meeting was after Williams and two other sailors had taken defendant's car without defendant's knowledge while it was parked in front of a bar. They rode around in it for about an hour, and then returned to the place from which they took the car. Defendant did not know Williams had the car until they returned to the bar. Defendant was standing there, appearing angry, and made a fuss at first. He mumbled something about where Williams went and how. Defendant was pretty drunk. He got in the car with the sailors and after a while cooled off. He let Williams drive it back to the base, defendant going along. They drove around a while first. During the trip defendant mentioned something about where did Williams get the key. He grabbed it out of the switch, looked at it and then put it back. "He asked me to give it back to him but I laughed him off and made a big joke about it." "I told him he could have it after we got back." "When we got to the base I reached and took it and went on into the base." "I just told him when we left that I would see him later." Defendant did not say anything.

The fourth meeting was the night of the accident, three weeks to a month after the last meeting. The car was in front of the Pal's Club. Williams was with another sailor. Williams saw defendant either in the Pal's Club or another bar down the street, talking to some other people. Williams could not remember speaking to defendant, but waved. He thinks defendant returned the greeting. Williams did not ask defendant for the use of the car nor tell defendant that he was going to use it or where he was going. About 11:30 p. m. he and the other sailor entered the car without defendant's knowledge and drove away, to pick up a couple of girls and then return and get defendant. Williams used the key which he had in his pocket. A short while later the accident occurred. Williams then left the key in the car and went away. He never saw defendant thereafter. It is conceded that the accident was due to Williams' negligence. Subsequently at court martial proceedings,

Williams pleaded guilty to the charge that he made unauthorized use of an automobile, of another, referring to the use of defendant's automobile on this last occasion.

Sufficiency of the Evidence.

[2] There was no express permission. The facts do not raise an inference of an implied permission. The fact that on the third occasion, defendant had forgiven Williams for taking the car without his consent, cannot give rise to an inference that defendant was willing that Williams do so again. The fact that on three occasions defendant permitted Williams to drive the car while defendant was riding in it certainly raises no inference that defendant was willing that plaintiff might take the car without his knowledge. Nor does the key episode raise an inference of consent. There is no evidence that defendant saw Williams remove the key from his ring. However, a reasonable inference could be drawn from the evidence that defendant knew at the time of the fourth episode that Williams had the key. Williams testified that on the third occasion while returning to the base, defendant asked him to return the key. Williams said he would when they got to the base, but when they arrived there Williams took the key and left, defendant saying nothing. In view of his intoxicated condition, and all of the circumstances, this cannot be said to be a consent to Williams' later taking the car while defendant had it parked in front of the bar where defendant was drinking. Perhaps defendant was negligent in not insisting on a return of the key there at the base, and in not demanding the key the night of the accident when Williams waved to him in the bar. But section 402 of the Vehicle Code requires "permission, express or implied". Carelessness is not enough. Thus, a person who leaves a car on the street with the key in the ignition or with the ignition and car unlocked is negligent in so doing. He is presumed to know that such a condition of his car is almost an invitation to a thief to take it, and that it is liable to be taken, yet no one would claim that when so taken,

it is with the owner's permission. Here the only times the car was driven with the owner's permission was when the owner was in it. Disregarding the question of whether at the time of the key episode defendant was sober enough to realize all its implications, the strongest inference that can be drawn here is that defendant knew that Williams might again take the car without his permission, and did not take sufficient steps to prevent that contingency from happening. However, that is still a long way from granting permission for it to happen.

[3] Of course, the mere fact of possession of the automobile is not sufficient to establish that its possession was with the owner's permission. *Helmuth v. Frame*, 46 Cal.App.2d 381, 115 P.2d 852. A persuasive authority here is *Di Rebaylio v. Herndon*, 6 Cal.App.2d 567, 44 P.2d 581. There the owner had given permission to one Herndon to use the automobile upon condition that he would return it to the garage the next morning. Herndon did not so return it because he was feeling ill. He was unable to communicate with the owner to get the permission extended. The next day, while driving the car, he had the accident. A directed verdict was upheld, the court saying, " * * * the only permission given Herndon to use the car was that he might have it for a particularly specified period." 6 Cal.App.2d at page 569, 44 P.2d at page 582. In our case, the only permission given Williams was on the occasions when the owner was riding with him. *Henrietta v. Evans*, 10 Cal.2d 526, 75 P.2d 1051, is another case of permission for a limited purpose in which it was held that from such permission no general permission may be inferred.

[4] As pointed out by defendant, in determining whether there has been an implied permission, it is not necessary that the owner have prior knowledge that the driver intends to use the car, *Phipps v. Shacklett*, 137 Cal.App. 109, 29 P.2d 917, but it must be "under circumstances from which consent to use the car is neces-

sarily implied." 137 Cal.App. at page 111, 29 P.2d at page 918. In our case, there are no such circumstances.

In *Bradford v. Sargent*, 135 Cal.App. 324, 27 P.2d 93, a case of claimed permissive use, the court points out that the burden of proving an express or implied permission rests on the party asserting the benefit of the statute.

Garrison v. Booth, 10 Cal.App.2d 738, 52 P.2d 535, cited by defendant, is not in point. There the car was for the use of both husband and wife. The wife permitted her son to use the car at times. On the day of the accident, the son asked her permission. She did not object and knew he was using it. While the husband did not know the car was being used by his stepson on this particular occasion, he did know of the other occasions and had made no objection thereto. It was held that the trial judge was justified in drawing the conclusion that because of the stepfather's failure to object on prior occasions and by silence tacitly approving his wife's acts in giving the stepson permission to use the car, the stepson was using the car on this occasion with the stepfather's implied consent. Obviously, there is no similarity to the situation in our case.

Casey v. Fortune, 78 Cal.App.2d 922, 179 P.2d 99, was a case in which the court held that the circumstances overcame the owner's testimony that she did not know that her son had been using the car, and justified an inference that she had knowledge of the repeated use of the car and tolerated such use. Again, a different situation from the one here.

[5] Plaintiff failed to sustain the burden of proving permission, as there is no evidence from which it might reasonably be inferred that Williams had permission, either express or implied, to drive defendant's car on the night of the accident.

Instruction.

[6] In view of our determination of the main point in the case, it becomes unnecessary to consider at length the instruction which defendant claims is errone-

ous. Defendant contends that while the instruction was obviously concerning negligence in the accident, it might have been construed by the jury as bearing on the question of permission. It does not bear such interpretation. There was no error in giving it.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.



103 Cal.App.2d 651

TURNER v. MILSTEIN.

Civ. 17372.

District Court of Appeal, Second District,
Division 3, California.

April 20, 1951.

Action by Fred Turner against M. M. Milstein to quiet title to a parcel of realty. The Superior Court of Los Angeles County, William B. McKesson, J., rendered a judgment of dismissal, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that allegations that plaintiff had no notice or knowledge of proceeding had more than five years after entry of judgment, in the municipal court for issuance of writ of execution, if proved, were sufficient to establish extrinsic fraud.

Judgment reversed with directions.

1. Appeal and error ⇨917(1)

For purpose of determining whether complaint states cause of action, reviewing court must assume that all facts alleged in complaint are true.

2. Execution ⇨160

An attack on an order directing issuance of execution on ground that it was procured by fraud is a direct attack since establishment of fraud shows that no order was made.

3. Judgment ⇨460(4)

Allegations in complaint in quiet title action that plaintiff had no notice or knowl-

edge of proceedings had, more than five years after entry of judgment, in municipal court for issuance of writ of execution, if proved, were sufficient to establish extrinsic fraud.

4. Judgment ⚡419

Courts of equity will relieve a party from an unjust judgment rendered against him when, without service of process, whether actual or constructive, no opportunity has been given him to be heard in his defense.

5. Pleading ⚡52(2)

Where plaintiff alleged that he had no notice or knowledge of proceedings had more than five years after entry of judgment for issuance of writ of execution, that proceedings were had without notice and with intent to conceal from plaintiff the time and place of sale, that defendant delivered instructions to sheriff to sell property and that property was sold at private sale without competitive bidding, only one cause of action was alleged for restitution and to quiet title to the realty.

6. Action ⚡1

A "cause of action" is simply the obligation sought to be enforced against defendant.

See publication Words and Phrases, for other judicial constructions and definitions of "Cause of Action".

7. Pleading ⚡192(2)

A demurrer for uncertainty does not lie if what is sought is a statement of matter already within knowledge of demurring party.

8. Quieting title ⚡34(5)

Complaint in quiet title action, containing allegations that plaintiff had no notice or knowledge of proceedings had more than five years after entry of judgment, for issuance of writ of execution, and without notice to and intent to conceal from plaintiff the time and place of sale, defendant directed sheriff to sell property, and that property was purchased by defendant without competitive bidding, was not defective for failure to allege how or in what manner defendant concealed from plaintiff, time and place of sale of realty.

9. Limitation of actions ⚡39(1)

Section of Code of Civil Procedure providing that an action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued, applies only to action not covered in preceding sections of Code of Civil Procedure. Code Civ.Proc. § 343.

10. Limitation of actions ⚡37(2)

Where plaintiff's action to quiet title to certain realty was based on alleged fact that plaintiff had no notice and knowledge of proceedings had more than five years after entry of judgment for issuance of writ of execution and relief was sought on ground of fraud on part of defendant, action came within provision of Code of Civil Procedure requiring action for relief on ground of fraud to be brought within three years. Code Civ.Proc. § 338, subd. 4.

11. Limitation of actions ⚡180(5)

Where a demurrer specifies a particular section of statute of limitations of which defendant relies to defeat action, no other sections of statute are pleaded, and only question is whether cause of action is barred by particular section or sections mentioned in demurrer. Code Civ.Proc. § 338, subd. 4.

12. Quieting title ⚡29

Plaintiff's action to quiet title commenced on March 10, 1949, based on fraud of defendant in that plaintiff had no notice or knowledge of proceedings had more than five years after entry of judgment for issuance of a writ of execution, and that plaintiff had no notice or knowledge until February 11, 1948, was not barred by laches.

Walter Gould Lincoln, Los Angeles, for appellant.

Wapner & Wapner, Joseph M. Wapner and Joseph A. Wapner, all of Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of dismissal entered pursuant to an order sustaining defendant's demurrer to plaintiff's amended complaint with leave to

amend. Plaintiff declined to amend and the judgment followed. The action seeks to quiet title to a parcel of real property. The original complaint was filed March 10, 1949.

The amended complaint alleged:

On July 22, 1933, a trust deed executed by plaintiff on real property situated on Grape Street, Los Angeles, was foreclosed with a claimed deficiency of \$669.28.

October 17, 1933, an action (No. 326563) was filed in the municipal court to recover the deficiency. January 13, 1934, plaintiff's default was entered and judgment rendered against plaintiff for \$669.09. November 28, 1938, on supplementary proceedings, plaintiff testified that on November 26, 1938, a declaration of homestead had been filed on the property here involved.

June 18, 1942, Milstein, defendant in the present action, purchased the judgment for \$250 and on November 13, 1942, filed an assignment thereof to himself in the municipal court action. The first notice or knowledge plaintiff had of the assignment was on February 11, 1948.

January 30, 1943, more than five years after entry of the judgment, Milstein filed a notice of motion praying that execution issue on the judgment. The notice of motion was not accompanied by any affidavit showing diligence. The motion was heard on March 2, 1943. Neither the motion nor notice of the hearing of the motion was served on plaintiff. The court ordered that execution issue. On April 5, 1943, the clerk issued the writ. Plaintiff had no notice or knowledge of any such proceedings until February 11, 1948.

April 13, 1943, the sheriff made his levy as follows: "So 70 feet of Lot 43 Pardee Tract at Book 5, page 23 of Maps and Records of Los Angeles County and property known as No. 9050 Zamora, by handing to and leaving with Gladys Lockhart, tenant who was in possession of improved real property hereinafter described, a true copy of said writ." On April 13, 1943, plaintiff was, and at all times since has been, the record owner of said "So 70 feet of Lot 43 Pardee Tract." That property was not known as 9050 Zamora

but as 8950 Zamora Street, Los Angeles. Gladys Lockhart was not then, nor has she ever been, a tenant of plaintiff. He does not know her. Plaintiff "did not receive any notice, nor had he any knowledge of said purported levy, or of the issuance of said execution."

"[N]o notice of said execution or said levy was posted on the premises No. 8950 Zamora Street, or elsewhere in said County. * * * [H]ad said Sheriff made his levy upon the occupants of No. 8950 and had the notice of execution or levy been posted on said real property, the plaintiff herein would have received notice of the same, and would have redeemed from said levy." Plaintiff did not reside on said property on April 13, 1943, but resided in Fontana, San Bernardino County, and had been a resident there since 1938, "as defendant's attorney, Joe Wapner and defendant well knew at all times since 1938."

Without notice to, and with intent to conceal from, plaintiff the time and place of the sale of the property, Milstein delivered instructions to the sheriff to sell the property. February 7, 1944, the sheriff sold the property at private sale. There was no competitive bidding. Milstein and his attorney were the only persons who had notice or knowledge of the sale. Milstein, the sole bidder, bid \$300. The sheriff sold the property to Milstein and plaintiff was given a credit of \$270 on the judgment. The fair market value of the property at that time was \$6000 and "was clear of all encumbrances except the Declaration of Homestead, all as this defendant and his attorney well knew." February 11, 1944, the sheriff issued a certificate of sale, and on March 1, 1945, a deed of the property, to Milstein. Plaintiff first learned the sale had taken place on February 11, 1948. Milstein purchased the real property "for an insignificant amount grossly disproportionate to the actual value of the said real property, with the express intent and design to deprive plaintiff of his property." Milstein not only claimed title to the real property "of the fair market value of \$6000" but also claimed that plaintiff

"was still indebted to him in the sum of \$429.00 * * * being nearly twice what Milstein had originally paid for the judgment."

At all times since 1938, all taxes levied on the property and all insurance and expenses therefor have been paid by plaintiff, and none by Milstein. Because of lack of notice or knowledge, plaintiff had no opportunity to redeem. He could and would have redeemed before March 1, 1945, had he had either notice or knowledge of the sale.

The failure of defendant to notify plaintiff was intentional and fraudulent, and was designed to deceive and take undue advantage of plaintiff and deprive him of his property. Plaintiff has offered to do equity "to recover his real property" and particularly to pay defendant "the sum paid by him for his purchase of the judgment in case No. 326563, with legal interest thereon, but said Milstein demands the sum of \$3,000.00 therefor."

The prayer is for a decree 1) declaring the order of the municipal court for the issuance of execution void; 2) setting aside the issuance of the writ of execution; 3) declaring the sale void; 4) cancelling the sheriff's certificate; 5) cancelling the sheriff's deed; 6) requiring plaintiff to pay defendant such sum of money as the court may deem equitable and upon payment of such sum decreeing that plaintiff is the owner of the property and that defendant has no interest therein; 7) general relief.

The demurrer was general and special. The special grounds were: 1) several causes of action are improperly united and not separately stated; 2) it cannot be determined how or in what manner defendant concealed from plaintiff the time and place of the sale; 3) the action is barred by section 343 of the Code of Civil Procedure; 4) the action is barred by laches.

[1-4] For the purpose of this opinion we must, of course, assume that all of the facts alleged in the amended complaint are true. The present suit is a direct attack on the order directing the issuance

of execution. An attack on the order on the ground it was procured by fraud is a direct attack since establishment of the fraud shows that no order was made. *Parsons v. Weis*, 144 Cal. 410, 415, 77 P. 1007; *Stevens v. Kelley*, 57 Cal.App.2d 318, 324, 134 P.2d 56; *Sipe v. McKenna*, 88 Cal.App.2d 1001, 1005, 200 P.2d 61. It was alleged that plaintiff had no notice or knowledge of the proceedings had, more than five years after the entry of judgment, in the municipal court for the issuance of a writ of execution. These allegations, if proved, are sufficient to establish extrinsic fraud. "Courts of equity will relieve a party from an unjust judgment rendered against him when, without service of process, either actual or constructive, no opportunity has been given him to be heard in his defense." *Sipe v. McKenna*, supra, 88 Cal.App.2d at page 1005, 200 P.2d at page 64.

The facts alleged are almost identical with those in *Young v. Barker*, 83 Cal. App.2d 654, 189 P.2d 521, 522. If true, the facts here present a much stronger case for the interposition of equity than did those in the *Young* case where the court characterized them as follows: "a program, well prepared and almost successful, whereby plaintiff [defendant here] hoped to acquire a valuable property for a paltry sum by following the forms of law but in defiance of the elemental rules of equity and without a simulacrum [shadowy semblance] of justice." In the *Young* case the court stated, 83 Cal.App. at page 657-660, 189 P.2d at page 523:

"The bare allegation that the summons and complaint were not served on defendant without the averment of facts showing that she had a meritorious defense to the action in the municipal court is insufficient to state a cause of action. [Citations]. If this were the extent of defendant's allegation of error plaintiff would have been entitled to judgment, but she does not rest with this one charge of irregularity. She alleges a course of conduct by plaintiff and her attorney from the entry of the default judgment in the municipal court to the commencement of the instant action that unmistakably indicates, as

found by the court, a fraudulent purpose on their part and manifests a carefully planned and executed scheme to deprive defendant of a valuable property for approximately four per cent of the amount of her equity. * * *

"In *Odell v. Cox*, 151 Cal. 70, at pages 73, 74, 90 P. 194, there was an inadequacy of consideration, which alone is not a sufficient ground for vacating the execution sale; but, said the court, inadequacy of price is a circumstance to be considered in connection with other circumstances which together will be a ground for vacating the sale [151 Cal. at pages 73, 74, 90 P. 194]. In the *Odell* case as in the instant case the judgment debtor had no knowledge of the issuance of the execution or of the sale and although a writ of execution was levied in the manner authorized by law the method of its levy was such that the owner did not know and could not learn of the levy except from information given him by the opposing party or casually by someone who knew the facts. In view of the defendant's financial circumstances and of the appeal from the judgment he had no reason to believe that his property would be sold. To the same effect are the cases of *Winbigler v. Sherman*, 175 Cal. 270, 165 P. 943, and *Hyman v. Stern*, 61 Cal.App. 656, 215 P. 911. In *Graffam v. Burgess*, 117 U.S. 180, 192, 6 S.Ct. 686, 692, 29 L.Ed. 839, 843, it is said that if the inadequacy is so gross as to shock the conscience (it is so in the instant case), or if, in addition to the gross inadequacy, the purchaser has been unfair or has taken undue advantage, or if the owner of the property has been misled or surprised, the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property from the sale. 'Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud.' In *Schroeder v. Young*, 161 U.S. 334, 338, 16 S.Ct. 512, 513, 40 L.Ed. 721, 724, it is said that while mere inadequacy of price may not be sufficient in itself to warrant the setting aside of a judicial sale 'courts are not slow to seize upon other circumstances im-

peaching the fairness of the transaction as a cause for vacating it.' Further that such gross inadequacy as to shock the conscience, irregularities attending the sale, where the sale was conducted in such manner that the full value of the property could not be realized, if bidders had been kept away, if undue advantage had been taken to the prejudice of the owner, or if he had been lulled into false security, the sale may be set aside and the owner may be permitted to redeem. In the *Schroeder* case, as in the instant case, the levy was made under the specific direction of plaintiff's attorney, who was the sole bidder at the sale and the only person present excepting the officer conducting the sale."

As the facts alleged in the present suit are so similar to those in *Young v. Barker*, supra, 83 Cal.App.2d 654, 189 P.2d 521, and to those in the cases referred to in *Young*, further discussion is unnecessary. It is clear that the complaint states facts sufficient to constitute a cause of action.

Milstein argues that his grounds of special demurrer were well taken and that because plaintiff declined to amend, the judgment must be affirmed. *Hendricks v. Osman*, 72 Cal.App.2d 465, 466, 164 P.2d 545. We have concluded that none of the grounds of the special demurrer is well taken.

[5,6] One of the grounds was that several causes of action are improperly united and not separately stated. One cause of action only was alleged. The suit is in equity. A cause of action is simply the obligation sought to be enforced against the defendant. *Frost v. Witter*, 132 Cal. 421, 426, 64 P. 705; *Klopstock v. Superior Court*, 17 Cal.2d 13, 20, 108 P.2d 906, 135 A.L.R. 318. The cause of action alleged is for restitution—to quiet title to a parcel of realty. Incidental to that, plaintiff alleges the facts necessary to such a decree. Defendant confuses the unlawful conduct which gave rise to the cause of action with the cause of action itself.

In *Louval v. Gridley*, 70 Cal. 507, 11 P. 777, it was held that a complaint seeking to quiet plaintiff's title to land and

to have a deed from the plaintiff declared a mortgage, states but a single cause of action. In *Beronio v. Ventura Co. Lumber Co.*, 129 Cal. 232, 61 P. 958, it was held that a complaint seeking to quiet plaintiff's title to land and also to annul a sheriff's deed to the defendant under foreclosure of a mortgage states only a single cause of action for the enforcement of plaintiff's right to the premises in question against the unlawful claim of the defendant thereto, and is not subject to a demurrer for misjoinder of causes of action. In *Parsons v. Weiss*, 144 Cal. 410, 77 P. 1007, it was held that a complaint seeking to quiet plaintiff's title to a parcel of realty as against the defendant, and, as incidental thereto, to set aside a former judgment in favor of the defendant quieting his title as against the plaintiff, on the ground of fraud in its procurement, states but a single cause of action. In *Thompson v. Moore*, 8 Cal.2d 367, at page 370, 65 P.2d 800, 802, 109 A.L.R. 1027, it was said, that "a complaint consisting of two counts, one stating a cause of action to quiet title to real property, and the other for the cancellation of a judgment or other encumbrance against said real property states but a single cause of action." In *Wood v. Roach*, 125 Cal.App. 631, 14 P.2d 170, it was held that a complaint seeking to quiet plaintiff's title to realty, and, as incidental thereto, to have an order of confirmation of sale of the realty, and a deed issued pursuant thereto, declared void, states but one cause of action. See also *California Trust Co. v. Cohn*, 214 Cal. 619, 628 et seq., 7 P.2d 297; *Muir v. Hamilton*, 152 Cal. 634, 636, 93 P. 857; *Earl v. Lofquist*, 135 Cal.App. 373, 379, 27 P.2d 416; *Young v. Young Holdings Corp., Ltd.*, 27 Cal.App.2d 129, 146, 80 P.2d 723.

[7,8] The only specification of uncertainty was that it could not be determined how, or in what manner, Milstein concealed from plaintiff the time and place of the sale of the real property. The ultimate fact is pleaded. It is an old and elemental rule of pleading that a demurrer for uncertainty does not lie if what is sought is a statement of matter already within the knowledge of the demurring

party. Even under the strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading. If, in truth, Milstein concealed from plaintiff the fact that the property was to be sold, he knows it and he knows the time and place of concealment, if there was a time and place. It would seem that concealment is negative and that it would occur without any time or place. Milstein knows the facts.

[9-12] One of the grounds of the demurrer was that the action is barred by section 343 of the Code of Civil Procedure, providing that "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued." Section 343 is not controlling. It applies only to actions not covered in the preceding sections of the Code of Civil Procedure. *Richardson v. Michel*, 45 Cal.App.2d 188, 195, 113 P.2d 916. Where, as here, the gist of the action is fraud, and where relief is sought on that ground, the action comes directly within the provisions of section 338, subdivision 4, of the Code of Civil Procedure, irrespective of the form of action. *Richardson v. Michel*, 45 Cal. App.2d 188, 196, 113 P.2d 916; *Lightner Mining Co. v. Lane*, 161 Cal. 689, 702, 120 P. 771. This section was not specified as a ground of demurrer. When a demurrer specifies a particular section upon which the defendant relies to defeat the action, no other sections of the statute are pleaded, and the only question is whether the cause of action is barred by the particular section or sections mentioned in the demurrer. *Bank of San Luis Obispo v. Wickersham*, 99 Cal. 655, 659-660, 34 P. 444; *Pedro v. Soares*, 18 Cal.App.2d 600, 610, 64 P.2d 776; *Trubody v. Trubody*, 137 Cal. 172, 174, 69 P. 968; 16 Cal.Jur. 609, § 204. Nor is the action barred by laches. *Secret Valley Land Co. v. Perry*, 187 Cal. 420, 424-426, 202 P. 449; *Stanley v. Westover*, 93 Cal.App. 97, 109, 269 P. 468; *Huling v. Seccombe*, 88 Cal.App. 238, 241, 263 P. 362.

We are of the opinion that the court erred in sustaining the demurrer to the amended complaint.

The judgment is reversed with directions to overrule the demurrer and permit defendant to answer.

SHINN, P. J., and WOOD, J., concur.



103 Cal.App.2d 688

HARDIN v. SAN JOSE CITY LINES,
Inc. et al.
Civ. 14902.

District Court of Appeal, First District,
Division 1, California.
April 23, 1951.

Sally Hardin sued the San Jose City Lines, Inc., and others for personal injuries. From an order denying defendants' motion for change of venue, they appealed. On plaintiff's petition for a writ of supersedeas after entry of an order to show cause and a temporary stay order. The District Court of Appeal, By the Court, held that a corporation, which is sued as a resident of the county or district designated in its certificate of incorporation as the location of its office or place of business, cannot defeat the court's jurisdiction by showing that it has no office or place of business in such county or district.

Orders set aside, and petition denied.

1. Corporations ☞503(1)

A corporation, which is sued as resident of county or district designated in its certificate of incorporation as location of its office or place of business, cannot defeat court's jurisdiction by showing that it has no office or place of business in such county or district.

2. Appeal and error ☞458(2)

The granting of supersedeas pending appeal from order denying change of venue is justified only on showing that substantial questions will be presented on appeal.

Campbell, Hayes & Custer, San Jose, for appellant.

Rettig & Dunn, San Francisco, for respondent.

PER CURIAM.

The Petition for a Writ of Supersedeas alleges that Sally Hardin commenced an action for personal injuries against the San Jose City Lines, Inc., for personal injuries received in an accident in Santa Clara County. The Petition discloses that the defendant moved for a change of venue to either Alameda or Santa Clara County, which motion was denied. Defendant has appealed.

The Petition avers, and it is conceded that the Articles of Incorporation of defendant give San Francisco as the principal place of business of the defendant, but avers that this is in error as the corporation does not do business and has no office in San Francisco. This presents at most a disputable question of fact which has been decided adversely by the trial court.

[1] In an annotation in 175 A.L.R. 1092 at page 1094, in discussing this precise point it is stated:

"By the weight of authority, if the corporation is sued as a resident of the place designated in its Certificate of Articles of Incorporation as the location of its office or place of business, it cannot defeat the jurisdiction of the court by showing that in fact it has no office or place of business in that county or district."

[2] The granting of Supersedeas, " * * * is justified only when there is a showing that substantial questions will be presented upon the appeal from an order denying change of venue." Walker v. Wells Fargo Bank & Union Trust Co., 8 Cal.2d 447, page 449, 65 P.2d 1299, 1300.

We think the rule stated in the annotation is a sound rule and should be followed. The order to show cause and the temporary stay order are both set aside, and the Petition for a Writ of Supersedeas is denied. So ordered.

103 Cal.App.2d 741

BIGGS v. BIGGS et al.

Civ. 17873.

District Court of Appeal, Second District,
Division 1, California.

April 24, 1951.

Action by Robert E. Biggs against Anna Eve Biggs and others for divorce. One of plaintiff's attorneys filed with the clerk an order for dismissal of the action with prejudice, and subsequently plaintiff moved to set aside the dismissal. The Superior Court of Los Angeles County, William B. McKesson, J., entered an order denying motion and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that since no appeal was taken from the order of dismissal and plaintiff acquiesced in the dismissal for over a year, the trial court had no power to set aside order, since it was a final judgment.

Affirmed.

1. Judgment ⇨197

The entry of an order for dismissal in the clerk's register has the effect of a final judgment.

2. Judgment ⇨306, 403, 485**New trial** ⇨1

A judgment can be nullified by the court which rendered it only on a motion for a new trial, or by a motion to correct clerical mistakes in the judgment, or by motion where the judgment is void on its face or by an independent suit in equity. Code Civ.Proc. § 473.

3. Divorce ⇨139

Where plaintiff's attorney filed with the clerk an order for dismissal of divorce action but the wife's answer to the divorce action contained a prayer for affirmative relief, as far as the wife was concerned the action was still pending. Code Civ. Proc. § 581, subd. 5.

4. Judgment ⇨345

Where one of plaintiff's attorneys filed with the clerk an order for dismissal of the action and no appeal was taken from the order or a motion made for a new trial or for any relief from judgment, the trial court had no power to set aside order, since it was a final judgment.

5. Appeal and error ⇨154(1)

Where plaintiff acquiesced in order dismissing his action and made no attempt to appeal from order, there was a waiver and renunciation of the right to appeal.

William H. Brawner, Los Angeles, for appellant.

No appearance for respondent.

DRAPEAU, Justice.

To plaintiff's second amended complaint for divorce defendant answered, and prayed for affirmative relief.

February 11, 1948, one of plaintiff's attorneys filed with the clerk an order for dismissal of the action, with prejudice. This order was entered by the clerk.

October 7, 1949, plaintiff changed attorneys, and moved to set aside the dismissal. Notice of motion was given defendant's counsel. Affidavit was made by plaintiff that the dismissal was "inadvertently offered for filing," and was, and is, a nullity because affirmative relief was prayed for in the answer.

The motion was denied, and plaintiff appeals.

The case has been submitted to this Court without argument and upon plaintiff's opening brief only. Defendant made no objection when the case was dismissed, no appearance when the motion to set aside the dismissal was made, and has filed no brief and made no appearance in this court.

[1] The entry of an order for dismissal in the clerk's register has the effect of a final judgment. *Hopkins v. Superior Court*, 136 Cal. 552, 69 P. 299; *King v. Superior Court*, 12 Cal.App.2d 501, 56 P.2d 268; *Fisher v. Eckert*, 94 Cal.App.2d 890, 212 P.2d 64.

[2] A judgment can be nullified by the court which rendered it only: (1) On motion for a new trial; (2) by a motion under the provisions of Section 473 of the Code of Civil Procedure; (3) by motion therefor at any time where the judgment is void on its face; (4) by an independent suit in

equity. *Fisch & Co., Ltd., v. Superior Court*, 6 Cal.App.2d 21, 43 P.2d 855.

No appeal was taken from the order of dismissal. No motion for a new trial was made, nor for relief under the provisions of Section 473 of the Code of Civil Procedure. And the time for any such legal proceeding has long gone by.

Although his own lawyer caused it, plaintiff makes the contention that the order of dismissal was a nullity, because affirmative relief was prayed for in the answer and the dismissal was not joined in by defendant and her counsel.

[3] Subdivision 5 of Section 581 of the Code of Civil Procedure provides "no such dismissal with prejudice shall have the effect of dismissing a counterclaim or cross-complaint filed in said action or of depriving the defendant of affirmative relief sought by his answer therein." While defendant wife has made no attempt to set aside the judgment of dismissal, so far as her prayer for affirmative relief is concerned, the action is still pending. If so advised, the trial court may, in the exercise of its inherent power, dismiss defendant's cause of action for want of prosecution, but such dismissal of course would not be with prejudice. *Hibernia Savings & Loan Soc. v. Lauffer*, 41 Cal.App.2d 725, 107 P.2d 494.

[4] So far as plaintiff is concerned, we have a final judgment, *Bendlage v. Kohl-saat*, 54 Cal.App.2d 136, 128 P.2d 691, which the court had no power to set aside, *King v. Superior Court*, supra, and which bars and estops him from asserting its nullity. *Dillard v. McKnight*, 34 Cal.2d 209, 209 P.2d 387, 11 A.L.R.2d 835; 50 C.J.S., Judgments § 633, page 62.

[5] Plaintiff's position is wholly inconsistent. When the order for dismissal was made, and when plaintiff acquiesced in it for so long a time, it evidenced a waiver and renunciation of any right to set it aside. "The right to accept the fruits of a judgment or order and the right to appeal therefrom are not concurrent, but are wholly inconsistent, and an election of either is a waiver and renunciation of the other." *San Bernardino v. Riverside County*, 135

Cal. 618, 67 P. 1047, 1048; *Conlin v. Southern Pacific R. R. Co.*, 40 Cal.App. 743, 182 P. 71.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.



103 Cal.App.2d 659

In re ERLANGER'S ESTATE.

ERLANGER v. ERLANGER.

Civ. 18154.

District Court of Appeal, Second District,
Division 3, California.

April 20, 1951.

Rehearing Denied May 15, 1951.

Hearing Denied June 18, 1951.

Proceeding in the matter of the estate of Bert H. Erlanger, deceased, wherein Geraldine Erlanger, executrix, appealed from the decree of distribution entered by the Superior Court of Los Angeles County, Alfred E. Paonessa, J., and the appeal was opposed by Belle S. Erlanger. The District Court of Appeal, Bartlett, J., pro tem, held that where will provided for payment of a monthly sum to respondent out of the income of the estate, the principal of the estate could not be invaded to pay the monthly sum if income was insufficient.

Decree reversed with directions.

1. Wills ¶564(1)

Where will provided that deceased's mother should be paid a monthly sum out of the estate, and further clause provided that estate assets should be distributed to deceased's wife and that she should pay to deceased's mother the monthly sum for life out of the income of the estate, the clause provided for a bequest of income only, and would not call for interpretation, since it was unambiguous, clear and explicit.

2. Appeal and error ¶1008(3)

An appellate court is not bound by trial court's construction of a written instrument based solely upon terms of instrument with-

out the aid of evidence, and the appellate court must make the final determination in accordance with the applicable principles of law.

3. Wills ☞684(2)

Where will provided that distributee was to pay to deceased's mother during her lifetime a monthly sum out of the income of the estate, estate principal could not be invaded if income was insufficient to meet the monthly payments.

—◆—
Carl B. Sturzenacker, Hollywood, for appellant.

A. Brigham Rose, Los Angeles, for respondent.

BARTLETT, Justice pro tem.

This is an appeal by the executrix of the estate of Bert H. Erlanger, deceased, from the decree of distribution entered therein. The portion of the will involved in this appeal is the following:

"Second: I hereby direct that out of my estate shall be paid to my mother, Belle S. Erlanger, if she be still living at the time of my demise, the sum of Two Hundred Fifty Dollars (\$250.00) per month for her support and maintenance;

"Third: I hereby will, bequeath and devise unto my beloved wife Geraldine Erlanger, all of my property of which I may die possessed be it real, personal or mixed, or wherever the same may be located, to have and to hold subject to the following terms and provisions:

"I hereby direct that during the probate of my estate my executrix hereinafter named shall pay out of the income of my estate, if sufficient, and if not sufficient, out of my estate the sum of Two Hundred Fifty Dollars (\$250.00) per month to my mother, Belle S. Erlanger, if she be still living;

"Fourth: I hereby direct that upon the close of my estate all of my assets shall be distributed to my wife, Geraldine Erlanger, and out of the income of said estate, she shall pay to my mother, Belle S. Erlanger, the sums above set forth, during her lifetime."

The portion of the decree of distribution which is under attack reads, in part, as follows: "To Geraldine Erlanger, subject only to the trust created in behalf of Belle S. Erlanger, mother of the decedent, to pay to her on the first day of each and every month during her lifetime the sum of \$250.00 per month out of the income of the estate herein, and that if said income be insufficient, said Geraldine Erlanger shall invade the principal in order to assure and secure to said Belle S. Erlanger the aforesaid monthly payments." The only question before us is whether or not it was the testator's intention that after the probate proceedings had ended the trustee, in the event the income was insufficient to pay the entire sum of \$250.00 per month to respondent, should invade the principal of the trust estate created, to make up the difference.

[1] The paragraph of the will numbered "Second" taken alone would be ambiguous as to how, when, from what and by whom the payments should be made. However, reading the clauses of the will marked "Third" and "Fourth" respectively, we see that possible ambiguities are cleared up and the provisions in regard to the payment of this income are clear, specific and certain. By the paragraph marked "Third" the testator directed that during probate if the income from the estate was insufficient to make the payment of \$250.00 per month, then the executrix should make up the difference out of the estate. The paragraph marked "Fourth" is equally unambiguous, clear and explicit and provides that all of the assets of the estate shall be distributed to appellant and "** * * out of the income of said estate * * **" she shall pay the specified sum to respondent during her lifetime. (Italics ours.) This clause is direct, means what it says, provides for a bequest of income only and does not call for interpretation.

In Estate of Roberts, 27 Cal.2d 70, 73, 162 P.2d 461, 463, the will provided that: "After the payment of my just and lawful debts, I give, devise and bequeath to my wife, Elizabeth Clare Roberts, Two Hundred Dollars (\$200.00) per month for her natural life out of the rents and re-

ceipts of my estate. * * *” The court said, 27 Cal.2d at page 77, 162 P.2d at page 465: “The widow’s bequest, as one of income, was to be met by the net income of the estate. Unlike the recipient of an annuity (Prob.Code, § 161(3)) she was entitled to the periodic payments specified in the will only insofar as there was income to meet them. Estate of Brown, 143 Cal. 450, 455, 77 P. 160; Estate of Bourn, 25 Cal.App.2d 590, 599, 78 P.2d 193; Estate of Oliver, 21 Cal.App.2d 106, 108, 68 P.2d 735; see 2 Cal.Jur. 78; 2 Am.Jur. 824; 20 Words and Phrases p. 465; Taylor v. Gardiner, 296 Mass. 411, 6 N.E.2d 357, 109 A.L.R. 717.” A like provision in a will such as we have here was also construed in Estate of Markham, 28 Cal.2d 69, 168 P.2d 669. There the testator provided that from the income of the estate his sister should be paid \$100 per month during her natural life. Referring to this provision of the will the court said, 28 Cal.2d at pages 73, 74, 168 P.2d at page 673; “On the other hand the beneficiary of a trust to pay income or the legatee of an income is ordinarily dependent upon the existence of income, the amount received by him fluctuating with the income. The rule is and should be that a provision that payments shall be made from the net income of the trust property compels the conclusion that neither the corpus nor income in future years may be used unless there is a clear expression to the contrary in the trust instrument. See Estate of Platt, 21 Cal.2d 343, 131 P.2d 825; Estate of Phelps, 179 Cal. 703, 178 P. 846; Estate of Brown, 143 Cal. 450, 77 P. 160; In re Mackay’s Estate, 107 Cal. 303, 40 P. 558; Estate of Lockhart, 21 Cal. App.2d 574, 69 P.2d 1001; Claves v. Nutter, 49 Cal.App. 148, 192 P. 870; cf. Estate of Roberts, 27 Cal.2d 70, 162 P.2d 461; Crew v. Pratt, 119 Cal. 131, 51 P. 44; Estate of Watson, 32 Cal.App.2d 594, 90 P.2d 349; Estate of Bourn, 25 Cal.App.2d 590, 600, 601, 78 P.2d 193; Estate of Oliver, 21 Cal.App.2d 106, 68 P.2d 735; see 2 Am. Jur., Annuities, § 19; cases collected [In re Hardy’s Estate, 86 N.J.Eq. 405, 99 A. 326] L.R.A.1917E, 580; 136 A.L.R. 69.”

[2] The only case to which our attention is called by respondent is set forth in the following quotation from his brief: “It is respectfully submitted that this court is bound by said interpretation under the laws by the Supreme Court decision entitled, Estate of Rule reported in 25 Cal. 2d 1, at page 11, 152 P.2d 1003, at page 1008, 155 A.L.R. 1319, wherein it is adjudged that an ‘appellate court will accept or adhere to the interpretation * * * adopted by the trial court—and not substitute another of its own’”. In the foregoing quotation from the decision of the court the remarkable expedient is used of placing a period in the middle of a sentence and omitting the remainder of that sentence. The entire sentence from which the excerpt is made is as follows: “The rule is that an ‘appellate court will accept or adhere to the interpretation (of a contract) adopted by the trial court—and not substitute another of its own— * * * where parol evidence was introduced in aid of its interpretation, and such evidence * * * is such that conflicting inferences may be drawn therefrom.’ (4 Cal.Jur. 10-Yr.Supp. (1943 rev.) 146-147, § 192; see also 2 Cal.Jur. 934-939, § 549.)” Estate of Rule, 25 Cal.2d 1, 11, 152 P.2d 1003, 1008, 155 A.L.R. 1319. In the case before us there is not one word of testimony concerning the intent of the testator. This case is typical of those where the rule which governs appellate courts in the construction of written instruments under such circumstances is that set forth in the Estate of Platt, 21 Cal.2d 343, at page 352, 131 P.2d 825, at page 830, as follows: “An appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence (Brant v. California Dairies, Inc., 4 Cal.2d 128, 48 P.2d 13; Boyer v. United States Fidelity & Guaranty Co., 206 Cal. 273, 279, 274 P. 57; O’Connor v. West Sacramento Co., 189 Cal. 7, 17, 207 P. 527; Estate of Thomson, 165 Cal. 290, 131 P. 1045; Mitchel v. Brown, 43 Cal.App.2d 217, 110 P.2d 456; Wall v. Equitable Life Assur. Society, 33 Cal.App. 2d 112, 91 P.2d 145; Texas Co. v. Todd,

19 Cal.App.2d 174, 64 P.2d 1180), where there is no conflict in the evidence (*Moffatt v. Tight*, 44 Cal.App.2d 643, 112 P.2d 910), or a determination has been made upon incompetent evidence, *Rilovich v. Raymond*, 20 Cal.App.2d 630, 67 P.2d 1062. Under these circumstances, there is no issue of fact, and it is the duty of an appellate court to make the final determination in accordance with the applicable principles of law."

[3] For the reasons which we have stated the decree of distribution, insofar as it determines that if the income from the trust estate created therein is insufficient to pay the sum of \$250.00 per month to respondent, appellant is to invade the principal of the estate to secure respondent said sum, is reversed with directions to the trial court to amend the conclusions of law and to enter a modified decree in accordance with the views herein expressed.

SHINN, P. J., and VALLÉE, J., concur.



103 Cal.App.2d 472

WALPOLE v. PREFAB MFG. CO. et al.
Civ. 17730.

District Court of Appeal, Second District,
Division 3, California.

April 16, 1951.

Rehearing Denied May 4, 1951.

Hearing Denied June 14, 1951.

Action by Helen Walpole against the Prefab Manufacturing Company, a partnership, and Charles A. Hayward and others, for breach of contract to sell and deliver prefabricated houses. The Superior Court, Los Angeles County, Paul Nourse, J., rendered judgment for plaintiff and the plaintiff and the defendants appealed. The District Court of Appeal, Vallée, J., held that the court did not err in awarding plaintiff the difference between the price she would have paid the first-named defendant had orders been filled and the price she would have received on resale, and that the court did not err in awarding interest on the damages adjudged, but that allegations of plaintiff's complaint were

sufficient to require reception of evidence on subject of her special damages.

Judgment affirmed in part and reversed in part, and cause remanded.

1. Sales ⇐418(4)

Prefabricated houses which were specially built and designed, and made of a variety of materials cut into varying sizes which, when assembled, became prefabricated units offered for sale, in nature of things, were goods without an available market and therefore measure of damages for breach of contract to deliver such houses was loss directly by and naturally resulting in ordinary course of events from seller's breach. Civ.Code, § 1787(1-3).

2. Appeal and error ⇐1071(6)

In action by sales agent against manufacturer for breach of contract to sell and deliver prefabricated houses, where case was tried by all parties upon theory that there was not an available market for houses, and trial judge in his memorandum opinion stated that they were such that they could not be procured in the market, manufacturer on appeal could not complain of error that court did not make a specific finding that there was not an available market for prefabricated houses of kind and quality it manufactured. Civ.Code, § 1787(1-3).

3. Appeal and error ⇐931(3)

Where trial court has not made a finding on issue reviewing court will not assume that it would have made a finding contrary to uncontroverted evidence and reasonable inferences therefrom, but will assume that had finding been made it would have been in accordance with such evidence.

4. Damages ⇐40(2)

On breach of a contract, loss of profits shown to be direct and natural result of act or omission complained of, may be recovered provided amount thereof is shown with sufficient certainty. Civ.Code, § 1787 (2).

5. Damages ⇐40(2)

Where profits are expressly stipulated for in contract, and are real purpose and direct and immediate fruit of contract,

they are part and parcel of it and must be considered as entering into and constituting a portion of its very elements.

6. Damages ⇐45

Expenses incurred in anticipation of, or preparation for, performance, ordinarily are a recoverable element of damages for breach of contract.

7. Principal and agent ⇐41(6)

In action by sales agent against manufacturer for breach of contract to sell and deliver prefabricated houses, expenses which agent could recover as element of damage for breach of contract were included in difference which agent would have been required to pay manufacturer for houses and her resale price. Civ. Code, § 1787(1-3).

8. Principal and agent ⇐41(6)

Where manufacturer orally agreed to sell prefabricated houses to sales agent for resale, and difference between price which was paid by agent and price that agent was to charge her customer was 25 per cent. of cost to agent, and such 25 per cent. was 20 per cent. of agent's selling price, agent was a mere middleman whose profit was dependent on difference between purchase and selling price, and profits to be derived from agent's resales were specifically made part of agreement between parties, and loss of such profits resulted directly and naturally in ordinary course of events from manufacturer's breach of contract. Civ. Code, § 1787(1-3).

9. Principal and agent ⇐41(6)

In action by sales agent against manufacturer for breach of contract to sell prefabricated houses, where no expenditures were required of agent to consummate her resale contracts, and agent's buyers in addition to paying selling price, were required to pay all other expenses, such as haulage, sales tax, cost of blueprints, credit investigation reports and interest, agent's gross profits were her net profits and were properly allowed as damages for breach. Civ.Code, § 1787(1-3).

10. Principal and agent ⇐41(6)

Where sales agent for manufacturer of prefabricated houses had contracts with

subdealers which provided that commission of subdealers should be payable in cash upon delivery of accepted orders and payment received in full from manufacturer, and that delivery of materials by manufacturer was subject to availability of materials, agent's payment to subdealers was to be made upon delivery of houses and receipt of payment by agent, award to sales agent in her action against manufacturer for breach of contract, of difference between contract and resale price as damages was equivalent of delivery and payment, obligating agent on subdealers' contracts.

11. Sales ⇐418(15)

Even though original buyer has not yet been held liable to his sub-purchaser, amount of his probable liability may be recovered from original seller.

12. Sales ⇐418(15)

In action by sales agent against manufacturer for breach of contract to sell and deliver prefabricated houses, court properly awarded sales agent full 20 per cent. profit she lost by reason of manufacturer's breach, notwithstanding that sales agent owed commissions to her subdealers under subdealer contracts. Civ Code, § 1787(1-3).

13. Interest ⇐39(1)

Interest is allowable from time sum becomes due if, it is certain or can be made certain by calculation. Civ.Code, § 3287.

14. Principal and agent ⇐41(3)

In action by sales agent against manufacturer for breach of contract to sell and deliver prefabricated houses where contract provided for price to be paid by agent and price that agent was to charge her customers, and difference between two prices was 25 per cent. of cost to agent and of 25 per cent., 20 per cent. was agent's selling price, agent's damages, for breach, of difference between price she would have paid manufacturer had it filled orders and price she would have received on resale was certain and therefore interest thereon was properly allowed from day of breach. Civ.Code, §§ 1787(1-3), 3287.

15. Stipulations ⇨14(7, 10)

In action by sales agent against manufacturer for breach of contract to sell and deliver prefabricated houses, where manufacturer stipulated that a large number of contracts and other documents could be received in evidence without proof of signatures thereon, that certain checks were received by payees, and that contracts were taken on or prior to certain dates manufacturer had not stipulated that all orders taken by manufacturer prior to certain date and submitted on list of certain date were "bona fide" orders, especially in view of statement of counsel that he would not so stipulate.

16. Principal and agent ⇨63(2)

Where manufacturer orally agreed to sell prefabricated houses to sales agent on all bona fide orders which had been received by agent or her subdealers prior to January 25, provided a list was submitted to manufacturer prior to January 31, manufacturer was not obligated to fill five orders which were not on list submitted by agent on January 30.

17. Principal and agent ⇨41(4)

In action by sales agent against manufacturer for breach of contract to sell and deliver prefabricated houses where manufacturer had agreed to fill all "bona fide" orders which had been received by agent prior to certain date provided a list was submitted to manufacturer prior to another certain date, and that such orders complied with certain conditions, evidence was sufficient to sustain finding that certain disputed orders were not "bona fide".

18. Principal and agent ⇨41(4)

Where manufacturer orally agreed to sell prefabricated houses to sales agent and either party had right to sell such houses at any place and in competition with other, when manufacturer received an order by other dealers and delivered houses directly to such dealers, evidence that sales agent did not make sale, nor fill order or perform any service in connection with it, and that manufacturer did not agree to pay sales agent a commission on such sale, supported finding that sales agent was not entitled to any commission thereon.

19. Principal and agent ⇨41(4, 6)

In action by sales agent against manufacturer for breach of a contract to sell and deliver prefabricated houses, evidence sustained finding that even though sales agent lost two sales by action of city officials in denying building permits, such sales were not lost because buildings as constructed by manufacturer, did not comply with building code, and therefore denying damages to agent because of manufacturer's failure to fill such orders was not error.

20. Principal and agent ⇨41(4)

In action by sales agent against manufacturer for breach of contract to sell and deliver prefabricated houses, finding that manufacturer's sales through two other dealers, were not in violation of any contract between sales agent and manufacturer, and that manufacturer did not contract not to sell to other dealers within five miles of agent's subdealers, was not error.

21. Principal and agent ⇨41(6)

In action by sales agent against manufacturer for breach of contract to sell and deliver prefabricated houses, sales agent was not entitled to damages for injury to her name, character, or personal reputation, since such damages were too uncertain, speculative, and remote.

22. Principal and agent ⇨41(6)

In action by sales agent against manufacturer for breach of contract to sell and deliver prefabricated houses, sales agent's measure of damages was the loss directly and naturally resulting in ordinary course of events from manufacturer's breach. Civ.Code, § 1787(2).

23. Sales ⇨418(15)

Generally, damages from loss of good will and injury to business resulting from breach of a contract to deliver goods are recoverable.

24. Damages ⇨45

Generally, a person is entitled to recover all reasonable and necessary expenses to which he may have been put by reason of a breach of contract, and if

special damages are natural consequences of breach they may be recovered.

25. Principal and agent ⇨41(3)

In action by sales agent against manufacturer for breach of contract to sell and deliver prefabricated houses, allegations that as result of manufacturer's breach it was necessary for agent to employ additional clerical force to handle complaints of subdealers and of persons who had placed orders and made deposits with agent, and that agent spent more than she otherwise would have spent had manufacturer delivered houses, to support claim for special damages were sufficient to show that injury to agent's business and good will, directly and naturally resulted in ordinary course of events from manufacturer's breach. Civ.Code, § 1787.

26. Principal and agent ⇨41(4)

In action by sales agent against manufacturer for breach of contract to sell and deliver prefabricated houses, court erred in sustaining objections to agent's proffered evidence in her endeavor to prove damages to her business and its good will and agent's expenditures for additional clerical help. Civ.Code, § 1787.

27. Appeal and error ⇨1013

Whether special damages alleged in a breach of contract action are a loss directly and naturally resulting in ordinary course of events from breach, is a question of fact for trial court.

O'Melveny & Myers, Lauren M. Wright and John P. Pollock, all of Los Angeles, for defendants, appellants and respondents.

Wood, Crump, Rogers & Arndt and Stanley M. Arndt, all of Los Angeles, for plaintiff, appellant and respondent.

VALLÉE, Justice.

Appeals from a judgment for plaintiff in an action for damages for breach of a contract to sell and deliver prefabricated houses.

In September, 1945, plaintiff and defendant Prefab Manufacturing Company (re-

ferred to as Prefab), a copartnership, entered into an oral agreement whereby Prefab appointed plaintiff sales agent and distributor for the sale of prefabricated houses manufactured by Prefab. The latter agreed to sell to plaintiff as many prefabricated houses as she would order at such dealers' list prices as, from time to time, would be published by Prefab. It was understood that plaintiff was to resell the houses. She was to pay cash for them; or if the purchaser desired to buy on credit, Prefab would fill the order only if the credit of such purchaser was approved by Allied Building Credits, Inc. Either party had the right to sell the prefabricated houses at any place and in competition with the other. The agreement was terminable by either party at will.

From time to time Prefab issued price lists showing the price to be paid by plaintiff and the price that plaintiff was to charge her customers. The difference between the two prices was 25% of the cost to plaintiff. The 25% was 20% of plaintiff's selling price.

On January 25, 1946, the parties orally agreed that Prefab would sell and deliver to plaintiff, at Prefab's dealers' existing list price, prefabricated houses on all *bona fide* orders which had been received by plaintiff or her subdealers prior to midnight on January 25, 1946, provided a list of such orders had been submitted by plaintiff to Prefab prior to midnight of January 31, 1946, and that each such order had been paid for in cash or was in actual process of financing with Allied Building Credits, Inc., on or before February 9, 1946, and would thereafter be approved by Allied.

On January 30, 1946, plaintiff submitted to Prefab a list in writing of 103 orders for 121 houses. On February 1, 1946, Prefab notified plaintiff that it would fill orders for only 25 houses.

Of the 103 orders submitted by plaintiff, the court found that 34 were *bona fide* orders which had not been filled as promised by Prefab and that the remainder were not *bona fide*. The 34 orders would have been sold to plaintiff for \$50,215.39 and

plaintiff would have resold them for \$62,-737.72, a difference of \$12,522.33.

The complaint was in six counts. Counts 3 and 6 were dismissed by plaintiff. The remainder alleged 1) damages for failure of Prefab to fill accepted orders; 2) damages for sales made by Prefab in territory alleged to be exclusive to plaintiff; 4) commissions on an order received by Prefab directly and alleged to have been turned over to plaintiff; 5) damages on certain orders alleged to have been taken by plaintiff and cancelled because the houses did not pass building law requirements.

The court found that plaintiff had been damaged in the sum of \$12,522.33, the amount she would have received on resale had Prefab filled the 34 *bona fide* orders. It found for defendants as to counts 2, 4, and 5. Judgment was for plaintiff against Prefab and its copartners for \$12,522.33, with interest from February 1, 1946. All parties appeal.

Appeal of defendants

Defendants' assignments of error are:

1) The court erred in awarding plaintiff the difference between the price she would have paid Prefab had the orders been filled and the price she would have received on resale. 2) The court erred in awarding interest on the damages adjudged.

The measure of damages for failing to deliver goods is prescribed by Civil Code section 1787, enacted in 1931, which reads: "(1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.

"(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract. "(3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought

to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver." Section 1787 is section 67 of the Uniform Sales Act. It comes from section 51 of the English Sale of Goods Act, with the insertion at the beginning of subsection (1) of the words: "the property in the goods has not passed to the buyer, and".

[1-3] The court did not make a specific finding that there was not an available market for prefabricated houses of the kind and quality manufactured by Prefab; however, there is evidence to that effect. The only inference that can be drawn from the uncontradicted evidence is that there was no available market. The complaint alleged that plaintiff "could only get such units from defendant Prefab." The prefabricated houses were specially built and designed, were made of a variety of materials cut into varying sizes which, when assembled, became the prefabricated units offered for sale. In the nature of things, they were a commodity not usually found on the market. Cf. *Patty v. Berryman*, 95 Cal.App.2d 159, 172, 212 P.2d 937. It is apparent that plaintiff could not replace the prefabricated units and thus satisfy her own vendees who were entitled to insist upon receiving the specific prefabricated units they had ordered and not reasonable substitutes therefor. The case was tried by all parties upon the theory that there was not an available market for the houses. The trial judge in his memorandum opinion stated they were such that they could not "be procured in the market." Having proceeded on this theory at the trial, Prefab cannot now complain of error. *Wolfsen v. Hathaway*, 32 Cal. 2d 632, 646-647, 198 P.2d 1; *Kantlehner v. Bisceglia*, 102 Cal.App.2d 1, 226 P. 2d 636. Further, where the trial court has not made a finding on an issue, the reviewing court will not assume that it would have made a finding contrary to the uncontroverted evidence and the reasonable inferences therefrom. On the contrary, the reviewing court will assume that had the finding been made it would have been in accord with such evidence. *Sun-Maid Raisin Growers v. Papazian*, 74 Cal.App.

231, 238, 240 P. 47. It is evident from the facts found and the judgment ordered, in the light of the entire record, that if the court had found on the question of whether there was an available market, the finding would have been adverse to Prefab. Prefab cannot complain of the lack of such specific finding. *Chamberlain v. Abeles*, 88 Cal.App.2d 291, 300, 198 P.2d 927; see *Boas v. Bank of America*, 51 Cal.App.2d 592, 598, 125 P.2d 620.

[4,5] In the absence of an available market, the measure of damages "is the loss directly and naturally resulting in the ordinary course of events" from Prefab's breach. Civ.Code, § 1787(2). On breach of a contract, loss of profits shown to be the direct and natural result of the act or omission complained of may be recovered provided the amount thereof is shown with sufficient certainty. *McKay v. Riley*, 65 Cal. 623, 4 P. 667; *National Oil Refining & Mfg. Co. v. Producers' Refining Co.*, 169 Cal. 740, 745, 147 P. 963; *Morello v. Growers Grape Prod. Ass'n*, 82 Cal.App.2d 365, 374-376, 186 P.2d 463; *Panno v. Russo*, 82 Cal.App.2d 408, 415, 186 P.2d 452; *Norwood Lumber Corporation v. McKean*, 3 Cir., 153 F.2d 753, 757; 5 Williston, *Contracts* (Rev.Ed.) § 1347; 25 C.J.S. *Damages*, § 42, p. 516; § 46 Am. Jur. 817, § 689. Where profits are expressly stipulated for in the contract, as they were in the case at bar, and are the real purpose and direct and immediate fruit of the contract, they are part and parcel of it and must be considered as entering into and constituting a portion of its very elements. *Schiffman v. Peerless Motor Car Co.*, 13 Cal.App. 600, 604, 110 P. 460.

[6,7] Expenses incurred in anticipation of, or preparation for, performance, ordinarily are a recoverable element of damage for breach of contract. *Buxbom v. Smith*, 23 Cal.2d 535, 541, 145 P.2d 305; 25 C.J.S. *Damages*, § 46, p. 524. In the present case, such expenses are included in the difference which plaintiff would have been required to pay Prefab for the houses and the resale price.

230 P.2d—3½

[8] Under the agreement, plaintiff was a mere middleman whose profit was dependent upon the difference between purchase and selling price. The profits to be derived from plaintiff's resales were specifically made a part of the agreement between the parties. It was understood and expressly agreed that her margin of profit upon such resales was to be a stipulated percentage over and above the price she was to pay Prefab. The parties fixed the measure of damages in the event of a breach. The loss of these profits resulted directly and naturally in the ordinary course of events from Prefab's breach of the agreement.

Long Beach Fisheries Co. v. Curtis Corp., 58 Cal.App. 318, 208 P.2d 372, and *Roach Bros. & Co. v. Lactein Food Co.*, 57 Cal.App. 379, 207 P. 419, relied on by Prefab, are not in point. In the Long Beach case the only pertinent point decided was that testimony of a witness to the effect that there was no market for fish could not be considered because a foundation had not been laid by proof that he was an expert. In the Roach case there was no evidence, as there was here, that there was not an available market. Both cases were decided before the enactment of Civil Code section 1787. Each case discussed then Civil Code section 3308 which at that time (1922) fixed the measure of damages for the breach of a seller's agreement to deliver personal property. The measure fixed by section 1787 is not the same as that formerly fixed by section 3308. Section 3308 was repealed in 1931, Stats. 1931, p. 2258.

[9] Prefab says the court awarded gross profits instead of net profits. If plaintiff's fixed expenses neither increased nor decreased as a consequence of Prefab's nonperformance, there was no loss or benefit arising from that factor. *Oakland California Towel Co. v. Sivils*, 52 Cal.App.2d 517, 520, 126 P.2d 651. Whether the fixed expenses set forth in plaintiff's monthly operating statements, in evidence, were or were not affected as a consequence of the nonperformance of the contract was a question for the trial court. Prefab does

not point out wherein the court erred in impliedly finding that the expenses were not so affected. There was evidence that no expenditures were required of plaintiff to consummate her resale contracts. Plaintiff's vendees, in addition to paying the selling price, were required to pay all other expenses, such as haulage, sales tax, cost of blue prints, credit investigation reports and interest. Hence plaintiff's gross profits were her net profits and were properly allowed.

[10-12] Prefab claims that commissions (8% of the 20% retail sales price) which plaintiff had agreed to pay her subdealers, should be deducted from the total profit plaintiff lost because, it is argued, under the terms of the contracts between plaintiff and her subdealers, the latter have no claim against plaintiff for these commissions. The contention is not tenable. The contracts between plaintiff and her subdealers provided that the commission of the subdealers "shall be payable in cash semi-monthly upon delivery of accepted orders and payment has been received in full by the company," and that "the delivery of materials by the Company is subject to the availability of the materials to the Company." Prefab does not deny that had the contracts been performed plaintiff would have been liable for the commissions. If, therefore, she is entitled to recover the 20% loss of profits on all *bona fide* sales, as we hold she is, she cannot deny liability under her contracts with the subdealers who effected any of the *bona fide* sales. The provisions of the contracts between plaintiff and her subdealers do not release plaintiff from her obligation to the subdealers under the facts. The sales were not made to the subdealers. As we construe these provisions of the contracts, *payment* to subdealers was to be made upon delivery of the houses and receipt of payment by plaintiff. The award to plaintiff of the difference between the contract and resale price is the equivalent of delivery and payment. The compensation of the subdealers was a commission upon a purchase which they had induced third persons to make. Further, Prefab, at the trial, expressly abandoned the defense of impossibility of

performing the contract through inability to secure materials. As said by the learned trial judge in his opinion, "If the plaintiff is entitled to recover against the defendant upon an order secured by one of her subdealers, she certainly is not entitled to say to the subdealer that he is not just as much entitled to his percentage of the recovery as he would have been to his percentage of the sales price had the goods been delivered. Plaintiff would not be entitled to take advantage of the subdealer's efforts and secure a judgment of damages because of them, and yet say to him that his efforts could not be compensated because the order had not been fulfilled. Having taken advantage of his efforts and treated the contract as a binding contract for the purpose of securing a judgment against the defendant, she must treat it as binding upon her." Even though the original buyer has not yet been held liable to his subvendee, the amount of his probable liability may be recovered from the original seller. 3 Williston, Sales (Rev.Ed.) Secs. 599a, 614a. The court properly awarded plaintiff the full 20% profit she lost by reason of Prefab's breach.

[13, 14] Interest was awarded plaintiff from February 1, 1946, the day of the breach. Prefab's claim of error is without merit. Interest is allowable from the time the sum becomes due if, as here, it is certain or can be made certain by calculation. Civ.Code, sec. 3287; *Lineman v. Schmid*, 32 Cal.2d 204, 209 et seq., 195 P.2d 408, 4 A.L.R.2d 1380.

Appeal of plaintiff

Plaintiff's assignments of error are: 1) The court erred in not awarding additional damages by reason of Prefab's breach of the agreement of January 25, 1946. 2) The findings with respect to counts 2, 4, and 5 are not supported by the evidence. 3) The court erred in sustaining Prefab's objection to the reception of evidence with respect to special damages.

1. Plaintiff included in the list submitted January 30, 1946, thirteen orders which the court found were not *bona fide*. Plaintiff claims this finding is not supported by the evidence. The findings do not define the

term "*bona fide*" as used therein. We assume from the record that the court meant that an order was not "*bona fide*" if it was based on a contract which was not valid or was not subsisting at midnight on January 31, 1946, or if it was not on the list submitted. The findings do not specify wherein these thirteen orders were not *bona fide*. They were not filled. Under the agreement of January 25, 1946, the only orders which Prefab agreed to fill were *bona fide* orders which had been taken by plaintiff or her subdealers prior to January 25, 1946, and which were submitted to Prefab on a list prior to midnight of January 31, 1946, and which were either paid for in cash or in actual process of financing with Allied Buildings Credits, Inc., on or before February 9, 1946, and were thereafter approved by Allied.

The court found with respect to the orders which it found to be *bona fide* that "plaintiff was excused from tendering the purchase price in cash or from seeking to have the credit of the purchasers approved by Allied Building Credits, Inc.," because "it would have been useless for the plaintiff to have tendered payment in cash upon said orders or to have sought to have the credit of the purchasers named in said orders approved by Allied."

[15] Plaintiff asserts that Prefab stipulated that all orders taken by plaintiff prior to January 25, 1946, and submitted on the list of January 30, 1946, were *bona fide* orders. The trial court did not, and neither do we, so construe the stipulation. Prefab merely stipulated that a large number of contracts and other documents could be received in evidence without proof of the signatures thereon, that certain checks were received by the payees, and that the contracts were taken on or prior to the dates they bear. Prefab's counsel expressly stated, "I will not stipulate that they are *bona fide* orders."

[16, 17] a) Five orders (Medlock, Marirro, Wilson, Woosie, and Grimes) were not on the list submitted by plaintiff on January 30, 1946, and Prefab was therefore under no obligation to fill them under the agreement of January 25th.

b) The contract on one order (Ackerman) was dated January 11, 1946. It expressly provided that the purchase was contingent upon the approval of the credit application. One hundred dollars was paid on signing the contract. Nothing further was done prior to January 31st. An application for credit had not been made at that time. On March 29, 1946, the customer requested that the contract be cancelled. It was cancelled and the deposit returned. The evidence was thus sufficient to warrant the court in concluding that the Ackerman order was not *bona fide*.

c) On January 7, 1946, plaintiff received two orders (Nichols) which were on the January 30th list. One was for two houses, sales price \$4,004.02; the other was for six houses, sales price \$4,651.28. Two hundred and fifty dollars was deposited with each order. Credit applications on these orders were approved by Allied on February 7, 1946. Only two of the houses—in the order for six houses—were delivered. We are unable to find any basis for the finding that these orders were not *bona fide*. The evidence with respect to them is not controverted. The order of \$4,651.28 was filled to the amount of \$1,550.43, leaving unfilled four orders of \$3,100.85 and two orders of \$4,004.02, a total of \$7,104.87. Plaintiff is entitled to judgment for 20% thereof, or \$1,420.97, with interest thereon from February 1, 1946.

d) On December 8, 1945, plaintiff received an order for one house from Summer. It was on the list of January 30th. The order was cancelled on January 30, 1946, and a new order taken. The required deposit on the latter order was \$200. Only \$95.50 was deposited with the first order. No further deposit was made. Summer did not, on January 30, 1946, own the property on which the house was to be erected. Plaintiff refunded to Summer on February 15, 1946, and was released of all claims. The evidence was thus sufficient to warrant the court in concluding that this order was not *bona fide*.

e) On December 11, 1945, plaintiff received an order for one house from Hilton, delivery to be made to Bray, C.O.D., on

"Jan. 10 or Sooner." A deposit of \$150 was received with the order. There was no evidence that delivery was tendered on January 10th or sooner. There is no evidence as to why delivery had not been made prior to that date. Plaintiff refunded the \$150 on March 8, 1946. The court was warranted in inferring that the contract was abandoned.

f) On December 16, 1945, plaintiff received an order for one house from Carrigan. A deposit of \$25 on a purchase price of \$1,915.50 was received. The contract contained this provision: "Refundable if no deal." No additional cash was paid and no application for credit was made prior to February 1, 1946. Plaintiff made no showing as to why nothing was done between December 16th and February 1st. The \$25 was refunded on April 29, 1946. The evidence thus supports the finding that this order was not *bona fide*.

g) On January 12, 1946, plaintiff received an order for one house from Garnett. A cash payment of \$100 was received on January 14th and refunded on February 23, 1946. No further payment was made

and no application for credit made prior to February 1, 1946. Plaintiff made no showing as to why one or the other had not been done. The court was warranted in concluding that this order was not *bona fide*.

h) On January 24, 1946, one Shook was to be one of plaintiff's subdealers. On that date he gave plaintiff a check for \$1,278.42 on a purchase price of \$1,389.88 for a house to be delivered on January 28th at Needles. The house was to be used by Shook as a model. The order was on the list of January 30th. Plaintiff returned Shook's check to him. The date it was returned does not appear. The court was warranted in inferring that this contract was contingent on Shook's becoming a subdealer and that, because of the agreement between plaintiff and Prefab of January 25, 1946, the sale was mutually cancelled.

i) Plaintiff received \$65.50 from Thompson. An application for credit was made to Allied which was approved on February 1, 1946. The order appears in the list submitted by plaintiff on January 30th as follows:

Date	P. O. #	Unit	Customer	Sales	Deposit	Status
12-22-45	1065	1	Thompson		80.50	ABC Rejection (Con. Lost)

This is all of the evidence with respect to this order. In view of the fact that it appears from the list that the order had been cancelled, the court was warranted in so concluding even though Allied approved credit on February 1.

[18] 2a. On December 17, 1945, Prefab sold directly to West End Chemical Company eight prefabricated houses for \$17,104. It paid a commission of \$1,425.32 thereon to Angelo & Woolsen. It did not pay a commission to plaintiff. The court found that plaintiff was not entitled to any commission thereon. Plaintiff claims the finding is unsupported by the evidence. When the order was received by Prefab it handed it to plaintiff. The houses ordered were delivered directly by Prefab to West End. Apparently payment was made by the latter through a distributor other than plaintiff. The sale was not made by plaintiff. Plaintiff did not fill the order or per-

form any service in connection with it. Prefab did not agree to pay plaintiff a commission on the sale. Plaintiff did not assume any obligation to either Prefab or West End. Prefab did not obligate itself to her in any way in connection with the order. She did not earn a commission on the sale. This finding is amply supported by the evidence.

[19] 2b. With respect to two orders (Landrum and Mohr) obtained by plaintiff, the court found that the officials of the cities of Manhattan and Burbank refused to issue permits for the erection of the houses, "and assigned as a reason therefor that the same did not comply with the 'Uniform Building Code,' which building code was in effect in said cities." The court further found that the houses did comply with said code and "that the defendant did not warrant that any officials in charge of the interpretation of said code

would not deny permits," and "the plaintiff lost two sales by reason of the action of such officials but that such sales were not lost because the buildings as constructed by the defendant did not comply with the building code." Plaintiff claims these findings are not supported by the evidence and that the court should have awarded her damages because of Prefab's failure to fill the orders. This claim is untenable. There was no evidence that these houses did not comply with the building code. There was evidence from which the court could infer that the refusal of the officials to issue permits was due to resistance in some communities to prefabricated houses.

[20] 2c. Prefab made sales through Dill and through Herman. The places of business of Dill and Herman were within five miles of a place of business of a subdealer established by plaintiff. The court found "that said sales were not in violation of any contract between plaintiff and defendant and that the defendant did not contract not to sell to other dealers within five miles of subdealers established by the plaintiff." Plaintiff concedes that she did not have an exclusive contract. She claims that on January 11, 1946, it was agreed between herself and Prefab "that no dealer would be permitted to put up a model house within 5 miles of the model house of another dealer." There was written evidence that the agreement was "that no more dealers would be set up out of town by you or myself without checking with each other first." Further, there was evidence from which the court could have inferred that the Dill and Herman distributorships were established prior to January 11, 1946. While there was evidence from which the court could have concluded that the parties made the agreement claimed by plaintiff and that the distributorships were established after January 11th, resolution of the conflict was for the trial court. It did not err in making this finding.

3. Plaintiff alleged as special damages that by reason of the breach by Prefab of the agreement of January 25, 1946, "her business, name, character and reputation were unjustly assailed and her goodwill was injured and impaired to her damage in

the sum of \$25,000," and in addition that "as a result of said actions of said defendant Prefab, it was necessary for plaintiff to employ additional clerical force to handle the various complaints of her subdealers and of the persons who had placed such orders and made such deposits and to endeavor to placate them and make refunds and as a result, plaintiff spent at least \$4,797.81 more than plaintiff otherwise would have spent had defendant Prefab delivered the California Cottages in accordance with its agreement, to plaintiff's further damage in the sum of \$4,797.81." Plaintiff sought to introduce evidence in an effort to prove these allegations. Prefab's objections thereto were sustained.

[21] Plaintiff was not entitled to damages for injury to her name, character, or personal reputation. Such damages are too uncertain, speculative, and remote. In *Westwater v. Rector etc.*, of *Grace Church*, 140 Cal. 339, at page 342, 73 P. 1055, at page 1056, it was held that a plaintiff in an action for breach of contract cannot recover damages for injury to her reputation, the court saying: "What the reputation was, what it is now, how much and in what way it has been impaired by defendant, or has it been impaired by other persons or other causes, or by failure of the powers and ability of plaintiff, leads us into questions too abstruse and complicated for the human mind. Certainly, such damages are not clearly ascertainable." See also *McGregor v. Wright*, 117 Cal.App. 186, 3 P.2d 624.

[22-24] A different rule applies to damages for injury to her business and its good will and to expenditures made for additional clerical help. As we have said, plaintiff's measure of damages "is the loss directly and naturally resulting in the ordinary course of events" from Prefab's breach. Civ.Code, § 1787 (2). The general rule is that damages from loss of good will and injury to business resulting from a breach of a contract to deliver goods are recoverable. *Stott v. Johnston*, 36 Cal.2d 864, 229 P.2d 348; *Elkus Co. v. Voegel*, 27 Ariz. 332, 233 P. 57, 58; *Barrett Co. v. Panther Rubber Mfg. Co.*, 1 Cir., 24 F.2d 329, 337; *Cramerton Mills v. Nathan & Cohen Co.*,

231 App.Div. 28, 246 N.Y.S. 259, 267. While in the Stott, Barrett and Cramerton cases a breach of warranty was alleged, the measure of damages is the same as in a case of failure to deliver goods. Civ. Code, § 1789 (6). It is also the general rule that a person is entitled to recover all reasonable and necessary expenses to which he may have been put by reason of a breach of contract. *McCulloch v. Liguori*, 88 Cal. App.2d 366, 375, 199 P.2d 25; *Blair v. Brownstone Oil & Refining Co.*, 35 Cal.App. 394-396, 170 P.160; *Hockersmith v. Hanley*, 29 Or. 27, 44 P. 497, 501; *Blumenthal v. Stahle*, 98 Iowa 722, 68 N.W. 447, 448; *Gildner Bros. v. Ford Hopkins Co.*, 235 Iowa 191, 16 N.W.2d 229, 233; *Neil v. Cunningham Store Co.*, 149 Mo.App. 53, 130 S.W. 503, 506; Rest., Contracts, §§ 334, 336 (e) (14); 25 C.J.S., Damages, §§ 45, 46, p. 524; 15 Am.Jur. 542, § 133.) If special damages are the natural consequences of the breach, they may be recovered. 3 Williston, Sales (Rev.Ed.) §§ 599a, 614 et seq.

[25] The facts with respect to the claimed damages to plaintiff's business and its good will were alleged with particularity, and were sufficient, we think, to show that the injury thereto "directly and naturally" resulted "in the ordinary course of events" from the breach of the contract. Civ. Code, § 1787.

[26] We conclude that the court erred in sustaining objections to plaintiff's proffered evidence in her endeavor to prove damages to her business and its good will and expenditures for additional clerical help.

[27] We are not to be understood as holding that the special damages alleged were a loss directly and naturally resulting in the ordinary course of events from Prefab's breach; that will be a question of fact for the trial court. We merely hold that the allegations of the complaint are sufficient to require the reception of evidence on the subject, and that if it is found that such damages were a loss directly and naturally resulting in the ordinary course of events from Prefab's breach, they are recoverable.

The judgment, insofar as it awards plaintiff general damages in the sum of \$12,522.-33, with interest thereon from February 1, 1946, is affirmed. The court is directed to add \$1,420.97, with interest from February 1, 1946, to the amount of general damages heretofore awarded to plaintiff. In all other respects the judgment is reversed, and the cause is remanded for a new trial solely upon the issue of the amount of special damages, if any, sustained by plaintiff. Plaintiff shall bear one-half of the costs on appeal; defendants shall bear the other one-half.

SHINN, P. J., and WOOD, J., concur.



103 Cal.App.2d 721

READ v. READ.

Civ. 14715.

District Court of Appeal, First District,
April 24, 1951.

Paul I. Read brought action against Wilma
Division 2, California.

W. Read to modify custody provisions of Nevada divorce decree. The Superior Court in and for the County of Alameda, T. W. Harris, J., entered an order modifying custody provisions in a prior order so as to provide that plaintiff should have three of the children of the parties with him during the month of July every year, and the remaining child was to choose for herself whether she wished to join the others in visiting plaintiff, and the defendant appealed. The District Court of Appeal, Dooling, J., held that trial court did not abuse its discretion in so modifying the custody provision.

Order affirmed.

I. Divorce ⚭303(2)

Fact that children and father were all living in same county, where father could frequently see children without difficulty, when order fixing custody of children of divorced parents was made and that children

had since been removed to a distant part of the state by mother, rendering frequent visits with their father impracticable, constituted a sufficient "change in circumstances" to justify order modifying the custody provisions.

See publication Words and Phrases, for other judicial constructions and definitions of "Change in Circumstances".

2. Divorce ⇨302

Provision in order fixing custody of children of divorced parents that father should not take children to his home or permit children to meet with or be in company of his present wife at any time when children were taken from mother's home, could not be construed as an implied finding that father's present wife was an unfit person to be in contact with the children.

3. Divorce ⇨303(3)

Order modifying provisions of divorce decree giving mother custody of four children of divorced parents, with right of reasonable visitation to father, by providing that father was to have custody of three of the children during month of July of each year and that remaining child could choose for herself whether she wished to visit father with other children, was not abuse of discretion, where change of circumstances was shown in that children, after entry of original order, had been removed to a distant part of state by mother rendering frequent visits with father impracticable.

Robert M. Wiley, Hemet, for appellant.

Tobriner & Lazarus and Leland J. Lazarus, San Francisco, for respondent.

DOOLING, Justice.

In 1946 the parties to this action were divorced in Nevada upon an action brought by the wife. This decree adopted the provisions of an agreement that had been entered into by the parties concerning their property rights and the custody of the four minor children of the parties. As regards the custody of the children, the agreement, and hence the decree, provided that the mother should have custody of the children

with the father having reasonable rights of visitation, but only at the home of the mother.

Subsequently the father brought an action in Alameda County to modify the custody provisions of the Nevada decree. An order was made by Judge Quinn modifying the custody provisions of the Nevada decree to the extent that the father could not only visit the children at the home of the mother at reasonable times, but could take the two oldest children with him on alternate Sundays. It was further provided, however, that " * * * he shall not take or permit to be taken any of said children to his home nor shall he permit any of said children to meet with or to be in the company of his present wife at any time when any of said children are taken from the defendant's home * * *"; and also, "The defendant (mother) shall not by any act or word defame the character of the plaintiff or his present wife to any of said children."

On April 28, 1947, at the time of Judge Quinn's order both parties and the four minor children lived in Alameda County. The father saw his children two or three times a week.

In June, 1947, approximately two months after Judge Quinn's order, the mother sold her home in Alameda County. Taking the four children she moved first to Calistoga, California, and then, in August, 1947, to Hemet, California, where she has since resided with the four children. Since that time the father has seen his children only once. Though the children corresponded frequently with their father at the beginning of their stay in Hemet, correspondence subsequently became very infrequent. The father's business as an accountant makes it difficult for him to travel to Hemet (near Los Angeles). It also appears that he is physically unable to drive the distance between Oakland and Hemet.

In June, 1950, the father petitioned the Superior Court of Alameda County for an order modifying the custody provisions of Judge Quinn's order. He sought the right to have the four children with him during a portion of their vacations from school. After a hearing, Judge Harris of the above

court modified Judge Quinn's order so as to provide that the father have three of the children with him during the month of July every year, the remaining child to choose for herself whether or not she wished to join the others in visiting her father. From this order the mother appeals.

The jurisdiction of the court to make the order complained of is conceded. Appellant's entire appeal seems to be premised upon the basis that Judge Quinn's order was, in effect, a finding that respondent's present wife was not a fit and proper person with whom the children should associate, and that in this respect there has been no change of circumstances, although appellant also seems to argue that there is no change in circumstances in general.

[1] The fact that at the time Judge Quinn's order was made the children and the father were all living in Alameda County, where the father could frequently see his children without difficulty, and that the children have since been removed to a distant part of the state, rendering frequent visits with their father impracticable, constitutes a sufficient change in circumstances to justify the order appealed from.

[2] We cannot follow appellant in her argument that a finding that respondent's present wife is an unfit person to be in contact with the children must be implied from Judge Quinn's order prohibiting the father from taking the children into her presence. The present wife has no legal rights in relation to the children and if Judge Quinn deemed it better for the children not to see her under the then existing circumstances she had no legal standing to complain. It required no finding of unfitness to justify that order, which sufficiently distinguishes the case of *Booth v. Booth*, 69 Cal.App.2d 496, 159 P.2d 93, where the mother was deprived of the custody of her own infant daughter, in which case the normal legal rights of a parent were taken from her.

[3] Here the argument for an implied finding of unfitness is based on pure conjecture, and it may be conjectured with at least equal probability that, since Judge

Quinn found it necessary to provide that appellant should not "defame the character of the * * * present wife to any of said children", he concluded that less friction would be generated by the order in the form in which he framed it. With the subsequent change of circumstances Judge Harris did not abuse his discretion in removing this restriction for the month of July, in which month under his order the father should have the children in his home.

The order appealed from is affirmed.

NOURSE, P. J., and GOODELL, J.,
concur.



103 Cal.App.2d 778

In re LEYMELE'S ESTATE.

RAKOCZY et al. v. FRESNO COUNTY
HUMANE SOC. et al.

Civ. 4315.

District Court of Appeal, Fourth District,
California.

April 25, 1951.

Proceeding in the matter of the estate of Z. S. Leymel, deceased. Anna Rakoczy and others, heirs of the deceased, filed a petition for construction of the will of the deceased and determine heirship, and they were opposed by the Fresno County Humane Society and others. The Superior Court of Fresno County, George M. DeWolf, J., rendered an order construing the will and determining heirship, and the heirs appealed. The District Court of Appeal, Mussell, J., held that heirs were not in position to have charitable bequests contained in will set aside though will was executed less than 30 days prior to death of deceased.

Order affirmed.

I. Wills §13(3)

Generally, a testamentary gift to charity is valid, even though made within 30 days of testator's death, but such gift may nevertheless be avoided at instance

of an aggrieved heir of designated class. Probate Code, §§ 41, 42.

2. WILLS ⇐13(3)

An heir of a testator who makes a testamentary gift to charity within 30 days of testator's death is not an "aggrieved heir" unless he would have been entitled to take the property of the testator had it not been willed to charity, as in a case where will contains an alternative disposition to one other than the heir. Probate Code, §§ 41, 42.

See publication Words and Phrases, for other judicial constructions and definitions of "Aggrieved Heir".

3. WILLS ⇐13(3)

Where heirs of testator, who executed will giving certain property to charities less than 30 days prior to his death, were not mentioned in will either as substitutional or residuary beneficiaries, and will provided that residue and remainder should go to executrix, heirs were not "aggrieved heirs" within meaning of statute providing that no property may be given to any charitable or benevolent society by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him who, under will, or laws of succession, would otherwise have taken the property of the testator, unless will was duly executed at least 30 days before death of testator. Probate Code, §§ 41, 42.

Harold A. Parichan, Fresno, for appellants.

John A. Willey, David E. Peckinpah, George J. Roth and Iener W. Nielsen, all of Fresno, for respondents.

MUSSELL, Justice.

Z. S. Leymel died May 9, 1947. He had executed a will on April 25, 1947. The will was admitted to probate and letters testamentary were issued to Marie Holdridge, executrix, on May 27, 1947. The decedent was survived by a sister, Anna Rakoczy, and three nephews, Ralf Rakoczy, Harold Rakoczy and Charles Beckwith, who are the only known living heirs at

law of the decedent and are the appellants here.

Under the third paragraph of the will a life estate in certain real and personal property was given to said Marie Holdridge, with the remainder over to the Fresno County Humane Society, a charitable institution, provided, however, that if the Fresno County Humane Society was not in existence at the death of said Marie Holdridge, the remainder over would not lapse but would pass to Fresno State College. Under the fourth paragraph, certain specific bequests of personal property were made to the Fresno County Humane Society and to the Fresno County Library. In the sixth paragraph a life estate in certain real property was granted to Marie Holdridge with the remainder over to Homer Blevins Chapter No. 1 of the Disabled American Veterans. Under the seventh paragraph, Marie Holdridge received sixty per cent of certain specific personal property. Specific gifts of a ten per cent interest in said property for each of testator's heirs were made to testator's sister, Anna Rakoczy, his nephew, Ralf Rakoczy, and his nephew, Charles Beckwith, with the further provision that if said Anna Rakoczy should predecease the testator, her gift would pass to Marie Holdridge. The tenth paragraph of the will reads as follows: "All the rest, residue and remainder of my property I hereby give, devise and bequeath to Marie Holdridge."

The appellants filed a petition for construction of the will and to determine heirship. Marie Holdridge died on the 26th day of November, 1949, before completion of the administration of the estate and letters of administration were issued to the public administrator of Fresno County.

On March 20, 1950, the trial court made its order that the gifts, devises and bequests contained in paragraphs numbered third, fourth and sixth of the will are valid and legal and that in the distribution of said estate, said devises and legatees are entitled to the respective portions in said paragraphs set forth.

Appellants contend that since the testator died within thirty days after executing the will, the charitable bequests mentioned in paragraphs third, fourth and sixth thereof should have been distributed to them. We find no merit in this contention.

Sections 41 and 42 of the Probate Code provide:

"Section 41. Restrictions. (*Time of executing will: Amount of gifts: Passage of property given contrary to law.*) No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will, or the laws of succession, would otherwise have taken the property so bequeathed or devised, unless the will was duly executed at least 30 days before the death of the testator. If so executed at least 30 days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected.

"(*Section not deemed to vest property in relative.*) Nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, unless and then only to the extent that such

relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will."

"Section 42. Exemption of certain bequests and devises. Bequests and devises to or for the use or benefit of the State, or any municipality, county or political subdivision within the State, or any institution belonging to the State, or belonging to any municipality, county or political subdivision within the State, or to any educational institution which is exempt from taxation under section 1a of Article XIII or section 10 of Article IX of the Constitution of this State and statutes enacted thereunder, or for the use or benefit of any such educational institution, or made by a testator leaving no spouse, brother, sister, nephew, niece, descendant or ancestor surviving by whom the property so bequeathed or devised would have been taken if said property had not been so bequeathed or devised, are excepted from the restrictions of this article."

It is apparent that appellants are not mentioned either as substitutional or residuary beneficiaries in the will and that they cannot take under the laws of succession because the residuary clause otherwise disposes of all the rest, residue or remainder of decedent's property. In re Estate of Davis, 74 Cal.App.2d 357, 362, 168 P.2d 789.

[1,2] As was stated in Re Estate of Haines, 76 Cal.App.2d 673, 679, 173 P.2d 693, 696: "Accordingly, it may be stated that generally speaking a testamentary gift to charity is valid, even though made within 30 days of the testator's death; however, such a gift may nevertheless be avoided at the instance of an aggrieved heir of a designated class; but such heir is not aggrieved unless he would have been entitled to take the property had it not been willed to charity, as in a case where the will contains an alternative disposition to one other than the heir."

And as was said in Re Estate of Randall, 86 Cal.App.2d 422, 426, 194 P.2d 709, 711: "Under the direct provisions of Section 41, the only living persons who can object to the

charitable gift here under discussion are a brother and two nephews of testatrix, appellants herein. But such persons, by the language of that section, take the property only 'if and to the extent that they would have taken said property as aforesaid, but for such devises or legacies (to charity); *otherwise the testator's estate shall go in accordance with the will and such devises and legacies shall be unaffected.*' (Italics added.) And to make it doubly sure that the language should not be misunderstood, the section then provides that '(n)othing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity * * * in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will'".

[3] Under the circumstances shown by the record, appellants are not in a position to have the charitable bequests contained in the will set aside.

Order affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



103 Cal.App.2d 754

JACOBS v. BOZZANI MOTORS,
Limited, et al.

Civ. 18391.

District Court of Appeal, Second District,
Division 1, California.

April 25, 1951.

Action by Louis Jacobs against Bozzani Motors, Limited, a corporation, J. O. Reade, Harry Bernstein, and others for negligent operation of an automobile. From a judg-

ment rendered on a verdict against named defendants, they appealed, and defendant Bernstein filed a motion for an order to augment the record and permit use of record by all appellants. The District Court of Appeal, Drapeau, J., held that clerk's transcript should be augmented so as to include notice of appeal filed by defendant Bernstein and permit him to use the record on appeal and that he should have 30 days to serve and file opening brief.

Order in accordance with opinion.

Appeal and error ☞765

Where notice of appeal filed by driver of automobile did not appear in record on appeal from judgment against driver, registered owner of automobile and his employer for negligent operation of automobile, clerk's transcript would be augmented on driver's motion, to which there was no opposition, so as to include driver's notice of appeal and driver would be permitted to use the record on appeal along with the other defendants and would be allowed 30 days to serve and file opening brief. Rules on Appeal, rule 12(a).

Eugene S. Ives, Los Angeles, for defendant and appellant Bernstein.

No appearance for respondent.

DRAPEAU, Justice.

In this action judgment was rendered upon a jury's verdict against three defendants for negligence in operating an automobile. The automobile was registered in the name of defendant J. O. Reade, an employee of defendant Bozzani Motors, Ltd.; defendant Harry Bernstein was the driver.

Notice of appeal was filed by the two first named defendants, and also by Mr. Bernstein.

In the record before this Court, however, the notice of appeal of Mr. Bernstein does not appear.

Hence his motion (to which there is no opposition) to augment the record. Rule 12(a), Rules on Appeal.

It is ordered that the Clerk's Transcript be augmented by including the notice of appeal of Harry Bernstein; that he be

permitted to use the record on appeal in this Court along with the other defendants, and that he have thirty days from and after the date of this order to serve and file his opening brief.

WHITE, P. J., and DORAN, J., concur.



103 Cal.App.2d 592

PEOPLE v. MANSOUR.

Cr. 4538.

District Court of Appeal, Second District,
Division 2, California.

April 19, 1951.

Mary Elizabeth Mansour was convicted in the Superior Court of Los Angeles County, Kenneth C. Newell, J., of armed robbery, and from the judgment of conviction and order denying her motion for a new trial, she appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal law ⇨769

In a criminal case, it is incumbent on a court to instruct jury fully and fairly on the law relating to the facts of the case.

2. Criminal law ⇨784(1), 1186(4)

In prosecution for armed robbery, wherein evidence bearing on intent of defendant was circumstantial, refusal of instruction that facts were required not only to be entirely consistent with theory of guilt but inconsistent with any other rational conclusion, was error, but was not reversible error in view of other instructions given. Const. art. 6, § 4½.

3. Criminal law ⇨1186(4)

The failure to include in an instruction a proper statement of the principle that circumstantial evidence must be inconsistent with any other rational hypothesis than that of guilt does not always require reversal. Const. art. 6, § 4½.

4. Criminal law ⇨784(9)

Provision of instruction that when case which has been made out by the People against a defendant, rests entirely or chiefly on circumstantial evidence, before jury may find a defendant guilty based on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt, was incorrect because too liberal in favor of defendant.

5. Criminal law ⇨829(3)

In prosecution for armed robbery, wherein defendant introduced some evidence that at time of alleged robbery she had been under the influence of narcotics, refusal of defendant's requested instruction requiring jury to find as a condition of convicting her that any assistance she rendered to one who actually committed the robbery, was given knowingly and with criminal intent, was not error, where, under proper instruction, jury found that defendant intended to aid and abet the robbery.

6. Criminal law ⇨1159(2)

Finding of fact of jury, based on substantial evidence in prosecution for armed robbery, that defendant intended to aid and abet the robbery, was conclusive on reviewing court.

7. Robbery ⇨24(1)

Evidence sustained armed robbery conviction of defendant who sat outside in her automobile while her paramour committed the actual robbery, and who drove him away from the scene after the robbery.

Zeman & Hertzberg and Harrison W. Hertzberg, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen. and Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant demands that her conviction of armed robbery be reversed on the grounds of (1) errors in refusing to give certain instructions and (2) the "verdict is against the weight of the evidence." She appeals

from the judgment of conviction and from the order denying her motion for a new trial.

The victim of the robbery is one Boyd Welin, co-owner of a pharmacy in Pasadena. Having entered his store at 8:30 a. m. he was soon alarmed by the rattling of the front door. A stranger entered and concealed himself behind a counter. As the merchant advanced toward the front, the intruder jumped out, drew a .38 caliber revolver and commanded the pharmacist to raise his hands, return to the rear and lie down. His hands were tied by the bandit who demanded money and narcotics. On being informed where to get the drugs and that the money was in a canister, he made a search but soon returned to tell Welin that was not what he desired; he wanted "morphine and dilauidide." At that juncture, the colored porter, Tyler, arrived. After the latter had knocked a second time, the stranger signaled him to go to the rear door. Tyler called to Welin to inquire whether he was all right. The druggist's affirmative answers were given at the direction of the robber. When Tyler approached the back door the bandit grabbed his coat in an attempt to jerk him across the threshold. But the porter ran and called for the police. Thereupon, Baranik, for that was the stranger's name, made his exit, crossed the street to a convertible car parked about 150 feet from the rear door of the pharmacy, entered the right side of the vehicle which was driven rapidly away by appellant. A bystander having got the license number of the departing automobile, it was promptly spread by radio broadcast. Two police officers of Azusa pursued the fleeing car as they traveled 75 miles an hour while appellant kept in the lead. The pursuit ended in San Gabriel just after Baranik had escaped from the wild machine.

In response to the inquiring officer appellant said, "he put a pistol in my back, put a gun in my back" which she repeated after having been reminded that the man's clothes were still in her machine. At the police station she was asked where the man left the car and "how did you get into this mess?" She replied, "I stopped in Pasa-

dena to get a sandwich and he had a pistol. He put it in my back." She stated that he was about 56, but declined to answer further. But her silence did not forestall a successful search. The officers discovered that the wayward couple had spent several days at the home of Mrs. Baseel, sister of appellant, in Pomona prior to the day of the robbery, pretending that they were married. Before noon on the day of the crime Baranik called at Mrs. Baseel's, left his mackinaw coat, borrowed \$10, stated that there had been some trouble and departed.

At her trial appellant testified that she had been a gambler for more than 15 years; had lived with a gambler named Barnett (referring to Baranik) in Los Angeles and had with him visited Mrs. Baseel in Pomona; about April, 1948, she became addicted to the use of morphine, heroin and dilauidide after using them for a kidney ailment; such addiction had continued to the date of the robbery, January 28, 1950; Baranik was also a drug addict and procured narcotics for her; on the morning she drove to Mr. Welin's pharmacy she had no kind of narcotic and had been without them for some time; when they could not find the man who had supplied them, Baranik suggested a druggist in Pasadena from whom the medicament might be purchased; she was very ill, had only \$5; Baranik had money and was pretty sure he could get narcotics at the Pasadena store, but made no mention of a robbery. Since she was ignorant of their destination Baranik directed her course to Welin's pharmacy and to the place for parking her automobile 150 feet down the street from the rear of the store. Because something was wrong with her steering wheel she always used the largest space available. Her companion told her to wait while he was trying to buy the coveted drug. She neither saw a revolver on Baranik nor learned from him that he possessed one. Very ill, she sat in her car waiting for him when suddenly a commotion jarred the quiet of the vicinity as Baranik came running, jumped into the machine and told her to drive and get away from there. She testified that after he had commanded her to drive away, she asked what happened before she started;

that she was too excited to know where she was driving; that Baranik told her to drive faster, the police were coming; that she did as directed and made many turns; that Baranik changed coats and as he jumped from the car he directed her to keep going but he never told her that a robbery had occurred.

She testified that she had no intention of aiding Baranik to commit a robbery when she drove him to the drug store and that she had no such intent in driving away; that she feared perhaps the law had apprehended the druggist for selling narcotics; that her first knowledge of the robbery was at the preliminary hearing. She explained her statements to the police that a gun had been stuck in her back because it was true; she had stopped for a sandwich because she did not know what had happened and to avoid telling that she had been trying to buy narcotics. She admitted her denial of knowledge of Baranik and testified that she did not know he had a gun until a few minutes after he entered her car.

Baranik had visited the Baseel home during the preceding two and a half years and had often driven appellant's convertible car.

The Instructions Refused.

The emphasized assignment of error is the court's refusal to direct the jury that where the evidence relied upon for conviction is wholly circumstantial it must be consistent with no theory other than the guilt of the accused. In support of her thesis she contends that since she denied all knowledge of Baranik's purpose to commit a robbery there was no proof of her having knowingly aided and abetted him except such inferences as might be drawn from the circumstances shown. In line with such contention she submitted and the court rejected the following instruction: "You are instructed that in order to convict upon circumstantial evidence, it is necessary not only that all the circumstances concur to show that the defendant committed the crime charged, but it must also be shown that these circumstances taken as a whole are inconsistent with any other rational conclusion, and it is not sufficient that the circumstances proven coincide with, ac-

count for, and, therefore, render probable the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every other hypothesis, except the single one of guilt, or you must find the defendant not guilty." Appellant contends that (1) such instruction was necessary for the reason that "the entire crime or a necessary element thereof was presented to the jury wholly by circumstantial evidence"; (2) the aid rendered to the actual bandit was given without guilty knowledge on the part of appellant. From the facts established, briefly outlined above, and from a scrutiny of appellant and her several conflicting statements the jury were not without proof from which it could be reasonably inferred that appellant had guilty knowledge of Baranik's intention to commit a robbery. They were both addicts; both had suffered several days for want of the drugs, and they lived in the intimate relationship of spouses. Necessarily she knew of his possession of the revolver and since he had not such power of self-control as would restrain him from committing a major crime, deliberately planned, the jury could from their knowledge of human passions and of the behavior of man when reduced to extremities, reasonably infer that appellant's paramour reassured her that he would obtain the dilaudide and heroin even though he should be compelled to do violence in order to succeed.

[1-3] It is incumbent upon a court in a criminal case to instruct the jury fully and fairly upon the law relating to the facts of the case. *People v. Bender*, 27 Cal.2d 164, 176, 163 P.2d 8. Since the evidence in the instant action bearing upon appellant's intent is circumstantial, an instruction should have charged the jury that the facts must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion. Therefore, the refused instruction was a correct one and should have been given. 27 Cal.2d at page 177, 163 P.2d 8. However, the failure to include in an instruction a proper statement of the principle that circumstantial evidence must be inconsistent with any other rational hypothesis than that of guilt does not always require a

reversal. *People v. Koenig*, 29 Cal.2d 87, 93, 173 P.2d 1; *People v. Bender*, supra. While holding that such an instruction should have been given, the court determined in *People v. Webster*, 79 Cal.App.2d 321, 179 P.2d 633, that failure to do so was not sufficiently prejudicial to warrant a reversal. The same situation prevails in the case at bar. Besides the aggravating facts which justify inferences of guilt, the court generously instructed the jury on the doctrine of reasonable doubt and upon the elements of proof required in cases depending upon circumstantial evidence; the significance of circumstantial evidence; the virtues of direct evidence; the jury's duty where the proof is susceptible of two reasonable constructions, one favoring guilt, the other favoring the innocence of the accused and their duty when one construction of the evidence is reasonable while the other is unreasonable with the admonition that the entire proof must carry the convincing force required to support a verdict of guilt, concluding "*when the case which has been made out by the people against a defendant rests entirely or chiefly upon circumstantial evidence, before the jury may find a defendant guilty based upon such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt.*"

[4] Thus, in the instant action, the instructions given were substantially the same as those given in *People v. Webster*, 79 Cal.App.2d 321, 179 P.2d 633, with the addition of the instruction last above quoted which was one of those the refusal of which was complained of in that case. Indeed, the last quoted passage was too liberal. It has been held to be incorrect as a statement of the law since it is not necessary that each fact in a chain of circumstances that will establish a defendant's

guilt be proved beyond a reasonable doubt. The doctrine of reasonable doubt applies to proof of guilt, and not to the establishment of each incident or event inculcating the defendant. *People v. Nunn*, 65 Cal.App.2d 188, 195, 150 P.2d 476; *People v. Klinkenberg*, 90 Cal.App.2d 608, 632, 204 P.2d 613. But as if to make it impossible for the jury to overlook the necessity of their giving appellant every advantage known to criminal procedure to be acquitted of the accusation, they received the following addition to the charge: "*One who does not actively commit the offense, but who aids, promotes, or encourages its commission either by act or counsel or both, is not deemed by law to be guilty and shall not be found guilty of the crime unless he did what he did knowingly and with criminal intent. To abet another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting, or aiding the commission of such criminal offense.*" The jury was thereby instructed that they must specifically find beyond a reasonable doubt that the appellant did what she did knowingly and with criminal intent before she could be found guilty and they are presumed to have understood such instruction. The sum total of the instructions given by the court upon circumstantial evidence and reasonable doubt and the rule requiring the jury to be guided by that view of the evidence that indicates innocence, were sufficient to compel a reasonable jury to know that the circumstances proved must be entirely consistent with the theory of guilt and contrary to any other reasonable conclusion before they could find appellant guilty. The conclusion cannot be avoided that a reversal on account of the refusal would be violative of the constitution. Art. VI, section 4½.

[5,6] Appellant assigns as prejudicial error the refusal of an extended instruction¹ requiring the jury to find as a condi-

1. "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take

into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive, or intent with which he committed the act." Penal Code, sec. 22.

The word "intoxication" as used in the above instruction is not limited to intoxication which is caused by alcoholic bev-

tion of convicting her that any assistance she rendered to Baranik in the commission of the robbery was given knowingly and with criminal intent. She contends "that such aid was given innocently and without any guilty knowledge." In proof of her being under the influence of drugs she cites the testimony of an arresting officer that "she had dark circles under her eyes, pupils were dilated and eyes dark and sunken, her head shook and she appeared greatly agitated, and later she appeared to be under the influence of narcotics." That testimony was supported by the opinion of another officer. She contends that her abnormal mental state should have been considered in determining whether she was possessed of the requisite intent to commit a robbery. Under proper instructions the jury found that she intended to aid and abet the robbery. Such finding of fact is conclusive upon the reviewing court where there is any substantial evidence to support it. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778. But despite the testimony favorable to her contention, the racing of her car around corners and over the streets of Azusa, her fairy tale about Baranik's holding a gun against her body as she operated the vehicle and her having stopped at Pasadena to get a sandwich, argue forcefully that she was not under the influence of narcotics but wilfully attempted to deceive the officers. She testified that she had been without morphine and its derivatives for some time and had no available supply. She did not contend that her want of knowledge of Baranik's intention to rob was due to her use of such drugs. But to give her the benefit of her addiction to the use of them the court instructed the jury: "Where

a person commits an act without being conscious thereof, such act is not criminal even though, if committed by a person who was conscious it would be a crime." That instruction allowed the jury to acquit her if they had a reasonable doubt that at the time of the crime she was not conscious of the criminal character of her act whether due to her ignorance of Baranik's intention or to the influence of narcotics. She was not by any instruction obliged to establish her knowledge of her paramour's criminal intention or the state of her assertedly dull consciousness. *People v. Hardy*, 33 Cal.2d 52, 64, 198 P.2d 865.

The case of *People v. Hill*, 77 Cal.App.2d 287, 175 P.2d 45, is cited by appellant in support of her contention that the judgment should be reversed because she knew nothing of what was being done in the pharmacy, or of what had been intended. It does not support her. The appellant Ingram in the cited case first met his codefendants less than three hours before the latter committed robbery. They induced him to drive them around for a while to look for some girls. After going to the south end of the city they asked him to park on a side street and await their return. He sat in his car, shut off his motor and went to sleep. On their reappearance after the robbery he switched on his lights. He did not see Hill's revolver, nor did either companion mention their criminal purpose to him. He neither instigated nor advised it, received no fruits of the crime or was he promised any. His companions exculpated him and there was no reason for discrediting them. Baranik was not a witness at appellant's trial.

erages, but includes intoxication produced by narcotic drugs.

You are further instructed that while intoxication, voluntarily acquired, is not a defense to crime, still, where the offense charged is one requiring the existence of a specific intent or state of mind, unless the proof shows to a moral certainty and beyond a reasonable doubt that such intent or state of mind did exist, the defendant is entitled to an acquittal, and the absence of such criminal intent or state of mind may be established by evidence that at the time of the

alleged offense the accused was so intoxicated as to be incapable of forming such intent or state of mind.

In the instant case, the defendant may not be lawfully convicted except by proof to a moral certainty and beyond a reasonable doubt that she aided and abetted the commission of the robbery as alleged in the information. In order for one to be convicted by aiding and abetting, there must be proof to a moral certainty and beyond a reasonable doubt that any assistance given was done knowingly and with criminal intent.

Evidence is Sufficient.

[7] By her assignment that the verdict is "against the weight of the evidence" appellant intended to say that there is no substantial proof of her intentional participation in the robbery. So considered it must be rejected. Baranik's belated assertion of her innocence to the court when he was sentenced is of no avail. From the facts in evidence reasonable minds could fairly infer that appellant knowingly aided and abetted the robbery. She had consorted with Baranik for over two years; had lived with him in her sister's home; was with him during the days and nights while they suffered destitution of narcotics; conveyed him to the pharmacy in her own machine; parked where she would have ample space to turn. She testified that this was necessary because her steering wheel was difficult to turn; that on his return from the crime he pulled a .38 caliber revolver and ordered her to drive away; that she did so at the moment of his command and learned a few minutes later he had the gun. When sighted by the police she increased her speed to from 45 to 60 miles per hour, made many turns while so traveling. Having diminished her speed to allow her companion to escape, she accelerated to a high rate of speed before being overtaken by the officers. She told them about getting the sandwich and the strange man's putting the gun to her back, but that she did not know his identity. Her evident deceit and her attempt to shield her confederate, together with her presence at the scene of the crime, her hastily conveying Baranik beyond the environs of Pasadena and her numerous inconsistent statements were such facts as might reasonably convince the jury that she was a knowing abettor of a bold and daring brigand. In view of the nature of her long association with Baranik, it was a rational inference that she did not drive him 19 miles after leaving the pharmacy without ascertaining that the "some trouble" he had had was his robbery of the druggist, even conceding that she had no prior knowledge of his purpose. Knowing that she had no narcotic in her possession for the police to recover, after Baranik leaped from her car, had she been innocent, she would have

stopped and waited for the police. She did not.

Judgment and order denying the motion for a new trial are affirmed.

McCOMB and WILSON, JJ., concur.



103 Cal.App.2d 405

KALMUS v. KALMUS et al.

Civ. 17534, 17672, 17700.

District Court of Appeal, Second District,
Division 1, California.

April 12, 1951.

As Modified on Denial of Rehearing
May 8, 1951.

Hearing Denied June 11, 1951.

Natalie M. Kalmus sued Herbert T. Kalmus and Technicolor Motion Picture Corporation for separate maintenance, dissolution of partnership, accounting, and appointment of receiver, wherein the first named defendant cross-complained for declaratory relief and injunction. The Superior Court of Los Angeles County, Elmer D. Doyle, Daniel N. Stevens, William B. McKesson, JJ., entered a judgment adverse to plaintiff, and an order refusing to vacate the judgment and an order denying plaintiff suit money and temporary alimony, and the plaintiff appealed. The District Court of Appeal, White, P. J., held that denial of plaintiff's motion for a continuance was not an abuse of discretion.

Judgment and orders affirmed.

See also 97 Cal.App.2d 74, 217 P.2d 64.

1. Continuance ☞7

An application for a continuance is addressed to trial court's discretion.

2. Continuance ☞12

In a proper case a continuance should be granted because of illness of a party or a member of his family, but in considering all such applications trial court should be governed by the course which seems most likely to accomplish substantial justice, and in seeking such a course, court may take into consideration the legal sufficiency of a showing in support of the motion and good faith of the moving party.

3. Appeal and error ⚭966(1)**Continuance** ⚭12

Illness of a party does not ipso facto require granting of motion for a continuance, and it is for trial court in all cases, except where otherwise expressly provided by statute, to determine whether circumstances shown are such as to make it proper that a continuance be granted, and its conclusion thereon will not be disturbed unless there has been a plain abuse of discretion.

4. Continuance ⚭1

Because of necessity for orderly, prompt and effective disposition of litigation and loss and hardship to parties to an action, as well as to witnesses therein, it is a part of bounden duty of trial judge, in absence of some weighty reason to contrary, to insist upon cases being heard and determined with as great promptness as exigencies of the case will permit.

5. Continuance ⚭47

Evidence failed to establish that trial court abused its discretion in holding that plaintiff in action for separate maintenance and dissolution of partnership was physically able to come to California from her home in Massachusetts for the trial and to participate therein, and to deny plaintiff a continuance upon ground of disabling illness.

6. Continuance ⚭7

The discretion contemplated by law in continuing an action because there was pending in courts of a sister state another action between the parties is not a capricious or arbitrary one, but an impartial discretion, guided and controlled in its exercise by fixed legal principles, and should be exercised in manner to subserve and not to impede or defeat ends of substantial justice.

7. Continuance ⚭7

"Abuse of discretion", in ruling on a motion for continuance, occurs when in its exercise a court exceeds the bounds of reason, all of the facts and circumstances before it being considered, and complaining party must affirmatively establish abuse of discretion.

See publication Words and Phrases, for other judicial constructions and definitions of "Abuse of Discretion".

8. Continuance ⚭10

Trial court did not abuse its discretion in denying plaintiff's motion for a continuance because of pendency of a Massachusetts action between the parties, where it appeared that plaintiff was the one who first chose the courts of California forum for determination of the litigation, and it was only after an adverse ruling was made in her attempt to secure relief sought on order to show cause and when confronted with a cross complaint for declaratory relief and injunction in the California action, that plaintiff filed the Massachusetts action, and especially where decision in Massachusetts action would not determine all issues in the California action.

9. Continuance ⚭10

While a continuance should be granted on facts that show that justice requires that cause should await the trial and conclusion of another proceeding affecting the same parties, it is essential that the entire relief demanded and sought for in the first action can be awarded in the other.

10. Abatement and revival ⚭4**Courts** ⚭475(1)**Prohibition** ⚭10(1)

The pendency of a prior action in a court of competent jurisdiction, predicated on same cause of action and between the same parties, constitutes good ground for abatement of a later action within the same jurisdiction either in same court or in another court having jurisdiction, and first court to assume and exercise jurisdiction in a particular case acquires exclusive jurisdiction and prohibition lies to restrain another court from proceeding if it is threatening to do so.

11. Judgment ⚭17(10)

Jurisdiction of court under statute providing that one may proceed with the trial and take judgment in a cause in absence of adverse party provided, if issue to be tried is an issue of fact, proof was first made to satisfy court that adverse party has had five days notice of such

trial does not depend upon preservation of the proof of service, but upon the fact that service has been made. Code Civ. Proc. § 594.

12. Judgment ⇨17(2)

Plaintiff's admission that she had more than five days notice of date of trial, coupled with documentary evidence before trial court showing conclusively that due and regular notice of trial had been given her, were sufficient to establish fact that plaintiff had been given the notice required by statute, so as to authorize trial court to proceed with the trial and take judgment in the cause in absence of plaintiff. Code Civ.Proc. § 594.

13. Appeal and error ⇨607(1)

Where at appellant's request in her "notice to clerk to prepare a record on appeal", the notice of trial and affidavit of service thereof by mail had been brought before District Court of Appeal, District Court of Appeal could consider such documents on theory that having been filed in the papers in the case and noted in register of actions, and which documents could be judicially noticed by the court of original jurisdiction, they could be considered on appeal. Code Civ.Proc. § 594; Civ. Code, § 3532.

14. Judgment ⇨143(10, 15)

Plaintiff's motion to vacate judgment which was based on cumulative assertions of ill health and erroneous prophecies of her attorneys as to what action court would take on motion for continuance did not claim inadvertence, mistake or excusable neglect within statute relating to setting aside a default judgment. Code Civ.Proc. § 473.

15. Appeal and error ⇨436

When an appeal is taken from a judgment, unless appeal is subsequently dismissed, case must be deemed pending in the reviewing court until appeal is determined.

16. Appeal and error ⇨439

Where appeal from default judgment was regularly taken, effect of the appeal was to transfer the cause to the reviewing

tribunal and to suspend the power of trial court to vacate judgment under statute relating to setting aside a default judgment. Code Civ.Proc. § 473.

17. Appeal and error ⇨716

On appeal from order in suit for separate maintenance denying plaintiff suit money and temporary alimony, it was validity of trial court's action in denying plaintiff's application which was reviewable, and not trial court's opinion or statement of reasons for its action.

18. Divorce ⇨235, 285

Husband and wife ⇨298½, 300

Because granting and refusing of alimony in actions for divorce or separate maintenance is a matter which lies largely in discretion of trial court, an appellate tribunal will not interfere unless it be made clearly and affirmatively to appear on face of entire record in case that the discretion was abused. Civ.Code, § 137.

19. Husband and wife ⇨283(1)

In exercise of its discretion on application of plaintiff in action for separate maintenance for suit money and temporary alimony, trial court was entitled to consider plaintiff's necessity for the financial aid she sought. Civ.Code, § 137.

20. Husband and wife ⇨283(1), 297

A wife seeking suit money and temporary alimony in suit for separate maintenance must establish necessity for such awards, and they are not a matter of absolute right but may be awarded only upon a finding of necessity. Civ.Code, § 137.

21. Husband and wife ⇨297

Denial of application of plaintiff in action for separate maintenance for suit money and temporary alimony was not an abuse of discretion under the evidence. Civ.Code, § 137.

22. Trial ⇨56

On application of plaintiff in suit for separate maintenance for suit money and temporary alimony, trial court did not err in sustaining objections to introduction of some proffered newspaper clippings and excerpts from other publications to prove an existent marriage relationship between par-

ties, where such evidence was at best cumulative. Civ.Code, § 137; Code Civ.Proc. § 2044.

23. Trial ⚡56

Discretion of a court to stop cumulative testimony is not only inherent, but is expressly recognized by statute. Code Civ.Proc. § 2044.

24. Attorney and client ⚡76(4)

Where letter written by plaintiff to her last named attorneys specifically confined authority conferred upon such attorneys to act for limited purpose only in attempting to secure a continuance of the trial, the authorized service of such attorneys as plaintiff's counsel was terminated upon denial of motion for continuance, and no order permitting such attorneys to withdraw was necessary and notice to plaintiff under statute was therefore unnecessary. Code Civ.Proc. § 284.

25. Appeal and error ⚡882(1)

One cannot be heard to complain of orders made by court at instance of such party, nor can complaint be made of claimed error when one himself has invited it.



C. Ray Robinson, James A. Cobey, Merced, Bruce Walkup, Dan L. Garrett, Jr., San Francisco, for appellant.

Jennings & Belcher, Los Angeles, (Louis E. Kearney, Los Angeles, of counsel), for respondents.

WHITE, Presiding Justice.

Appellant Natalie M. Kalmus and respondent herein Herbert T. Kalmus, were married in Massachusetts in 1902. On December 22, 1921, in an action instituted by appellant herein she secured a divorce by *decree nisi* from respondent Kalmus herein, which decree became final June 23, 1922. By the terms of this divorce decree, respondent Kalmus was ordered to pay to appellant herein the sum of \$7,500 per year as alimony. It is conceded that such payments have been made continuously to the present date and are still being made by respondent Kalmus and being accepted by the appellant herein.

The record also reflects that at the time of the aforesaid divorce, respondent Kalmus delivered to or for the account of appellant in full and complete settlement of all his obligations to her (other than alimony) certain household effects, a \$25,000 insurance policy, the sum of \$5,000, 1,000 shares of stock of the Technicolor Motion Picture Corporation, and negotiable bonds of the total principal amount of \$25,000.

In 1945 appellant made certain claims against respondent Kalmus, and as a result the parties entered into a contract, under the terms of which the respondent Kalmus paid to the appellant \$36,625, and agreed that his estate would continue the payment of the \$7,500 per year alimony for such period after his death as the said appellant should live. Under the contract, there was also paid appellant's counsel a fee of \$7,500 for their services in connection with such contract. By this instrument, respondent Kalmus also undertook to pay to appellant for a period not exceeding three years, additional sums approximating \$8,000 per year. In the contract, appellant acknowledged that the Massachusetts divorce decree was valid and in full force and effect and that she knew no valid or proper ground to vacate or modify the decree of divorce, and that she was not the common-law wife of respondent Kalmus. The contract provided that its acceptance by appellant and the payments therein provided for should be "in full and complete satisfaction and settlement of, and in lieu of, all past, present and future claims, demands and liabilities, of every nature and description whatsoever, against Herbert T. Kalmus, except those arising out of his obligations under this agreement". No contention is made that this contract has ever been rescinded or that appellant ever tendered back any of the payments made thereunder.

The instant action is one commenced by appellant against respondent Herbert T. Kalmus for separate maintenance, dissolution of partnership, accounting and appointment of Receiver.

In view of the somewhat complicated situation presented because of three consolidated appeals being here involved, it

might be helpful, in the interest of clarity, to set forth chronologically some of the pertinent events in the history of two California actions between the parties to this appeal, as well as a third subsequent action now pending in the Massachusetts courts between the same parties.

On July 21, 1948, appellant herein filed an action against respondent Herbert T. Kalmus, and Technicolor Motion Picture Corporation, et al., numbered 364,392 in the files of the Clerk of the Superior Court of Los Angeles County. Although this action is not involved in this appeal, reference to the same is made because the file therein was used in connection with a motion for continuance of the second action, which will be a subject of discussion on this appeal.

On July 21, 1948, in the aforesaid action, numbered 364,392, an order to show cause re alimony, court costs, attorneys' fees, etc., was issued returnable July 29, 1948.

On the last-mentioned date, respondent, with his counsel, appeared in response to said order to show cause and the same was thereupon dismissed.

On the same date appellant secured a new order to show cause, practically identical in form, directed to respondent Kalmus and returnable August 6, 1948.

When on August 6 respondent appeared in response to the last-named order to show cause, the matter was continued to October 25, 1948, and on said last-named date was continued to October 27 and again to November 9, 1948.

On October 20, 1948, appellant filed her second amended complaint for separate maintenance, dissolution of partnership and accounting, etc.

On October 28, appellant filed a request for dismissal of the above-named action numbered 364,392 and on the following day such dismissal was entered by the clerk.

On November 9, 1948, the aforesaid order to show cause was placed off calendar due to the fact that the action had been dismissed by appellant.

On November 4, 1948, appellant filed her complaint in the instant action, numbered

370,515. This complaint is concededly practically identical with the second amended complaint in the aforesaid action numbered 364,392 which, as heretofore pointed out, was dismissed.

On November 5, 1948, respondent Herbert T. Kalmus served and filed his answer and cross-complaint herein.

On November 4, 1948, counsel for appellant presented to the court, in chambers, a request for a new order to show cause. At the time such application was made respondent's counsel was also present. It appears that the court indicated it would issue the order to show cause and make it returnable on November 9, 1948, which was the same date upon which the previous order in the case which was dismissed was set.

On November 10, 1948, another order to show cause returnable November 29 and directed to respondent Kalmus, was issued by the court.

On November 29, 1948, hearing on the last-mentioned order to show cause was commenced, and after several days of hearing, the court, on December 10, 1948, made its minute order denying alimony *pendente lite*, attorneys' fees and costs to appellant.

On December 20, 1948, *notice of appeal* was given from the foregoing minute order of December 10, 1948.

On December 29, 1948, appellant filed in the courts of Massachusetts a complaint to vacate the aforesaid Massachusetts decree of divorce between the parties hereto.

On March 8, 1949, notice that the action here in question was set for trial on June 1, 1948, was given to appellant and such notice, together with proof of service, was filed in the office of the county clerk on the same day. At that time appellant was appearing *in propria persona*.

On May 24, 1949, appellant gave notice of a motion to be heard on May 31, 1949, to continue the trial when set, as aforesaid, for June 1, 1949. This motion was given by attorneys Clifford Thoms and David L. Sefman, who were then appearing as counsel for appellant.

On May 31, 1949, appellant's motion for continuance came on for hearing, was argued before the court and denied.

On June 1, 1949, the action was called for trial, at which time the foregoing attorneys Thoms and Sefman appeared as counsel for appellant, and counsel also appeared for the respondents herein. A motion made by Messrs. Thoms and Sefman to withdraw as counsel for appellant was granted. No previous notice of motion of such withdrawal had theretofore been given to counsel for respondents.

On June 1, 1949, the action proceeded to trial, following which the court ordered judgment that appellant herein take nothing and that respondent Herbert T. Kalmus was entitled to the relief prayed for in his cross-complaint. Findings of fact and conclusions of law were filed and the judgment was entered on June 13, 1949.

On August 9, 1949, appellant herein appealed from said judgment by serving and filing notice of such appeal on that date.

On September 21, 1949, appellant herein served a motion to set aside the aforesaid judgment on the ground that it had been obtained through mistake, inadvertence, surprise and excusable neglect.

On September 29, 1949, the motion to set aside the judgment was heard by the court and denied.

On December 1, 1949, an *appeal* was taken from the order of September 29, denying the motion to set aside the judgment pursuant to Section 473 of the Code of Civil Procedure.

Three appeals are thus presented to us to be considered, viz:

(1) An appeal from the judgment of the trial court;

(2) An appeal from the order of the court below refusing to vacate the aforesaid judgment; and

(3) An appeal from the order of the lower court denying appellant suit money and temporary alimony.

On the first appeal it is contended that reversible error was committed in rendering the judgment of June 13, 1949, because

the denial of appellant's motion for a continuance was an abuse of discretion.

In this regard, as heretofore pointed out, the record reflects that on March 8, 1949, appellant, then appearing *in propria persona*, was served with notice that the cause was set for trial on June 1, 1949, in the department of the presiding judge. On May 24, 1949, appellant through her then attorneys, served on respondent Kalmus alone, a notice of motion for continuance and supporting affidavits. Hearing of said motion for continuance was noticed for May 31, 1949, the day before the trial date. No claim is made that appellant did not have actual notice of the trial date from the early part of March, 1949. In fact, she states in her brief that, "It is true that appellant actually had more than the required five days notice. She has never claimed otherwise".

As one of her grounds for continuance appellant urged disabling illness upon her part, supported by an affidavit of her physician in Massachusetts, where she was then residing. After detailing the nature of appellant's illness, the physician said in his affidavit, dated May 16, 1949, "At the present time I do not consider that her physical condition will permit the physical ordeal of a transcontinental trip and a prolonged legal trial, and I feel that such a trip and such trial would jeopardize the present condition of her health".

Appellant's claim of illness was sharply disputed. In response to the foregoing affidavit, respondent Kalmus filed affidavits showing that on May 19, 1949, appellant took a taxicab for a considerable distance from one hotel to another, at the latter of which she had luncheon with a group of eleven people; that upon leaving the luncheon she went shopping, returned to her hotel, obtained her baggage, proceeded to a railway station and departed on a journey. There was presented an affidavit of Doctor Harry L. Kozol, a graduate of Harvard College and Harvard Medical School, and a qualified psychiatrist, who averred that he had examined the abstract of the record of Baker Memorial Division of the Massachusetts General Hospital re-

ferring to appellant who was admitted to such hospital on April 29, 1949, and discharged on May 3, 1949. In his affidavit, Doctor Kozol stated that in his opinion there was no medical reason why appellant could not travel to California on May 29, 1949, and participate in the trial of this action. The witness stated his reasons in great detail for holding the opinion which he expressed.

There was another affidavit of Joseph Decker who averred that plaintiff engaged in numerous physical activities on May 14, May 15, May 23 and May 26, 1949, and that she walked "briskly, vigorously, firmly and rapidly".

In another affidavit it was averred that on May 19, 1949, plaintiff arrived in Boston from New York by train, that she walked rapidly and carried her own luggage. That on May 23, 1949, appellant attended the horse races in Boston, Massachusetts, that she remained through six of the races and returned therefrom via a streetcar and subway. That on May 26, 1949, plaintiff was seen in Brookline, Massachusetts, riding in an automobile, shopping in various stores, and carrying various parcels. There was another affidavit averring that on May 21, 1949, plaintiff also attended the horse races at Boston, Massachusetts, and was seen betting various sums of money on different races. In another affidavit it was averred that on May 21, 1949, while plaintiff was in attendance at the races, she "walked fast and shouldered her way through the large crowd without any trouble".

[1-5] An application for a continuance is addressed to the sound discretion of the trial court. While, in a proper case a continuance should be granted because of the illness of a party or of a member of his family, nevertheless, in considering all such applications the court should be governed by the course which seems most likely to accomplish substantial justice. And in seeking such a course, the court may take into consideration the legal sufficiency of the showing in support of the motion and the good faith of the moving party. Illness of a party does not *ipso*

facto require the granting of the motion, and it is for the trial court in all cases, except where otherwise expressly provided by statute, to determine whether or not the circumstances shown are such as to make it proper that a continuance be granted, and its conclusion thereon will not be disturbed unless there has been a plain abuse of discretion. Because of the necessity for orderly, prompt and effective disposition of litigation and the loss and hardship to the parties to an action, as well as to witnesses therein, it becomes and is a part of the bounden duty of the trial judge, in the absence of some weighty reason to the contrary, to insist upon cases being heard and determined with as great promptness as the exigencies of the case will permit. Under the facts hereinbefore narrated, it is manifest that in denying plaintiff a continuance upon the ground of disabling illness, and holding that the plaintiff was physically able to come to California for the trial and to participate therein, there was no abuse of discretion. *McElroy v. McElroy*, 32 Cal.2d 828, 832, 198 P.2d 683; *Lindsey v. Wright*, 84 Cal.App. 499, 503, 258 P. 438; *Lynch v. Superior Court*, 150 Cal. 123, 88 P. 708; *Flynn v. Fink*, 60 Cal.App. 670, 672, 673, 213 P. 716.

Appellant further contends that the motion for a continuance should have been granted because there was pending in the courts of Massachusetts an action, which was at issue, to determine the validity of the Massachusetts divorce decree rendered December 31, 1921. In determining appellant's claim that the court abused its discretion in not continuing the California action until the one in Massachusetts had been determined, it must be borne in mind that the present action in California was commenced November 4, 1948, the hearing on appellant's motion for alimony *pendente lite*, attorneys' fees and costs was heard and the order denying such application was entered December 10, 1948. That on December 20, 1948 appellant filed her notice of appeal from such order. In the meantime, respondent Kalmus, on November 5, 1948, had filed his answer to appellant's complaint and also his cross-

complaint. It was not until December 29, 1948, nineteen days subsequent to the conclusion of the foregoing order to show cause proceeding, and nine days after she had taken an appeal therefrom, that appellant filed in the Massachusetts court her petition to vacate, on the ground of fraud, the aforesaid decree of divorce granted by the Massachusetts court in 1921.

The pendency of the Massachusetts action was first set up by appellant in her answer to respondent's cross-complaint, and was made one of the two grounds of the motion for continuance on May 31, 1949.

While conceding that the trial court herein was possessed of the power to proceed, *Dandini v. Dandini*, 86 Cal.App.2d 478, 483, 195 P.2d 871; *Hammell v. Britton*, 19 Cal.2d 72, 83, 119 P.2d 333, because it had jurisdiction over both of the parties and the subject matter, appellant predicates her claim of abuse of discretion on the choice of the California court to exercise that power under the circumstances here present.

[6,7] Without doubt, the discretion contemplated by law is not a capricious or arbitrary one, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is to be exercised in conformity with those legal principles, the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. With reference to when, in a legal sense, discretion has been abused, it may be said that abuse of discretion occurs when in its exercise a court exceeds the bounds of reason, all of the facts and circumstances before it being considered. And the complaining party must affirmatively establish abuse of discretion. It is never presumed, *Silver v. Shemanski*, 89 Cal.App.2d 520, 529, 201 P.2d 418.

[8] In the light of the principles just enunciated, we conclude that the court below did not abuse its discretion in denying a continuance because of the pendency of the Massachusetts action. This conclusion is influenced by a consideration of

the facts and circumstances which were before the trial court. In the first place, it was appellant who first chose the courts of California as the forum for determination of the litigation which she commenced in the first action on July 21, 1948. Such selection was ratified by her when she filed an amended complaint in that action. When, on October 28, 1948, appellant dismissed this action she was again at liberty to select her forum. Again, she chose the California courts by filing the present action therein. She further utilized this selection by procuring an order to show cause, in response to which she brought respondent into the California court. It was only after an adverse ruling was made in her attempt to secure relief sought on the order to show cause, after an appeal was taken by her from such order, and when confronted with a cross-complaint for declaratory relief and injunction in the California action, that appellant filed the Massachusetts action. We are not here confronted with a situation wherein the California court refused a continuance because of the pendency of a *prior* action filed in another jurisdiction, but on the contrary, refusing a continuance because of the pendency in a sister state of a *subsequently* filed action. Furthermore, the record reflects that the Massachusetts court refused to accede to appellant's attempt to advance trial of the case there pending when she urged the pendency of the California action as a ground for such advancement.

[9] 17 Corpus Juris Secundum, Continuances, § 24, page 205 is authority for the statement that while a continuance should be granted on facts that show that justice requires that the cause should await the trial and conclusion of another proceeding affecting the same parties, "it is essential that the entire relief demanded and sought for in the first action can be awarded in the other".

[10] In the case of *Simmons v. Superior Court*, 96 Cal.App.2d 119, 122, 214 P.2d 844, 848, cited by appellant, the court stated: "It is settled California law that

the pendency of a prior action in a court of competent jurisdiction, predicated on the same cause of action and between the same parties, constitutes good ground for abatement of a later action within the same jurisdiction either in the same court or in another court having the jurisdiction, 1 Cal.Jur. 23, sec. 4; and it is held that the first court to assume and exercise jurisdiction in a particular case acquires exclusive jurisdiction and prohibition lies to restrain another court from proceeding if it is threatening to do so. (Citing cases.)"

With reference to the rule which applies between courts of different states with reference to "abatement" of or "stay of proceedings" by reason of the pendency of two actions predicated on the same cause of action and between the same parties, the court, in the last-cited case stated, 96 Cal.App.2d at page 123, 214 P.2d at page 848, "the court in which the *second* action is brought may *in its discretion* stay or suspend that suit, awaiting decision in the *first* one, or, influenced by a spirit of comity, may refuse to entertain it, if the same relief can be awarded in the *prior* suit". (Emphasis added.)

In *Pesquera Del Pacifico S. De R. L. v. Superior Court*, 89 Cal.App.2d 738, 741, 201 P.2d 553, 555, the order of the trial court refusing to stay proceedings upon the ground of a prior pending action in Mexico was upheld for the reason that "the trial court found there was no satisfactory proof or evidence to show that any or *all of the issues* presented in the suit pending in Mexico are identical with or similar to the issues before him". (Emphasis added.)

In the present action we find, (1) appellant is a resident of the state of California, (2) the California action was commenced first, (3) the California case has decided every issue raised in the Massachusetts case, as well as a great many additional issues; whereas (1) the Massachusetts case was the subsequently commenced action, and (2) its issues are much more limited and a decision therein will not determine all of the issues in the California action.

The issues tendered by the instant proceeding and those tendered by the Massachusetts case are not at all the same. An examination of the respondent's cross-complaint for declaratory relief and for an injunction immediately reveals the fact that were a trial of the Massachusetts case to be had prior to the trial of the California action, and should appellant be successful in the former, the decision would settle but a fraction of the issues determined and settled by the findings and judgment of the California court now under consideration.

[11] Appellant further contends that the court was without jurisdiction to render the judgment appealed from. In support of this contention it is argued that there was no compliance by respondents at the trial with that portion of paragraph 1, section 594 of the Code of Civil Procedure, which provides that one may proceed with a trial and take judgment in a cause in the absence of the adverse party, "provided, however, if the issue to be tried is an issue of fact, proof must first be made to the satisfaction of the court that the adverse party has had five days notice of such trial".

Under the circumstances with which we are confronted in this case, appellant's contention is without merit. She relies strongly upon the cases of *Hurley v. Lake County*, 113 Cal.App. 291, 298 P. 123, and *Stubblefield v. Long*, 125 Cal.App. 329, 330, 13 P.2d 862. But neither of the cited cases militate against the statement that it is the fact that service was made, rather than the proof of service that vests the court with jurisdiction to act. The jurisdiction of the court does not depend upon the preservation of the proof of service but upon the fact that service has been made. As heretofore pointed out, appellant in her brief says, "It is true that appellant actually had *more* than the required 5 days notice. *She has never claimed otherwise*". (Emphasis added.) To this must be added the fact that on May 24, 1949, appellant, through her then attorneys served on respondent Kalmus a notice of motion for continuance in which it was specifically stated that the cause in which it was filed, "is now set for hearing on the first day of

June, 1949". The record further contains a letter written by appellant on May 20, 1949, some twelve days before the date set for trial, addressed to the aforesaid attorneys, and in which communication she authorized them to act for her to obtain a continuance of the trial, "which is now set for hearing on June 1, 1949". At no time did appellant urge a continuance on the ground that she did not have five days notice of the trial date. Furthermore, appellant was represented by counsel on the motion for a continuance and the same attorneys appeared on the date set for trial, upon which occasion they asked for and were granted permission to withdraw as attorneys for appellant.

[12] We therefore hold that in view of appellant's admission in her brief that she "had more than the required five days notice", and "has never claimed otherwise", coupled with the other facts hereinbefore adverted to, she was fully aware, at least on May 20, 1949, that the cause was set for trial on June 1. That on May 24, seven days before the trial date, she gave notice of motion for a continuance of said trial, and appeared by counsel to seek such continuance. With this admitted knowledge of the trial date, there was no necessity for presenting any additional proof by way of offering in evidence the affidavit of service of notice of trial on March 8, 1949, or otherwise. And certainly, no prejudice was suffered by appellant from the failure so to do.

Appellant's admission that she had more than five days notice of the date of trial, coupled with the hereinbefore documentary evidence before the court showing conclusively that due and regular notice of trial had been given her, were sufficient to establish the fact that she had been given the notice required by section 594 of the Code of Civil Procedure, and support the court's finding to that effect.

[13] It might also be here noted that at appellant's request in her "Notice to Clerk to Prepare a Record on Appeal", the notice of trial and affidavit of service thereof by mail on March 8, 1949, have been brought before this court. We may

therefore, consider such documents on the theory that having been filed in the papers in the case and noted in the register of actions, and which documents could be judicially noticed by the court of original jurisdiction, they may be considered on appeal. *Brock v. Fouchy*, 76 Cal.App.2d 363, 367, 172 P.2d 945. If there ever was a situation for the application of the maxim of jurisprudence (Civ.Code, sec. 3532), "The law neither does nor requires idle acts", the contention of appellant to which we have just given consideration provides it.

From what we have said up to this point, it necessarily follows that the court was clothed with jurisdiction to render the judgment of June 13, 1949, and that no prejudicial error was committed in denying appellant's motion for a continuance of the trial on June 1, 1949.

We come now to a consideration of appellant's claim that reversible error was committed in denying her motion under section 473 of the Code of Civil Procedure. In the instant case, judgment was entered on June 13, 1949. On August 9, 1949, appellant served and filed her notice of appeal from such judgment. On September 21, 1949, she filed her notice of motion under section 473 of the Code of Civil Procedure to set aside said judgment, and on September 29, 1949, the motion was denied. While conceding that generally, the effect of an appeal is to deprive the trial court of jurisdiction until the appeal has been determined and the remittitur from the appellate tribunal has been filed in the trial court, and that such last named court, while its jurisdiction is so suspended, cannot vacate or set aside the judgment, appellant insists that in the case at bar, the provisions of section 946 of the Code of Civil Procedure should not be read into section 473 as an implied limitation upon the statutory power of the trial court under the last cited section. That section 946 should be limited to preventing any action by the trial court to enforce the judgment appealed from. That the remedies by appeal and by section 473 are concurrent and independent.

[14] At the outset the question arises whether appellant's motion purportedly made under section 473 of the Code of Civil Procedure was, in fact, such a motion. In support of appellant's motion to vacate the judgment, no affidavit was filed averring that the judgment was taken against her because of any "inadvertence, mistake or excusable neglect". The motion was based on cumulative assertions of ill health and erroneous prophecies of her attorneys as to what action the court would take on the aforesaid motion for a continuance. Neither of these claims come within the meaning of section 473 of the Code of Civil Procedure. An unexpected ruling on a motion for a continuance does not result in "surprise" as contemplated by section 473. *Nicholson v. Nicholson*, 85 Cal.App.2d 506, 508, 509, 193 P.2d 112; *Mann v. Pacific Greyhound Lines*, 92 Cal. App.2d 439, 445, 446, 207 P.2d 105.

[15, 16] And notwithstanding the foregoing, we are persuaded that the court was without jurisdiction to grant relief under the provisions of section 473 of the Code of Civil Procedure. When an appeal is taken from a judgment, unless it is subsequently dismissed, it must be deemed pending in the reviewing court until the appeal is determined. The situation here presented is not one in which the appeal may not be deemed to oust the trial court of jurisdiction. 2 Cal.Jur., sec. 178, p. 415. Therefore, the appeal in the instant case, having been regularly taken, its effect was to transfer the cause to the reviewing tribunal and to suspend the power of the trial court to vacate the judgment. *Bracey v. Gray*, 71 Cal.App.2d 206, 208, 162 P.2d 314; *Swan v. Riverbank Canning Co.*, 81 Cal.App.2d 555, 558, 184 P.2d 686; *California Real Estate Exchange v. Sequoyah Hills Co.*, 75 Cal.App. 695, 696, 243 P. 54; *Field v. Hughes*, 134 Cal.App. 325, 327, 25 P.2d 241; *Linstead v. Superior Court*, 17 Cal.App.2d 9, 12, 61 P.2d 355.

Appellant earnestly insists that reversible error was committed in denying her suit money and temporary alimony. The minute order entered upon the termination of the taking of evidence on appellant's

application, reads as follows: "The order to show cause having heretofore been heard, argued and submitted, the Court now makes the following findings and order: The Court finds that the plaintiff has accepted support from the defendant since the entry of the Massachusetts divorce decree. That plaintiff has accepted the benefits of the 1945 contract and has failed to return the benefits to defendant or to give notice of rescission of said contract. For the purposes of this hearing, the contract of 1945 is found to be a valid contract. The Court finds that there was no reconciliation between the parties and that the plaintiff has failed to establish the relationship of husband and wife between the parties by a preponderance of the evidence. Alimony *pendente lite*, attorney fees and costs are denied".

Appellant's claim of reversible error is based primarily upon that portion of the foregoing order reading, "that the plaintiff (appellant herein) has failed to establish the relationship of husband and wife between the parties by a preponderance of the evidence". Such holding, says appellant, is "plainly and prejudicially erroneous. The degree of proof required of Appellant upon the issue of the marital relationship between Appellant and Respondent at the hearing upon her application for suit money and temporary alimony is that she show that there is a fair or reasonable probability of her being able at the trial to prove such relationship by a preponderance of the evidence. In other words, preponderance of the evidence is the standard of proof required at the trial, but fair probability is all that is demanded at the show cause hearing".

It should, however, be observed from a reading of the foregoing minute order that the lower court stated only three of the reasons why it denied the application of appellant, viz: (1) Estoppel of appellant to claim suit money and alimony *pendente lite* in attacking a divorce decree of the Massachusetts court, under which for twenty-seven years she had received \$7,500 each year as alimony. (2) Estoppel of appellant to claim suit money and tempo-

rary alimony in attacking the said Massachusetts divorce decree because of (a) the 1945 contract between appellant and respondent, (b) appellant's receipt of substantial considerations under such contract from respondent, and (c) appellant's failure to restore such considerations to respondent and her failure to give notice of rescission of the said 1945 contract. (3) Failure of appellant to establish the relationship of husband and wife between herself and respondent by a preponderance of the evidence.

[17] It is the validity of the court's action in denying appellant's application which is here reviewable, and not the court's opinion or statement of reasons for its action.

[18] With the rule just enunciated in mind, we are satisfied from a reading of the record, revealing as it does the facts and circumstances before the court in the case at bar, that no conclusion could have been arrived at other than the one reached by the court, whether that conclusion was based on the "preponderance of the evidence" rule or upon the rule contended for by appellant that "when there is a fair probability at such hearing that the marriage will be proven at the trial, temporary alimony and suit money should be allowed". As is set forth in section 137 of the Civil Code, any allowance of counsel fees and costs in a divorce action is confided to the discretion of the trial court. Because the granting and refusing of alimony in actions for divorce is a matter which lies largely in the discretion of the trial court, an appellate tribunal will not interfere unless it be made clearly and affirmatively to appear on the face of the entire record in the case that the discretion was abused.

[19] Regardless of the findings which appear in the minute order, appellant's application may have been denied for reasons not therein expressed. In the exercise of its discretion the court was entitled to, and undoubtedly did, consider appellant's necessity for the financial aid she sought, and in that regard, as pointed out

by respondent, there was evidence in the record that—

"(a) Appellant was already receiving from defendant (and had been receiving for nearly three decades) the sum of \$7500.00 per year as alimony under the Massachusetts divorce decree which she was purporting to attack and, as supplemented by the February 19, 1945, contract, will continue to receive such alimony for the balance of her life should respondent predecease her.

"(b) Appellant, under her contract with Technicolor Corporation, was receiving and will receive for life \$11,000.00 annually without rendering any service therefor.

"(c) Appellant had had a total income of over \$30,000.00 per year for a number of years right down to the time of the hearing on her application.

"(d) Appellant had received from respondent at the time of the Massachusetts divorce in 1921 certain household effects, a \$25,000.00 insurance policy, the sum of \$5,000.00 in cash, 1000 shares of stock of the Technicolor Company and negotiable bonds in the amount of \$25,000.00; and

"(e) Plaintiff had received from defendant under the contract of February 19, 1945, \$36,625.00 cash".

[20] As heretofore pointed out, a reviewing tribunal does not pass upon the reasoning or argument upon which judicial action is taken but reviews only the action itself. A wife seeking the awards here under consideration must establish necessity for them. They are not a matter of absolute right and may be awarded only upon a finding of necessity. *Loeb v. Loeb*, 84 Cal.App.2d 141, 144, 148, 190 P.2d 246; *Baldwin v. Baldwin*, 28 Cal.2d 406, 413, 170 P.2d 670; *Warden v. Warden*, 218 Cal. 98, 99, 21 P.2d 418.

[21] Concerning appellant's claim that the proof offered on the hearing now under review was sufficient to establish a *fair probability* that she would, at the trial, prove the existence of her marriage to respondent, she relied on two grounds: (a) that the aforesaid Massachusetts divorce was invalid; and (b) that a New

York common-law marriage was contracted in 1923. It would unduly prolong this already lengthy opinion to narrate the evidence, oral and documentary, received at the hearing. Suffice it to say that in the more than 800 typewritten pages of testimony taken on the order to show cause hearing there is revealed evidence that appellant was given an ample opportunity to be heard, that the court was justified in giving full faith and credit to the Massachusetts decree, and holding that the claimed New York common-law marriage was never contradicted; that no reconciliation had ever taken place between the parties, and that they never resumed relations as husband and wife after the Massachusetts decree of divorce. That thereby, the subject matter which forms the jurisdictional prerequisite for a court to order support, costs and counsel fees *pendente lite* was extinguished. And this is so, whether measured by the "preponderance of evidence" rule or on the "fair probability" rule that the wife will on the trial succeed in establishing the marriage. *Carbone v. Superior Court*, 18 Cal.2d 768, 771, 117 P.2d 872, 136 A.L.R. 1260; *Loeb v. Loeb*, supra; *Knox v. Knox*, 88 Cal. App.2d 666, 676, 199 P.2d 766. The facts and circumstances which were before the court satisfy us that the order denying appellant's application for suit money and alimony *pendente lite* was a proper exercise of the discretion vested in it.

[22, 23] We perceive no error in the court's ruling sustaining objections to the introduction of some proffered newspaper clippings and excerpts from other publications to prove an existent marriage relationship between the parties. At best, such evidence was merely cumulative, and the discretion of a court to stop cumulative testimony is not only inherent, but is expressly recognized by section 2044 of the Code of Civil Procedure. *Douillard v. Woodd*, 20 Cal.2d 665, 669, 128 P.2d 6; *Sheridan v. Sheridan*, 15 Cal.App.2d 200, 201, 59 P.2d 175.

Finally appellant contends that reversible error was committed in allowing her counsel to withdraw on the day after the denial of the foregoing motion for a contin-

uance, which date of withdrawal was the day set for trial of the action. Appellant's claim in this regard is that the motion of her attorneys to withdraw was granted in violation of the provisions of section 284 of the Code of Civil Procedure which permit a change of attorneys at any time before or after judgment or final determination "1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes; 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other * * *".

Appellant's main complaint is that at no time was she given notice prior to the making and granting of the motion by her then attorneys to withdraw as her counsel. That this contention is without merit is made manifest by the record.

It appears therefrom that when appellant filed the prior action, she was represented by attorneys Lowenthal and Elias. When she dismissed that action she was represented therein by attorney Max M. Gilford. When appellant instituted the present action she was represented by attorney Max M. Gilford. At the hearing on the order to show cause in this action she was represented by Messrs. Gilford, Russell and Robert Mendelson. On February 11, 1949, appellant filed in the instant action a "substitution of attorneys" wherein she was substituted *in propria persona* in the case. On May 24, 1949, attorneys Clifford Thom and David L. Sefman, acting as attorneys for appellant, served upon respondent Kalmus the aforesaid motion for continuance of this case. On the day of the hearing of the motion for continuance, Messrs. Thoms and Sefman filed a document substituting them as attorneys for appellant "in the place and stead of Natalie M. Kalmus, *in propria persona*". On the day following the denial of the motion for continuance, when the case was called for trial, the last-named attorneys presented to the court a notice of motion for withdrawal as attorneys of record. The notice of motion read as follows:

"David L. Sefman and Clifford Thoms, attorneys at law, will move the above entitled Court on June 1, 1949, in the Depart-

ment of the Presiding Judge, to withdraw as attorneys for the plaintiff and cross-defendant, Natalie M. Kalmus, on the grounds that they were employed by the said Natalie M. Kalmus for the limited purpose of attempting to secure from the above entitled Court a continuance of the trial in the above entitled matter which was set for hearing on June 1, 1949.

"Said motion is based upon the letter dated May 20, 1949, directed to Clifford Thoms and David L. Sefman, attorneys, and signed by Natalie M. Kalmus, a copy of which is hereto attached, and upon the records and files in the above entitled action."

The letter referred to in the foregoing notice of motion, and a copy of which was attached thereto, is as follows:

"David L. Sefman and Clifford Thoms

"420 Chester Williams Building

"Los Angeles 13, California

"In re: Natalie M. Kalmus v. Herbert Kalmus

Los Angeles Superior Court No. D370515

"Gentlemen:

"This is to confirm our understanding that you are to act as my attorneys *for the limited purpose only* in attempting to secure from the above entitled Court a continuance of the trial of the above entitled matter, which is now set for hearing on June 1, 1949.

"s/s NATALIE M. KALMUS
NATALIE M. KALMUS"
(Emphasis added.)

When the motion to withdraw just referred to was presented by attorneys Thoms and Sefman it was opposed by respondent Kalmus until said attorneys filed with the court the original of the above-mentioned letter addressed to them by appellant.

[24, 25] As a matter of fact, no order permitting attorneys Thoms and Sefman to withdraw was necessary, and notice to ap-

pellant under section 284 of the Code Civ. Proc. was therefore unnecessary. By her letter of May 20, 1949, appellant specifically confined the authority conferred upon the last-named attorneys to "act as my attorneys for the limited purpose only in attempting to secure from the above entitled Court a continuance of the trial * * *". When the motion for continu-

ance was denied their authorized service as appellant's counsel was completed and terminated. Had said attorneys attempted to act as appellant's counsel at the trial they would have been so acting without authorization and contrary to the limitation placed upon their services by appellant herself in the aforesaid letter. We therefore conclude that the motion of attorneys Thoms and Sefman to withdraw must be assumed to have been made pursuant to the instructions of the appellant when she strictly limited the scope of their employment. As heretofore pointed out, had these attorneys undertaken to represent appellant at the trial they would be acting without the scope of their authority, because such authority was strictly limited by appellant herself to representing her on the motion for a continuance. The withdrawal order was therefore properly made as one authorized and consented to by appellant herself in her letter aforesaid. One cannot be heard to complain of orders made by a court at the instance of such party, nor can complaint be made of claimed error when one himself has invited it. *Shapiro v. Equitable Life Assurance Society*, 76 Cal.App.2d 75, 94, 172 P.2d 725; *In re Radovich*, 74 Cal. 536, 540, 16 P. 321; *Duff v. Duff*, 71 Cal. 513, 525, 12 P. 570.

For the foregoing reasons, the judgment and orders from which these consolidated appeals were taken are, and each is affirmed.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; CARTER, J., dissenting.

103 Cal.App.2d 512

**OIL WORKERS INTERNATIONAL UNION,
CIO, et al. v. SUPERIOR COURT,
CONTRA COSTA COUNTY et al.
No. 14088.**

District Court of Appeal, First District,
Division 1, California.

April 18, 1951.

Original certiorari proceeding by Oil Workers International Union, CIO, an unincorporated association, and others, against Superior Court of the State of California in and for the County of Contra Costa, and Union Oil Company of California, a corporation, to review an order in which the Superior Court, Hugh H. Donovan, J., had found that petitioners had violated a temporary restraining order, and adjudged them in contempt of court therefor. The District Court of Appeal, Wood, J., held that the judgments of contempt entered on the various complaints were supported by substantial evidence except for those orders annulled.

Order affirmed except as to provisions named which are annulled.

Peters, P. J., dissented in part.

1. Contempt ⚡66(7)

In appraising sufficiency of evidence in a contempt proceeding, inquiry is whether judgment holding a petitioner guilty of contempt of court is supported by substantial evidence, not whether it is supported by a preponderance of evidence, it being function of trial court, not reviewing court, to weigh evidence.

2. Contempt ⚡66(7)

On petition to review judgment of trial court holding petitioner guilty of contempt sole question before reviewing court is one of jurisdiction of trial court to render judgment under review and if it be determined that in rendition of such judgment trial court acted within its jurisdiction, then inquiry ends, and only order reviewing court is authorized to make is one affirming proceedings of trial court but if it should appear from record that trial court either had no jurisdiction to pronounce judgment or exceeded its jurisdiction in so doing, then proceedings should be annulled. Code Civ.Proc. § 1075.

3. Certiorari ⚡68

Other than for purpose of determining whether evidence before trial court was sufficient to give that court jurisdiction, writ of certiorari will not be granted to review errors of law or mere questions of fact.

4. Appeal and error ⚡837(1)

On passing on question of trial court's jurisdiction, reviewing court may consider evidence before trial court for purpose of determining whether it was sufficient to give that court jurisdiction to render its judgment finding accused guilty of contempt, and in case court finds that evidence is insufficient to sustain conviction it will annul judgment, but in such a case review of evidence is limited to determining whether there was any substantial evidence before trial court to sustain its jurisdiction.

5. Appeal and error ⚡1012(1)

The power to weigh evidence rests with trial court.

6. Contempt ⚡60(3)

An accused on trial for contempt must be proved guilty beyond a reasonable doubt.

7. Contempt ⚡66(7)

Rule that an accused on trial for contempt must be proved guilty beyond all reasonable doubt has no application in a proceeding to review judgment of a trial court in finding accused guilty of contempt.

8. Contempt ⚡66(7)

In proceeding to review judgment of trial court in finding accused guilty of contempt, extent of reviewing court's power is to inquire whether there was any evidence before trial court sustaining its jurisdiction.

9. Contempt ⚡66(7)

Reviewing court may examine evidence to determine jurisdictional question and annul judgment of contempt if evidence does not satisfy that judgment or, conversely, annul an order which erroneously sustained a demurrer to an affidavit which sufficiently alleges commission of a contempt.

10. Appeal and error ⇨989

If trial court had jurisdiction, reviewing court's attention is confined to a consideration of whether there was any substantial evidence to support judgment of contempt.

11. Certiorari ⇨28(2)

Writ of certiorari will issue only when an inferior tribunal has acted without or in excess of its jurisdiction.

12. Certiorari ⇨5(1)

Writ of certiorari cannot be used as a writ of error whether an appeal be available or not.

13. Habeas corpus ⇨85(1)

In a proceeding on a writ of habeas corpus to review a judgment of contempt, burden is on petitioner to file necessary records and papers with reviewing court and burden is on him to establish necessary grounds for his release, and presumption of regularity of proceedings in support of judgment prevails in absence of evidence to contrary.

14. Injunction ⇨231

In proceeding to review order of trial court adjudging local union, and certain union members in contempt for violation of temporary restraining order prohibiting certain types of picketing, implied finding that union members adjudged guilty of contempt for participation in attempt to prevent train from entering plaintiff's oil refinery had knowledge of provisions of temporary restraining order prohibiting such activity was supported by substantial evidence.

15. Evidence ⇨151(1)

The knowledge a person may have when material to an issue in a judicial proceeding is a fact to be proven as any other fact and it differs from physical objects and phenomena in that it is a state of mind like belief or consciousness and cannot be seen, heard or otherwise directly observed by other persons and it may be evidenced by an affirmative statement or admission of possessor of it or if he is silent or says he did not have such knowledge, it may be evidenced by his conduct or by proof that information was given

him in writing and he read the document, or orally and he heard the statement made.

16. Evidence ⇨151(1)

Whenever motive or intent with which an act was done is relevant, direct testimony is admissible, although not conclusive.

17. Evidence ⇨151(1)

When knowledge of a fact has important bearing on issues, evidence is admissible which relates to question of existence or non-existence of such knowledge and a wide range of proof is allowed.

18. Contempt ⇨60(3)

Where it appears by substantial evidence that a person committed an act proscribed by a lawful order of a court and did so with knowledge of that order and its pertinent provisions, there is substantial evidence that will support a finding of an intentional violation of the order. Code Civ.Proc. § 1209.

19. Injunction ⇨231

In proceeding to review orders of trial court adjudging international union, local union and certain union members in contempt for violation of temporary restraining order prohibiting certain types of picketing, judgment finding union member in contempt for violation of restraining order by threatening train crew with bodily harm and in attempting to strike crew with rocks while crew was switching freight cars preparatory to driving train through entrance to plaintiff's refinery was supported by substantial evidence.

20. Injunction ⇨230(1)

Where temporary restraining order prohibited union and union members from intimidating, obstructing, molesting, harassing or threatening bodily harm or injury to plaintiff, its officers, agents, employees, customers or operator of any vehicle, engine or train while entering, or leaving plaintiff's oil refinery, complaint alleging that international union and local union and certain union members violated temporary restraining order by throwing rocks at and damaging a switch engine of plaintiff at refinery and threw rocks at certain employees of plaintiff who were

then on refinery property did not state a contempt.

21. Contempt ⇨54(4)

In case of an alleged contempt occurring outside presence of court, affidavit charging contempt must state facts which constitute contempt and if it fails to do so, court does not acquire jurisdiction to render a judgment thereon, no matter how clearly evidence at trial may demonstrate a violation of judicial process.

22. Injunction ⇨230(3)

Evidence that union member assisted other union members in preventing loading of third party's truck which was to remove coke from plaintiff's oil refinery, threatened truck driver and threatened to dump truck, sustained finding that such union member was in contempt for violation of temporary restraining order prohibiting the intimidating, obstructing, molesting and harassing of persons doing business with plaintiff's oil refinery while entering and leaving refinery.

23. Injunction ⇨230(2)

Complaint alleging that certain union members intimidated, molested, harassed and threatened bodily harm to and threw rocks at certain employees of oil refinery who were then on property of refinery did not state violation of temporary restraining order prohibiting any such acts as to any persons having business with oil refinery who were entering, attempting to enter, leaving or attempting to leave refinery.

24. Injunction ⇨231

In proceeding to review order of trial court adjudging union and certain union members in contempt for violation of temporary restraining order prohibiting certain types of picketing and interference with any person attempting to enter or leave plaintiff's oil refinery, findings that certain union member was in contempt for violation of order and that he threw rocks at train crew while crew was operating train from refinery and that union member and others stationed themselves as pickets for purpose of accomplishing

interference with movement of train, was sustained by substantial evidence.

25. Injunction ⇨231

In proceeding to review order of trial court adjudging local union and certain union members in contempt for violation of temporary restraining order prohibiting certain types of picketing and interference with any person attempting to enter or leave plaintiff's oil refinery, question was whether local union bore such a relation to transaction that it was a participant, directly or through its member actors, and was legally responsible for acts done, as acts enjoined by restraining order.

26. Injunction ⇨231

In proceeding to review order of trial court adjudging local union and certain union members in contempt for violation of temporary restraining order prohibiting certain types of picketing and interference with any person attempting to enter or leave plaintiff's oil refinery, findings that local union was guilty of contempt of authority of court for violation of restraining order by union members were supported by substantial evidence and were within jurisdiction of trial court to render.

27. Trade unions ⇨7

Fact that constitution and by-laws vested in International Union, acting through its International officers, power to authorize a strike called by a local union, and cast on International president duty to conduct all authorized strikes, did not alone make International legally responsible and amenable for acts done by its members or by one of its locals in contempt of authority of a court.

28. Trade unions ⇨7

Where International Union had power to authorize a strike called by a local union and duty to conduct all authorized strikes, but picketing was conducted through local union and its officers and committeemen, member-pickets were agents and representatives of International and International could not escape responsibility for acts of its agents and representatives, done in violation of temporary re-

straining order after International received notice and knowledge of order and its provisions.

29. Injunction ⇨231

In proceeding to review order of trial court adjudging International Union, local union and certain local union members in contempt for violation of temporary restraining order prohibiting certain types of picketing of plaintiff's oil refinery and interference with any person attempting to enter or leave oil refinery, findings that International Union was guilty of contempt as result of violation of temporary restraining order by members of local union, were supported by substantial evidence and were within jurisdiction of trial court to render.

30. Constitutional law ⇨90

Torts ⇨10(9, 12)

Where acts for which International Union, local union and certain union members committed were adjudged in contempt of court were in disobedience of that portion of temporary restraining order which forbade them from threatening bodily harm or injury to plaintiff's officers, agents, employees, customers, or any other persons having business with plaintiff, or attempting to serve plaintiff while entering, attempting to enter, leaving or attempting to leave plaintiff's refinery, such acts did not constitute peaceful picketing or come within constitutional guarantee of freedom of speech.

31. Trade unions ⇨7

Where local and international unions, incorporated associations, were in court as party defendants in an action in which plaintiff sought an injunction against each union restraining certain types of picketing, under statute declaring that when two or more persons, associated in any business, transact such business under a common name, whether it comprises names of such persons or not, associates may be sued by such common name, court acquired jurisdiction over unions to same extent as jurisdiction it had over any other party during pendency of action, including power to enforce obedience to its judgments, orders

and process. Code Civ.Proc. §§ 128, 388, 389.

32. Contempt ⇨40

Under statute declaring that disobedience of any lawful judgment, orders, or process of court, is a contempt of authority of that court and prescribing procedure for enforcement of such judgments, orders or process, proceeding is not a criminal action or proceeding but a special proceeding, criminal in character, not for punishment of offense against state, but intended to implement inherent power of court to conduct business of court and enforce lawful orders of court. Code Civ.Proc. §§ 1209-1222.

33. Contempt ⇨29

Under statute declaring that disobedience of any lawful judgment, order, or process of court is a contempt of authority of that court and statutes providing for procedure in contempt proceedings, within statute providing that word person "includes" a corporation as well as a natural person, quoted word is used as a word of enlargement, not of limitation. Code Civ.Proc. §§ 1209-1222.

See publication Words and Phrases, for other judicial constructions and definitions of "Includes".

34. Contempt ⇨29

In a proceeding under statute declaring disobedience of any lawful judgment, order, or process of court a contempt of authority of that court and prescribing procedure for contempt proceedings, it must appear that unincorporated association when involved as a party defendant be such a person as possesses capacity to obey order under consideration. Code Civ.Proc. §§ 1209-1222.

35. Commerce ⇨8(1)

Labor Management Relations Act of 1947 did not deprive state court of authority to declare International Union, local union, and local union members in contempt for violation of temporary restraining order which forbade picketing by means of acts of violence. National Labor Relations Act, §§ 1 et seq., 8(b)(4)(B, C), 10, as

amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 151 et seq., 158(b)(4) (B, C), 160.

36. States ⇨12(3)

A state has policing jurisdiction over its territorial waters, a jurisdiction that may be exercised by a state for all proper purposes.

37. Admiralty ⇨2

Under federal statute declaring that federal district courts have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction but saving to suitors in all cases right of a common-law remedy where common law is competent to give it, even if boat picketing of plaintiff's oil refinery by union members was a civil case of admiralty or maritime jurisdiction, trial court had jurisdiction to issue temporary restraining order forbidding picketing by means of acts of violence and to enter judgments of contempt for violation of restraining order. 28 U.S.C.A. § 1333; Act Cong. June 25, 1948, § 38, 28 U.S.C.A. note preceding section 1; Motorboat Act of 1940, §§ 1-21, 46 U.S.C.A. §§ 526-526t.

38. Admiralty ⇨1

In enactment of Motorboat Act of 1940, under which federal government asserts and exercises exclusive jurisdiction of every vessel propelled by machinery and not more than 65 feet in length, Congress did not assert exclusive federal jurisdiction or any jurisdiction over conduct of international or local union and union members in using picket boats with outboard motors to picket plaintiff's oil refinery and types of conduct which trial court found and declared to constitute a contempt of court as a result of violation of temporary restraining order prohibiting picketing by means of acts of violence. Motorboat Act of 1940, §§ 1-21, 46 U.S.C.A. §§ 526-526t.

39. Admiralty ⇨18

For a tort to be maritime alleged injury to person or property must be consummated on navigable waters, and not on land.

40. Admiralty ⇨22

Where acts of union members in violating temporary restraining order issued by trial court forbidding picketing of plaintiff's oil refinery by means of violence, took place on land although union members were using boats to picket oil refinery at time acts complained of occurred, fact that picketing by boat occurred on navigable waters did not bring such picketing within exclusive jurisdiction of federal courts. 28 U.S.C.A. § 1333; Act Cong. June 25, 1948, § 38, 28 U.S.C.A., note preceding section 1; Motorboat Act of 1940, §§ 1-21, 46 U.S.C.A. §§ 526-526t.

41. Injunction ⇨231

In proceeding to review order of trial court adjudging International Union and local union and certain union members in contempt for violation of temporary restraining order prohibiting certain types of picketing, question whether order directing issuance of subpoena duces tecum requiring unions to produce certain records had a sufficient foundation in fact stated in petitioner's affidavit which accompanied application for that order was not a question for consideration and determination by District Court of Appeal.

42. Injunction ⇨230(1)

Manner of production of documents produced in court in contempt proceeding by union in response to subpoena duces tecum, which documents went into evidence did not affect jurisdiction of trial court to render judgment finding union and certain union members in contempt for violation of restraining order.

43. Evidence ⇨154

Admissibility of evidence is not affected by fact that it was obtained by illegal search and seizure.

44. Injunction ⇨230(1)

In contempt proceeding against union and certain union members for violation of temporary restraining order, where counsel for union moved for a continuance for purpose of oral argument predicated on fact that he had been elected to legislature which convened thereafter and which would continue in session for ap-

proximately four weeks, but on day of motion counsel was not a member nor was legislature in session or in recess, statute authorizing postponement if party's attorney is member of legislature was not available to counsel. Code Civ.Proc. § 595.

45. Trial ⇐106

Oral argument in a civil proceeding tried before a court without a jury, is a privilege, not a right, which is accorded parties by court in its discretion.

46. Contempt ⇐61(1)

In contempt proceeding where union and union members sought a postponement for not less than 30 days, for purpose of preparing for oral argument, but during course of trial, court entertained and received benefit of expression of the views of counsel at every stage, denial of motion in no way impaired jurisdiction of the trial court to proceed.

47. Injunction ⇐231

Plaintiff company, as a person for whose protection temporary restraining order was issued prohibiting union from engaging in certain types of picketing, was a "party beneficially interested" and qualified to apply to Appellate Court for a writ of review, if trial court had dismissed contempt proceedings against union on ground that temporary restraining order was invalid for some reason and therefore plaintiff company was properly joined as a party respondent in contempt proceeding against union and union members. Code Civ.Proc. § 1069.

See publication Words and Phrases, for other judicial constructions and definitions of "Party Beneficially Interested".

48. Injunction ⇐230(1)

In contempt proceeding against international and local unions, and certain union members for violation of temporary restraining order prohibiting certain types of picketing, permitting attorneys for plaintiff in action in which restraining order was entered to prosecute contempt proceeding was not against public policy and did not deprive trial court of jurisdiction to enter judgment.

Edises, Treuhaft & Condon and Bertram Edises, all of Oakland, Robert L. Condon, Martinez, Lindsay P. Walden, Denver, Colo., A. L. Wirin, Fred Okrand, Los Angeles, for petitioners.

Arthur J. Goldberg, Gen. Counsel, Thomas E. Harris, Asst. Gen. Counsel, Washington, D. C., amicus curiae, (Jay A. Darwin, Daniel Fogel, San Francisco, of counsel), for the Congress of Industrial Organizations, as amicus curiae, in support of petitioning labor organizations.

Brobeck, Phleger & Harrison and Robert E. Burns, all of San Francisco, Tinning & DeLap, Archibald B. Tinning, and Robert Eshleman, all of Martinez, for respondent Union Oil Co. of California.

FRED B. WOOD, Justice.

This is a proceeding to review an order in which the superior court found that the petitioners herein had violated a temporary restraining order, and adjudge them in contempt of court therefor.

The petitioners are Oil Workers International Union, CIO, an unincorporated association (hereinafter called the International Union); Local 326 of Oil Workers International Union, CIO, an unincorporated association (hereinafter called the Local Union); J. P. Kenny, individually and as first vice-president of the Local Union; Frank M. Casey, individually and as financial secretary and business agent of the Local Union; Herman Phillips, Jr., Frank M. Silva, Harris E. Lakeman, Montell H. Bullock, Curtis C. Page, and Walter V. Holt.

The International and the Local Unions, Kenny, and Casey are defendants in the action in which the order under review was issued, an action brought by Union Oil Company of California to enjoin the commission of certain acts.

The verified complaint in that action, filed September 13, 1948, alleged that plaintiff operates at Oleum, Contra Costa County, a petroleum refinery, with two principal gates opposite each other and on either side of U. S. Highway No. 40 (one known as the main and the other as the Tormey entrance) and a number of subsidiary en-

trances; the refinery is also located on the main line of the Southern Pacific railroad, with four railroad entrances for the delivery of materials and shipment of products on spur tracks; it is necessary, in the conduct of the business, for plaintiff, the railway company and persons doing business with plaintiff to operate motor vehicles and trains into and out of the refinery; that the International and the Local Unions represent persons employed in the production and processing of petroleum and petroleum products, including persons so employed by plaintiff; that defendant J. Elro Brown is an officer, agent and representative of the International and other named defendants are officers, agents and representatives of the Local Union; that on September 4, 1948, the unions called a strike at the refinery; that ever since then defendants and their agents, members and representatives have and now are picketing the refinery by standing and patrolling in front of the several entrances thereto,—at the main entrance from 10 to 80 pickets and at another entrance from 4 to 20 pickets, and from 2 to 13 at the railroad entrance whenever it appeared that railroad cars were likely to enter or leave; at times as many as 100 pickets congregated at the main and Tormey entrances and by their number intimidated from entering or leaving the refinery, officers, agents, and employees of plaintiff, and other persons desiring to enter or leave; when persons or vehicles attempted to enter or leave by the main or the Tormey entrance, the pickets have so placed themselves in front of the entrance as to physically obstruct the same and prevent such persons and vehicles from utilizing the entrance; on September 4, 1948, defendants caused their pickets to enter the refinery premises and place themselves upon the railroad leading thereto in such manner as to obstruct the railroad entrance thereto and, despite plaintiff's demand to remove themselves, prevented the Southern Pacific Company from operating a train into the premises and caused the train to leave without picking up and removing ten tank cars of petroleum products being shipped by plaintiff and thereby prevented plaintiff and ever since have prevented plaintiff from

shipping said petroleum products; since September 4, 1948, for the purpose of unlawfully forcing plaintiff to accede to their demands, they have engaged in an unlawful scheme and conspiracy to molest, threaten, intimidate and coerce plaintiff, its agents, officers and employees, and the employees of Southern Pacific Company or other persons doing business with plaintiff, for the purpose of preventing the operation of the refinery, and of preventing plaintiff's officers, agents and employees working thereat and of preventing Southern Pacific Company and others from continuing to do business with plaintiff, and in pursuance of said purposes have obstructed the entrances and in the manner described have intimidated persons desiring to enter or leave the refinery; defendants threaten to and unless restrained by order of the court will continue to so obstruct the entrances and intimidate persons desiring to enter or leave, who will be prevented by intimidation and physical blockade from entering or leaving; and plaintiff will thereby be irreparably damaged and prevented from carrying on its said business, from bringing materials to the refinery, and from shipping the products from the refinery; and prayed for judgment enjoining defendants and persons acting under them from carrying on said scheme and conspiracy and from engaging in or continuing any of the acts described, and for a temporary restraining order and an injunction pendente lite.

On September 13, 1948, in the action in the superior court, that court issued an order requiring the defendants therein to show cause why they should not be enjoined and restrained, during the pendency of the action, from directly or indirectly committing any of the following acts:

"1. Intimidating, obstructing, molesting, harrassing or threatening bodily harm or injury to plaintiff's officers, agents, employees, customers, or any other persons having business with plaintiff, or attempting to serve plaintiff, or the driver or operator of any vehicle, engine or train while entering, attempting to enter, leaving or attempting to leave plaintiff's refinery at Oleum, Contra Costa County, California.

"2. Obstructing in any manner any entrance of plaintiff's said refinery at Oleum, Contra Costa County, California, including any entrance used for ingress and egress to and from said refinery by pedestrians, motor vehicles, or railroad engines and trains.

"3. Congregating, gathering, massing, demonstrating, marching, picketing, standing, sitting, loitering, walking or stationing or maintaining any pickets or other persons at or near or in front of or within two hundred yards of any entrance of plaintiff's refinery at Oleum, Contra Costa County, California, except as hereinafter provided.

"4. Maintaining, stationing, or placing more than four pickets or other persons at any one time at or about any entrance to plaintiff's refinery at Oleum, Contra Costa County, California.

"5. Picketing, or maintaining or stationing any pickets on the property of plaintiff at Oleum, California, and from marching or loitering on said property.

"6. Interfering with the movement of any automobile, trucks, railroad engines or trains, or other vehicles and from standing, lying, or gathering in the pathway of any automobiles, trucks, railroad trains or other vehicles which enter or leave or attempt to enter or leave or are about to enter or leave plaintiff's refinery at Oleum, Contra Costa County, California.

"7. Stationing or placing any picket or pickets with the intention or for the purpose of accomplishing any of the actions enjoined in paragraphs 1, 2, 3, 4, 5, and 6 above."

Immediately following the order to show cause, and as a part of it, the superior court further "Ordered that pending the hearing and determination of the foregoing Order to Show Cause the defendants and each of them, their agents, servants, representatives, officers, employees, members and pickets and each of them be and they are hereby restrained and enjoined from committing or performing directly or indirectly or by any means whatsoever any of the foregoing acts."

Pursuant to stipulations, the court made and entered orders, from time to time, con-

tinuing the hearing on the order to show cause and continuing in full force and effect the temporary restraining order.

The court issued orders to show cause (filed October 1 and 14, 1948) based upon affidavits filed by J. A. Grant, L. J. Briggs, Robert C. Diehl, J. H. Davison, Donald Ritchey, and two by G. H. Hemmen. Answering affidavits were filed by persons charged in the affidavits and served with the orders to show cause. Trial upon the issues thus presented commenced November 26 and concluded December 31, 1948.

Upon the conclusion of the taking of evidence, counsel for the alleged contemnors moved for a continuance of the hearing, under section 595 of the Code of Civil Procedure, and filed his affidavit in support of the motion. Thereupon the court directed counsel for the alleged contemnors to proceed with his oral argument, to which counsel objected that there was not sufficient time to prepare for or present oral argument. The motion was thereupon denied by the court and the matter taken under submission.

On January 12, 1949, the court entered its order finding that the petitioners had violated the temporary restraining order, and adjudging them in contempt of court because of such violations.

Petitioners challenge the validity of the judgments of contempt upon six separate grounds, each of which, they urge, requires annulment of those judgments by this court in this proceeding.

Those several grounds, in the order in which presented by petitioners, save for transposition of their sixth point to first position, are: (1) The evidence is insufficient to support certain of the judgments as to certain of the petitioners, (2) the restraining order is void for violation of petitioners' right of freedom of speech and for uncertainty of the complaint and affidavits upon which based, (3) the unions, as unincorporated associations, are not entities and therefore cannot be guilty of or liable for contempt, (4) the trial court had no jurisdiction to enjoin the acts in question because they were committed in a labor dispute over which the federal government

and its courts have exclusive jurisdiction, and some of them were committed upon navigable waters over which the federal government and its courts have exclusive jurisdiction, (5) in denying petitioners' motion to quash certain subpoenas duces tecum (assertedly issued upon affidavits which failed, contrary to state statutory requirements, to show the materiality of the documents sought), the trial court denied petitioners protection against unlawful search and seizure, and (6) in denying their motion, at the conclusion of the taking of evidence, for a continuance to enable their counsel to prepare for and to present oral argument, the trial court denied them their right to due process and the right to representation by counsel. They present the additional point that Union Oil Company of California was improperly joined as a respondent in their petition for the writ, that the company is neither a real party in interest nor a party whose interest would be directly affected by this proceeding, and that this proceeding should be dismissed as to the company.

We will consider, first their point that as to some of the charges and some of the petitioners there is a lack of evidence to support the judgments. We will then consider their other points in the order in which they have presented them. The asserted lack of evidence, we will discuss in connection with the several judgments and the charges upon which each is based.

1. *The Sufficiency of the Evidence to Support the Judgments as to the Several Petitioners.*

[1-3] In appraising the sufficiency of the evidence in a proceeding such as this, the inquiry is whether or not a judgment holding a petitioner guilty of contempt of court is supported by substantial evidence; not whether it is supported by a preponderance of the evidence, it being the function of the trial court, not the reviewing court, to weigh the evidence. In enunciating this test, for use in this type of proceeding, our Supreme Court in *Bridges v. Superior Court*, 14 Cal.2d 464, 94 P.2d 983, directed attention, first, to the principle that "On petition to review the judgment of the trial

court, it is definitely settled that the sole question before the reviewing court is one of jurisdiction of the trial court to render the judgment under review. If it be determined that in the rendition of said judgment the trial court acted within its jurisdiction, then the inquiry ends, and the only order the reviewing court is authorized to make is one affirming the proceedings of the trial court. On the other hand, should it appear from the record as certified to us that the court either had no jurisdiction to pronounce said judgment, or exceeded its jurisdiction in doing so, then the proceedings should be annulled. Sec. 1075, Code Civ. Proc. Other than as just indicated, the writ of *certiorari* will not be granted to review errors of law (*People v. Latimer*, 160 Cal. 716, 117 P. 1051), or mere questions of fact. *White v. Superior Court*, 110 Cal. 60, 42 P. 480." 14 Cal.2d at pages 484-485, 94 P.2d at page 993.

[4, 5] The existence of evidence before the trial court enters into the question of the jurisdiction of the trial court to act. As stated in the *Bridges* case, "in passing upon the question of the trial court's jurisdiction, the reviewing court may consider the evidence before the trial court for the purpose of determining whether it was sufficient to give that court jurisdiction to render its judgment finding the accused guilty of contempt, and in case the court finds that the evidence is insufficient to sustain the conviction it will annul the judgment. *McClatchy v. Superior Court*, 119 Cal. 413, 51 P. 696, 39 L.R.A. 691; *Hotaling v. Superior Court*, 191 Cal. 501, 506, 217 P. 73, 29 A.L.R. 127, and *Titcomb v. Superior Court*, 220 Cal. 34, 44, 29 P. 2d 206. But in such a case, the review of the evidence is limited to determining whether there was any substantial evidence before the trial court to sustain its jurisdiction. The power to weigh the evidence rests with the trial court. *Daily v. Superior Court*, 4 Cal.App.2d 127, 134, 40 P. 2d 936; *McFarland v. Superior Court*, 194 Cal. 407, 228 P. 1033; *In re Brambini*, 192 Cal. 19, 218 P. 569; *Strain v. Superior Court*, 168 Cal. 216, 223, 142 P. 62, Ann. Cas.1915D, 702; *White v. Superior Court*, 110 Cal. 60, 64, 42 P. 480; *Imperial Water*

Co. [No. 1] v. Board of Supervisors, 162 Cal. 14, 120 P. 780." 14 Cal.2d at page 485, 94 P.2d at page 993.

[6,7] The court considered and distinguished *In re Buckley*, 69 Cal. 1, 10 P. 69; *Hotaling v. Superior Court*, 191 Cal. 501, 217 P. 73, 29 A.L.R. 127, and other cases not cited, upon the ground that each of those was an original proceeding before the Supreme Court,¹ saying: "In proceedings of that nature, the same rule that governs the trial court in contempt proceedings is applicable to this or any appellate court at the hearing of contempt proceedings originally brought in such courts. It has repeatedly been held that an accused on trial for contempt must be proved guilty beyond a reasonable doubt. But such rule, as will be seen from the authorities cited above, has no application in a proceeding such as the one before us, to review the judgment of the trial court in finding the accused guilty of contempt." 14 Cal.2d at page 485, 94 P.2d at page 994.

[8] "In considering the evidence before the trial court in the light of the rule just stated, it is our sole duty to determine whether such evidence is of sufficient substantiality to support the judgment of conviction, or as stated in *Daily v. Superior Court*, supra (4 Cal.App.2d [at] page [124] 134, 40 P.2d [at] page 939): 'In the proceeding before us the extent of our power is to inquire whether there was any evidence before the trial court sustaining its jurisdiction.'" 14 Cal.2d at page 486, 94 P.2d at page 994.

These principles, applicable in such a proceeding as this, are the law today in California. They have been applied in a number of subsequent decisions of our Supreme and appellate courts, and cited with approval in others.

[9-13] That the sole question in such a proceeding is one of jurisdiction of the trial court to render the judgment under review, we find stated in *Hume v. Superior*

Court, 17 Cal.2d 506, 512, 110 P.2d 669; *Taylor v. Superior Court*, 20 Cal.2d 244, 125 P.2d 1; *Rappaport v. Superior Court*, 39 Cal.App.2d 15, 20, 102 P.2d 526; *Associated Lumber & Box Co. v. Superior Court*, 79 Cal.App.2d 577, 582, 180 P.2d 389; and *In re Oxman*, 100 Cal.App.2d 148, 223 P.2d 66. The reviewing court may examine the evidence to determine the jurisdictional question and annul the judgment of contempt if the evidence does not justify that judgment or, conversely, annul an order which erroneously sustained a demurrer to an affidavit which sufficiently alleged the commission of a contempt. *Taylor v. Superior Court*, supra, 20 Cal.2d 244, 246, 125 P.2d 1. As to sufficiency of the evidence, if the trial court had jurisdiction the reviewing court's attention is confined to a consideration of whether or not there was any substantial evidence to support the judgment of contempt. *Rappaport v. Superior Court*, supra, 39 Cal.App.2d 15, 22, 102 P.2d 526. In this state, the writ of certiorari will issue only when an inferior tribunal has acted without or in excess of its jurisdiction; this writ cannot be used as a writ of error whether an appeal be available or not, *Howard v. Superior Court* [reviewing a probate order, not a judgment of contempt], 25 Cal.2d 784, 787, 788, 154 P.2d 849. In a proceeding upon a writ of habeas corpus to review a judgment of contempt (a writ which tests the jurisdiction of the lower court to act), the burden is upon the petitioner to file the necessary records and papers with the reviewing court; the burden is on him to establish the necessary grounds for his release, and the presumption of regularity of the proceedings in support of the judgment prevails in the absence of evidence to the contrary. *Ex parte Oxman*, 100 Cal.App.2d 148, 223 P.2d 66. In a habeas corpus proceeding to review a petitioner's conviction of violation of an anti-picketing ordinance (an ordinance found valid in part

1. The *Buckley* case was an original proceeding in the Supreme Court. The *Hotaling* case was a proceeding upon a writ to review a contempt order of the superior court, an order issued in the case

after the filing of the remittitur, following the Supreme Court's decision in *Hotaling v. Hotaling*, 187 Cal. 695, 203 P. 745.

and invalid in part), petitioners failed to show that they were not convicted for violating the valid part of the ordinance; such a proceeding being in the nature of a collateral attack, the judgment under review carried with it a presumption of regularity; this is not a conclusive presumption, but it put a burden on the petitioners of proving that their convictions were based upon the invalid part of the ordinance, and they failed to meet that burden. In re Bell, 19 Cal.2d 488, 500, 122 P.2d 22.

We note that there are a few decisions which contain statements from which it might be inferred that the evidence test used in the Buckley case is applicable upon review of a judgment of contempt, statements apparently stemming from the Hotaling case. These decisions are: Mat-tos v. Superior Court, 30 Cal.App.2d 641, 86 P.2d 1056; Wilde v. Superior Court, 53 Cal.App.2d 168, 177, 127 P.2d 560; In re Clarke, 60 Cal.App.2d 21, 26, 140 P.2d 92; Groves v. Superior Court, 62 Cal.App.2d 559, 568, 145 P.2d 355; In re Felthoven, 75 Cal.App.2d 465, 171 P.2d 47; and In re Donovan, 94 Cal.App.2d 399, 402, 210 P.2d 860. The making of this comment carries with it no suggestion that any of the decisions last cited may have applied the wrong test in reviewing the evidence. In nearly all, if not all, the decision was based primarily upon the fact that the affidavit alleging contempt failed to state facts sufficient to constitute a contempt. In the Wilde case, the reviewing court found a total absence of evidence in support of one of the material facts. 53 Cal. App.2d at page 180, 127 P.2d 560. In the Clarke case, the reviewing court's examination of the record disclosed an absence of any "substantial evidence" tending to prove one of the material facts. 60 Cal. App.2d at page 32, 140 P.2d 92.

We will view the several judgments of contempt serially, with the charges upon which each is based, and in connection with each the questioned sufficiency of the evidence. We identify each judgment by the name of the person whose affidavit initiated the proceeding, referring to the affidavit as a "complaint."

Each complaint states that the temporary restraining order was issued by the court September 13, 1948; sets forth the provisions of the order in *hæc verba* and states that at all times mentioned the order has been and is in full force and effect; and alleges that at all times mentioned each of the alleged contemnors had notice and knowledge of the order and its provisions; that each of the alleged individual contemnors is and at all times mentioned has been a member and agent of each union and at all times acted as such; and that each alleged contemnor violated the order willfully, intentionally and unlawfully. The allegations of each complaint were put in issue by the answering affidavits, except that membership of the individuals in each union was admitted and petitioners Casey and the Local Union in their answer to Count II of one of the Hemmen complaints (not the one under review herein) expressly admitted that "Frank M. Casey is * * * an agent of Local 326." Casey verified the answering affidavits on behalf of the Local Union as well as in his individual capacity.

The Grant complaint, an affidavit by J. A. Grant, filed September 27, 1948, alleged, in count three thereof, that petitioners Phillips and the Local Union (and other persons named) violated the temporary restraining order on September 17, 1948, by threatening the train crew of a Southern Pacific railroad train with bodily harm and threatening to strike the crew with rocks and to use other violence on them if they drove the train into the refinery; that the train crew was about to operate the train through an entrance to the refinery to do business with plaintiff and haul tank cars from the refinery; and that by reason of said threats and acts the train crew was prevented from operating the train and refused to operate it into the refinery or to transact business with plaintiff.

The court found these allegations true as to Phillips, the Local Union, its officers and the members of the strike committee of the Local, and adjudged Phillips and the Local Union guilty of contempt of the authority of the court. As punishment there-

for, the court directed the union to pay a fine of \$50, and Phillips a fine of \$25; Phillips, if he defaulted in payment of his fine, to be imprisoned in the county jail at the rate of one day's imprisonment for each \$2.00 of the fine.²

The evidence shows that on the afternoon of September 17, 1948, a Southern Pacific train crew brought an engine and caboose from Rodeo to Oleum for the purpose of entering the premises of respondent's refinery and taking out some tank cars. The railroad tracks in this vicinity run close to the shore of San Pablo Bay. As this train approached a certain switch and was stopped for the purpose of unlocking and opening the switch, a boat with men in it was lying from 10 to 25 feet offshore. The boat had a sign on it "Picket" or "Picket Boat." When the train stopped and the trainmen got out and approached the switch to unlock and open it, rocks were thrown from men in the boat. Edmister (one of the men in the boat) testified that when the train came up and stopped to switch, he told them there was a picket there and "we" didn't want them to go in, and that he threw some rocks, and they (the trainmen) got in the switch engine and rode back to Rodeo. Phillips (in the boat with Edmister) denied that he threw any rocks and said that nobody else (nobody except Edmister) threw any rocks that he saw. However, three persons who were standing near the switch and knew and recognized Phillips, testified that he did throw rocks, and that some dozen to 20 rocks were thrown. This is substantial evidence of rock throwing by Phillips.

Petitioners' other contention in respect to Phillips is that there was no evidence that he had knowledge or notice concerning the temporary restraining order or any of its provisions. It is true that he denied having any such knowledge or notice. However, there is testimony that on that occasion a deputy sheriff told the men in the boat they were not supposed to throw rocks,

and that they had to be 200 yards from the Union Oil Company property. Phillips denied hearing any such statement. He admitted the boat was close in shore but said he did not even hear the conversation that Edmister had with anyone on shore; did not hear anything anybody said on shore; he was yelling at the time Edmister was throwing rocks and did not recall that Edmister was yelling at that time. He was at first quite uncertain whether there was anyone else in the boat beside himself and Edmister, said there may have been another fellow, or maybe two more, could not swear to it, and finally his best recollection was that there were others in that boat beside himself and Edmister. He was positive, however, he had not done any picket duty prior to this date (Sept. 17). But earlier in the trial he testified (in relation to counts I and II of the Grant complaint) that on two previous occasions, September 15 and September 16, he had been out in a boat on San Pablo Bay. On the 15th he was in a cabin cruiser, which carried a sign, "Oil Workers' Picket Boat," a sign he put on the boat on September 5. The picket sign was given him by the union and he put it on the boat; did not keep it on continuously, put it on and off upon occasion. The gas for that boat was given him for working. In his earlier testimony he said that between September 5 and 15 he picketed barges that came up the channel, and tankers, also over at Vallejo, whenever a boat was coming in; went out in the bay on the 15th and noticed a train coming, then went to Oleum and put the picket sign on the boat and waited for the train to come; saw a locomotive there, with fellows on the tracks, and a small boat offshore; stayed there half an hour, maybe a little longer; did not hear any conversation of the persons in the small boat.

On September 16, according to Phillips' earlier testimony, he was out in the bay in a smaller boat, with five other persons, fished for some time without any luck;

2. The court dismissed counts one and two of the Grant complaint because the persons charged thereunder did not have notice or knowledge of the restraining or-

der or its terms, and for like reason dismissed count three as to persons other than Phillips and the Local Union. Count four was dismissed during the trial.

they noticed a train from Rodeo approaching Oleum, so went to Oleum and put the picket sign on the boat and waited for the train to come; these signs were in the boat before they started fishing; the boat was lying offshore opposite the switch some 15 to 30 minutes before the train arrived; had been out for two or two and a half hours when they approached Oleum for the purpose of picketing that train; said that when the train arrived Mr. Costa, in the front of the boat, and about 6 or 7 feet from Phillips, got up and said something to the trainmen about "Are you going to open that switch?" but that Phillips did not hear what else Costa said, nor any reply. He saw Mr. Eshleman that day (the 16th) and knew that Mr. Eshleman said something, but could not hear Eshleman, could not hear the words, although Phillips admitted his hearing was all right.

There was testimony by the witness Creed that when the trainman unlocked the switch (Sept. 16) and the boat was within about 10 feet of the shore, Costa said, "Don't throw that switch," and "You are not going to take anything out of the refinery"; that the trainman asked, "Is that a threat?" and Costa said "Yes." Creed further testified that following the event just described, on the 16th, Mr. Eshleman, standing near the switch, close to the water's edge, stepped up and asked these men in the boat if they knew there was an injunction and court order forbidding any interference with trains out or in, to which Costa replied, "That doesn't make any difference. You're not going to take any cars out"; the bow of the boat was about 10 feet from shore; Creed was some 30 feet north of the switch, was about 35 to 40 feet from Costa, heard what Costa and the trainman said, and heard what Eshleman said. This testimony by Creed was corroborated by the witnesses Grant and Diehl. Diehl said that Eshleman shouted,

and the witness Eber testified that Eshleman cupped his hands and hollered.

[14-17] This evidence supports the implied finding of the trial court that Phillips heard the conversation between Costa and the trainman and the information concerning the restraining order furnished by Eshleman. It is a reasonable inference that such information, given under those circumstances to an active member-picket such as Phillips, produced in his mind the requisite knowledge of the pertinent provisions of the restraining order. This knowledge he acquired during and at the conclusion of his boat-picketing activities on the 16th but prior to those of the 17th of September.³ The knowledge a person may have when material to an issue in a judicial proceeding is a fact to be proven as any other fact. It differs from physical objects and phenomena in that it is a state of mind like belief or consciousness and cannot be seen, heard or otherwise directly observed by other persons. It may be evidenced by the affirmative statement or admission of the possessor of it. If he is silent or says he did not have such knowledge, it may be evidenced in other ways; e. g., by his conduct or by proof that the information was given him in writing and he read the document, or orally and he heard the statement made. "The state of mind of a person, like the state or condition of the body, is a fact to be proved like any other fact when it is relevant to an issue in the case, and the person himself may testify directly thereto. See 29 [20] Am.Jur. 312. Whenever the motive or intent with which an act was done is relevant, direct testimony is admissible, although not conclusive. *Harned v. Watson*, 17 Cal.2d 396, 403, 110 P.2d 431; *Gilmour v. North Pasadena Land etc. Co.*, 178 Cal. 6, 9, 171 P. 1066; *Horton v. Winbigler*, 175 Cal. 149, 156, 165 P. 423; *Karr v. Powell*, 66 Cal. App.2d 28, 33, 151 P.2d 576; see Code Civ.

3. The evidence concerning the events that occurred on the 15th and 16th of September was available for consideration by the court in relation to the picketing which occurred on the 17th of that month because later during the trial the parties

stipulated that, as to all of the witnesses who testified more than once in the case, all of their testimony and the other matters could be applied to each count (each charge or complaint of a violation of the temporary restraining order).

Proc., sec. 1870; 1 Jones Commentaries on Evidence, sec. 170 et seq.; 10 Cal.Jur., Evidence, sec. 117; 20 Am.Jur., Evidence, sec. 338; 31 C.J.S., Evidence, § 178. Also, when knowledge of a fact has important bearing upon the issues, evidence is admissible which relates to the question of the existence or non-existence of such knowledge and a wide range of proof is allowed. *Katz v. Bedford*, 77 Cal. 319, 323, 19 P. 523; 1 L.R.A. 826; *Central H[ighlights] Imp[rovement] Co. v. Memorial Parks*, 40 Cal.App.2d 591, 609, 105 P.2d 596; see *Code Civ.Proc.*, sec. 1870; 10 Cal.Jur., Evidence, sec. 118; 20 Am.Jur., Evidence, sec. 336; 31 C.J.S., Evidence, § 178." *Cope v. Davison*, 30 Cal.2d 193, 200, 180 P.2d 873, 877, 171 A.L.R. 667. The authorities therein cited indicate the wide range of proof allowed. In *Katz v. Bedford*, 77 Cal. 319, 19 P. 523, 1 L.R.A. 826, evidence that a party was present and saw certain work done was deemed material as tending to show that payment for that work without objection was made by him "with knowledge of the manner in which the work was done, and its quality." 77 Cal. at page 323, 19 P. at page 526. In *Treadwell v. Whittier*, 80 Cal. 574, 22 P. 266, 5 L.R.A. 498 (cited in 20 Am.Jur., Evidence, § 336), evidence that the defendants were cautioned by a skilled mechanic who had repaired their elevator that they were running it carelessly, was held "competent and material to show a knowledge by defendants that they were operating the elevator incautiously and carelessly." 80 Cal. at page 602, 22 P. at page 274. Whenever "the intention, feeling, belief, or other mental state of a person at a particular time * * * is material to an issue under trial, evidence of such person's declarations at the time, indicative of his then mental state, are admissible in evidence." In re *Estate of Carson*, 184 Cal. 437, 445, 194 P. 5, 9, 17 A.L.R. 239, cited in 20 Am.Jur. 312. In a prosecution for receiving stolen property, contradictory statements by the defendant and evasive answers to questions concerning ownership and the manner in which he acquired the property are evidentiary of guilty knowledge at the time of acquisition. *People v. Smith*, 26 Cal.2d 854, 161 P.2d 941. These

general principles of proof of knowledge are of course applicable in a contempt proceeding as in any other type of proceeding. See *In re Brambini*, 192 Cal. 19, 36-37, 218 P. 569, and *Sorrell v. Superior Court*, 73 Cal.App.2d 194, 166 P.2d 80.

[18] As to the element of intent, we must bear in mind that "Disobedience of any lawful judgment, order, or process of the court" is by statute defined as contempt of the authority of the court. *Code Civ. Proc.*, § 1209. When it appears by substantial evidence that a person committed an act prescribed by a lawful order of a court and did so with knowledge of that order and its pertinent provisions, there is substantial evidence that will support a finding of an intentional violation of the order. See *Hume v. Superior Court*, 17 Cal.2d 506, 512-513, and 110 P.2d 669, and *In re Jarvis*, 57 Cal.App. 533, 538, 207 P. 494. Petitioners cite *In re Donovan*, 94 Cal.App.2d 399, 210 P.2d 860, as holding that something more by way of proof of intent is required in a contempt proceeding. We do not so read that decision. The injunction there involved was mandatory in character, hence not in force pending an appeal, and the order made in the contempt proceeding contained no finding which negated a belief that the injunction was unenforceable pending the appeal. Here the restraining order was in full force and effect and the finding that as to Phillips all of the allegations of the complaint were true included findings that he committed these acts with knowledge that they were forbidden by order of court and that he did so willfully and intentionally.

We conclude that the judgment of contempt entered against Phillips on the Grant complaint was supported by substantial evidence and that the trial court had jurisdiction to render that judgment.

The Briggs complaint, an affidavit by L. J. Briggs, filed October 1, 1948, alleged that the International and the Local Unions, Harold A. Madden, Frank M. Silva, and Harry E. Lakeman, on September 22, 1948, at Oleum, violated the restraining order in that they threatened the train crew of a railroad train of the Southern Pacific Com-

pany with bodily harm and attempted to strike the crew with rocks and threw rocks at the crew while the crew was switching freight cars preparatory to driving the train through an entrance to plaintiff's Oleum refinery, thereafter to haul tank cars from the refinery; by reason of which acts the train crew was prevented from operating, and refused to operate the train into the refinery or to transact any business with the plaintiff.

The court found all of the allegations true, except that Madden at the time alleged had neither notice nor knowledge of the restraining order or of its provisions; dismissed as to Madden; and adjudged each union, Silva and Lakeman guilty of contempt of the authority of the court. As punishment therefor, the court ordered the International Union to pay a fine of \$50; the Local Union a fine of \$75; and Silva and Lakeman a fine of \$25 each.

This was a case of picketing a switch engine and caboose by boat. It occurred on the afternoon of September 22, 1948. Silva and Madden had gone out on the bay, from near Rodeo. Silva testified he knew the train was going to make that move (Rodeo to Oleum to haul tank cars into the plant), knew the train's schedule, and got there before the train did. He took 3 or 4 rocks in the boat, all they needed. When the train arrived, his boat was out about 70 feet from the main line, 10 or 15 feet from the shore. He had turned his outboard motor off and was rowing. Madden stood up on the rear seat, facing the shore. Silva figured when the engine came that far it was time to throw a couple of rocks, and told Madden to hit the caboose, not the trainmen. When the train stopped, Silva told Madden to let them have it. One rock hit the caboose and one the engine. Then the whistle blew, and that, said Silva, meant there was a threat on, a threat from those two rocks; Silva thought maybe they (he and Madden) could do it that way, and "we did it," "we stopped the train"; there was an argument then between the men on shore, and finally the train pulled out. This is substantial evidence, by Silva himself, in addition to the testimony of four persons who witnessed these events from the shore, each of whom

recognized Silva as the man who handled the oars and Madden as the man who threw the rocks.

Silva denied having any knowledge of the injunction or its provisions on the 22nd; said he had no such knowledge until a deputy sheriff told him about it October 6 or 7, after he had been served five times with papers concerning it. Yet, earlier in the trial, testifying concerning events in which he participated on September 15 and asked when he did find out about the injunction, he testified, "I don't remember, but later on I did find out. I think Mr. Carlson [deputy sheriff] or somebody told me, and that was, say, about, I should say, maybe a week or so after this [on the 15th] happened, maybe; I am not sure now." Confronted with this testimony, he said, "You must remember I said I wasn't sure what time it was—might be a week, might be two weeks, might be three weeks."

He had been active in picketing; testified he had picketed the main gate to the refinery during the first week of the strike, and the pedestrian gate after the 15th of September, on which occasions he might have seen those notices (placards 11 inches by 14 inches, setting forth the text of the injunction, posted at or near the gates on September 14), but did not pay any attention to them. Shown pictures of himself, with a picket sign, standing near the pedestrian gate (on Sept. 27), he said he would always stop there and talk a little bit, if he saw an opening, and always found a place where there was an opening; that every time he came up to the picket line he placed himself where there was an opening, so he always had a picket sign in his hand.

He said he had difficulty reading English, but that he read English a little bit in connection with his work, the switching lists used by him during the eight years he had worked as a brakeman for the company's plant locomotive, prior to which he had worked about 19 years on the company's railroad equipment and trucks within the refinery. Asked if he could read more than the word "Notice" on the placard (posted at the refinery entrances), which was produced in court, he said, "Yes, if I was get-

ting close to it." Asked to read further, he read, "'This refinery is protected by the restraining order and you are—' How do you pronounce that word?" By the court, "Injunction." Silva continued reading, "'October 13, 1948, in the case of the Union Oil Company'—at this time, my eyes are getting blurred, Your Honor." That was a demonstration of a working knowledge of English, written as well as spoken.

He testified, also, that he used to see Frank Casey four or five times a day. (Casey was financial secretary and business agent of the Local Union, and a member of its strike committee, and was served with a copy of the restraining order on the 14th of September.) Further indication of Silva's activity in picketing is furnished by certain issues of "Off Stream," a mimeographed news bulletin prepared by the publicity committee, and bearing the legend "Issued by The Strike Committee," of the Local Union, during a portion at least of the strike period. The issue dated 9-19-48, under the heading "Picket Boats," told the members of the union that "Frank Silva has one of the toughest jobs in this strike. He's in charge of the 'tank Car Pickets.' He's responsible for keeping the tank cars In the refinery—and they're still there! First the boys picketed the gates onto the tracks; then they were moved back 200 yards, so they picketed on the tracks; SP cops ran them off the tracks, so now 6 boatloads take turns picketing the switch, from the Bay. Our water-borne operation is a success so far; and Frank said, 'We intent to hold that line.' We believe they will. Keep up the good work, Frank and Crew!" The issue of Off Stream dated 9-22-48 carried a drawing of four men in a boat close offshore from a railroad track, two standing up and throwing rocks at fish, a sign by the track reading, "Oleum Gate 200 yards, S. P. R. R. Co.," and a heading, "We Picket by Land and by Sea." In the text of that issue appears the news item: "Our sea-going 'switch-pickets'—not to be confused with the Nelson and Swan picket fleet—were on the job. But the company moved two tank cars around and up the hill and past the Carpenter Shop. The pickets up above didn't realize what was happening,

and didn't get word down to the switch-boat. So the first thing the boys in the boat knew, two tank cars were out on the main track, having come out the gate by the Edeleanu Plant." Marcos, the president of the Local Union, testified that he did not know whether Silva was a captain in charge of the boats; that he heard Silva referred to as "Admiral of the Fishing Fleet," but did not think Silva had the responsibilities of keeping the tank cars in, any more than any other member of the Local.

Silva's admission that he found out about the injunction a week or so after the 15th of September was made in the presence of the trial judge, who by that very fact could appraise and evaluate the admission as a reviewing court cannot do from a mere reading of the typewritten record. The witness' manner of speaking and his evasiveness on the question of knowledge constituted evidence by conduct given the trial judge by the witness as to his state of mind concerning that knowledge and when it was acquired by him. Additional circumstances were the fact that notices of the restraining order were posted at all entrances to the refinery commencing September 14, that after September 15, according to Silva's testimony, he picketed at the pedestrian gate whenever he found an opening and that he always found an opening, and that he may have seen those notices but did not pay any attention to them. Such an admission given by a witness under those circumstances was substantial evidence upon which the trial court might base its finding that on September 22 Silva had knowledge of the pertinent provisions of the restraining order. Proof of opportunity to know of the injunction through the signs at the gates, alone, is not sufficient. However, it is stretching human credulity to the utmost to believe that Silva, and the other pickets, standing around and near the posted notices, would not indulge their natural curiosity and look at the signs, unless it were a situation such as referred to in *People v. Brown*, 74 Cal. 306, 16 P. 1, where the court said concerning the proof of knowledge on the part of a receiver of stolen property, "If a case could arise * * * in which it should appear that he suspected the fact,

and abstained from inquiry lest he should know, knowledge might be inferred." 74 Cal. at page 310, 16 P. at page 3. While perhaps any one of the circumstances above mentioned, standing alone, might not justify an inference of knowledge of the injunction, all of them taken together, considered in the light of the situation at the plant's entrances, make such an inference a very reasonable one.

Lakeman, by his own testimony and that of others, was alone in a boat, offshore, during these occurrences on the 22nd. Several witnesses testified that during these occurrences Lakeman was cruising in and out near shore, and that he yelled to persons on shore, calling them "scabs" and "rats." Several witnesses saw signs on several of the boats. There were five boats offshore of the switch that day; two close in, the others further out. One witness identified the signs as "Picket" but none identified those boats as including Lakeman's, and one saw no sign on Lakeman's. Lakeman testified he had no picket sign on his boat, and did not recall seeing any on the other boats. He said he went out in his boat to find if others had caught any fish; he had been out about 45 minutes to an hour, when, nearing Oleum, he came over toward these other boats to see what was going on, and recognized two men he knew inside the refinery fence, hollered at one of them asking what he was doing in there and called the other a "rat"; there was a train on the track; he stayed around three-quarters to an hour; recognized Silva in one of the boats; didn't know who the others in the boats were; his only purpose in staying there that length of time was that he heard some of the boys were going back to work and wondered who they were. He denied that on that day (the 22nd) he had any notice or knowledge of the restraining order; but earlier in the trial testified that on the 16th he was in the boat with Costa and Phillips, near the switch, that Costa hollered at one of the trainmen not to touch the switch, and the fellow said, "What are you going to do?", and did not recall any more conversation; and in this portion of his testimony said he heard Eshleman was supposed to have said something to Costa

but he, Lakeman, did not hear Eshleman's voice. He said he had done picket duty before; a couple of times early in the strike at the dormitory gate of the plant, and once in a boat about a week before the 22nd; said his duties for the union were to get fish and take them over to the hall, and get gasoline for the outboard motors at the Port of Oakland for the fishing boats that went out; that he handled gasoline for the boats at Joseph's, near Rodeo, gasoline purchased to donate to the union, used for the boats to do the fishing, he did not know if it was used in the boat motors in picketing or not. Here, as in the case of Phillips under the Grant complaint, was substantial evidence supporting the trial court's finding that Lakeman, as charged in the Briggs complaint, had knowledge and notice of the restraining order and its provisions, and that he was no mere bystander upon the occasion of the violent picketing of the train by Silva and Madden.

[19] We conclude that the judgment of contempt entered against Silva and Lakeman on the Briggs complaint was supported by substantial evidence, and that the trial court had jurisdiction to render that judgment.

The Diehl complaint, an affidavit by Robert C. Diehl, filed October 14, 1948, alleged that the International Union and the Local Union and Frank M. Silva, Stanley Shulman and Frank Coppa, on September 27, 1948, at Oleum, violated the temporary restraining order by throwing rocks at and damaging a switch engine of plaintiff at the refinery and did intimidate, molest, harass and threaten bodily harm to, and throw rocks at Robert C. Diehl, John Norton, John Salmond and J. A. Grant, employees of plaintiff who were then on the refinery property of plaintiff.

The court found all of the allegations true except that Shulman did not at that time have notice or knowledge of the restraining order or of its provisions; dismissed as to Shulman and adjudged each union and Silva guilty of contempt of the authority of the court. As punishment therefor the court ordered the International Union to pay a fine of \$75; the Local

Union a fine of \$100; and Silva a fine of \$50.

Substantial evidence was adduced that would probably support the judgment if the complaint stated facts sufficient to show on its face the commission of acts enjoined by the restraining order. The question is whether or not the alleged threatening of bodily harm to and throwing of rocks at certain of plaintiff's employees "who were then on the refinery property of plaintiff" were acts forbidden by the restraining order. If they were not, the complaint failed to allege the commission of acts which constituted disobedience of that order.

[20] If those acts were forbidden by that order, they were forbidden by the provisions of its first paragraph. But that paragraph is a single sentence which concludes with the words "while entering, attempting to enter, leaving or attempting to leave plaintiff's refinery at Oleum * *." Do those words limit everything that precedes them in that sentence or merely the immediately preceding words, "driver or operator of any vehicle, engine or train"? It seems clear that they limit and modify everything that is said in that sentence. That is their natural significance when one reads the sentence as a whole. Any other reading would result in no limitation as to the place of molestation of "plaintiff's officers, agents, employees, customers, or any other persons having business with plaintiff, or attempting to serve plaintiff." "[H]aving business with plaintiff" is not a limitation as to place. A person might have business with plaintiff at any place in the state. Then there would be the question whether "having business with plaintiff" applies to "plaintiff's officers, agents" or "employees." If not, this provision of the order would apply to the officers and employees when at the plant or at home, at work or on vacation, at any time and any place in the state. No intent to make an order of such a wide sweep can reasonably be ascribed to the trial court, especially when the gravamen of the complaint in the action and of the affidavits filed in support of the application for the

restraining order was the obstruction of entrances to the plant and interference with traffic in and out of the plant.

[21] In the case of an alleged contempt occurring outside the presence of the court, the affidavit charging contempt must state facts which constitute contempt. If it fails to do so, the court does not acquire jurisdiction to render a judgment thereon, no matter how clearly the evidence at the trial may demonstrate a violation of the judicial process. *Hutton v. Superior Court*, 147 Cal. 156, 159, 81 P. 409; *Wilde v. Superior Court*, 53 Cal.App. 2d 168, 177, 127 P.2d 560.

We conclude, therefore, that because of the failure of the Diehl complaint to allege the commission of acts enjoined by the restraining order, the judgment entered thereon was without jurisdiction and should be annulled.

The Davison complaint, an affidavit by J. H. Davison, filed October 14, 1948, alleged that the International Union and the Local Union, Frank M. Casey, and Charles C. Coughlan, on September 27, 1948, at Oleum, and Rodeo, violated the restraining order in that they threatened bodily harm to and intimidated, obstructed, molested and harassed Williard Frietas (a contractor of R. T. Collier Corporation), J. H. Davison, O. H. Ahnberg, and L. G. Hall (employees of R. T. Collier Corporation); that said contractor and employees of the Collier Corporation were attempting to accept delivery from plaintiff at the refinery and to transport to a railroad car, at Rodeo, a quantity of coke; that by reason of said acts of the persons named, the employees of the Collier Corporation were prevented from transporting the coke and from transacting business with plaintiff.

The court found all of the allegations true except that Charles Coughlan did not violate any provisions of the restraining order; dismissed as to Coughlan; and adjudged each union and Casey guilty of contempt of the authority of the court. As punishment therefor, the court ordered the International Union to pay a fine of

\$100; the Local Union a fine of \$125; and Casey a fine of \$50.

The evidence under this complaint demonstrates interference with and prevention of an attempt, on the 27th of September, 1948, of employees, and a contractor, of the R. T. Collier Corporation to remove a carload of petroleum coke from the Oleum plant. Davison, of the Collier company, testified that he arrived at a ramp along the railroad track near Rodeo at about 8:00 in the morning, for the purpose of cleaning a gondola car and readying it for loading at that point. This he did and in about an hour went to the coke pit at the respondent's refinery and there waited for two trucks to arrive from San Jose. At about 10:30 a. m. the trucks arrived and Davison (with Hall, superintendent of the Collier company) returned to the ramp at Rodeo, where they found the gondola had been moved along the track about 75 feet from the ramp and certain car jacks used to move the car were in the water of the slough near by. They commenced preparing to move the car back in place opposite the ramp by use of a winch and a cable. Hall had entered a shack or shed under or near the ramp to operate the electrical equipment and Davison was outside handling the cable, when they were approached by some men whom Davison recognized as strikers. They asked Davison what he was doing. He replied, "Loading coke." He recognized several of them but did not know their names, other than Frank Casey. One of them yanked the cable out of his hands; then the group proceeded to corner Hall in the shack; they surrounded him. Casey said, "We are getting hungrier every day, and the hungrier we get the meaner we get, and we are getting God-damn mean this morning, so that if you fellows attempt to load any coke here, we will beat the hell out of you, your drivers or anybody that's got a God-damn thing to do with this coke haul." Davison and Hall tried to explain to them that they had nothing to do with the strike and no grievance with the union, that the coke belonged to them and they were getting what was rightfully theirs. But they were told that did not

make any difference. Then Hall got out of the shack and went toward the refinery. After Hall left, Davison attempted to put the cable back into the shack to get it off the railroad right of way, as he could not apparently load any coke. He was stopped by Casey from doing that, and told "to get the hell out of here," and "Leave that stuff alone." Casey would not allow Davison to put the tools away. Davison then left the ramp and went over to the highway; stayed there until the truck loaded with coke arrived. When it did, Freitas, the driver of the truck, pulled off parallel to the highway, seeing there was no railroad car to dump it into. All the time there were other strikers gathering at the ramp. At the time the truck arrived, Davison counted up to 60 men, and estimated there were at least 100 there. A group gathered around Freitas and told him they would upset the truck because he had gone over the picket line. Two or three said, "Let's put the truck driver back inside the truck before we tip it over and let him dig himself out of the coke." Davison then pleaded with the men, asking them to let the truck go back to the refinery and dump its load there, and they permitted the driver to get back in the truck and go in the direction of the refinery. Davison then again attempted to put the cable back, when he was stopped by Frank Casey again and told to get the hell off of this property, so Davison went back up the highway. Then a deputy sheriff arrived, but he only stayed a couple of minutes and then left and parked his car about 50 yards south of the ramp. Davison then went and talked to the deputy, then returned toward the ramp, and was addressed by strikers who threatened him from time to time, calling him a scab, and saying they should beat him up and teach him a lesson. A little later, some of them started throwing rocks, and one of them hit and broke a light bulb on a standard near the ramp. Another deputy sheriff drove up and remained for about 20 minutes. A car drove by along the highway, the man in it taking pictures. Rocks were thrown at that car; several rocks hit the car. Shortly thereafter, Hall and Mr.

Ahnberg of the Collier company drove up from the direction of Oleum in a station wagon. Davison got in the car with them. Casey spoke to them; he was again the spokesman of the group. He said, "Are you going to try to load any coke?" Hall said, "Not today." Casey said, "Are you ever going to try to load any coke while the strike is going on?" Hall said, "I am certainly not going to try and load any coke under these conditions." While Casey was talking to Hall, there were quite a few hollering at the same time and threatening to tip over the car the three were in, and several of them were rocking the car, tilting it. As Davison, Hall and Ahnberg drove away (about noon of that day) rocks were thrown at their car and a couple of the rocks hit the car. They went back to the refinery, Davison to the coke pit, where he was about 15 minutes. Later, he returned to San Jose, going past the ramp near Rodeo about 1 o'clock. On their way back through Rodeo toward San Jose, there was no one around the ramp.

Hall's testimony was substantially the same as Davison's concerning what happened while Hall was at the ramp with Davison. He further testified that when, in response to Casey's inquiry, Hall said he intended to move coke, Casey said, "You are not going to move the coke this morning; I will have 200 men down in two minutes that says you won't move the coke," and that Casey turned around and told someone to go up to the hall and get the boys. Hall testified he had previously met Casey, when Hall was before the strike committee a couple of times, and during this discussion on the 27th Casey said to Hall, "We have been awful nice to you in a lot of respects and we are asking you not to move this coke in a nice way," and that we (Hall and Davison) were not moving the coke, that they would beat the hell out of the truck driver if he came down to the ramp, and all the rest of us that were around, and Casey said, "That is a threat," and asked Hall what he intended to do about it, to which Hall said he would have to go up and find out what he was going to do; and then Hall left the ramp and went to the refinery where Ahnberg (vice-

president of the Collier company) then was. Davison testified that about September 17, he and Hall met with the strike committee at the union's headquarters, at which meeting Casey, Marcos and Coughlan, among others were in attendance.

Freitas testified that as he drove his truck into the coke pit area at the refinery he was stopped by pickets at the entrance who wanted to know what he was going to do. He told them he was going to haul some coke for the Collier Corporation. They told him he wasn't allowed in there, and he replied that his local teamsters' union from San Jose said he could go through that picket line and he went in. While his truck was being loaded with coke, two cars drove up and stopped on the highway near by, and one of the men asked who was running the trucking part there. Freitas went to talk to them and they told him they weren't going to allow him to haul any coke and that they were quite desperate about it. They told him there were 1100 desperate men, they just didn't intend to let him haul any coke, and he said, "Well, I intend to haul it." They said, "We are not only warning you, we are threatening you," and then they drove away. As he entered the highway from the coke pit area, after loading his truck, some pickets told him he was in for a warm reception. He then drove down to the ramp near Rodeo and noted, when he got there, that the gondola car was not at the ramp, so he just stopped in front of the ramp. Some people came over and talked to him, including the man who talked to Freitas near the coke pit, and others who were in the two cars back at the refinery. They said, "We warned you not to come down here," and "We might just as well turn the truck over." And some of them said, "Let's let them go back," and there was argument pro and con, and Mr. Davison came over and started talking, and finally they let Freitas go back and unload (at the refinery), which Freitas did. Freitas' estimate was that there were, roughly, 60 men at and near the ramp. He did not see any officers near the ramp at that time. He went back to the refinery, encountered no interfer-

ence at the picket line in returning. After unloading, he had some lunch and was there at the refinery close onto an hour. On his way home (toward San Jose) he passed the ramp at Rodeo about 12:30 or 1 o'clock. There was no one at the ramp that he could see at that time.

Davison and Hall identified Tom Coughlan as one of those present, at least a portion of the time, at the loading ramp on the 27th, and Hall identified McKeown as being near the ramp on one of Hall's trips to the ramp. Casey was financial secretary and business agent, and a member of the strike committee, of the Local Union. He was served with the order to show cause and restraining order on September 14, 1948. Coughlan and McKeown were members of the strike committee of the union and were served with those two orders on September 15.

Casey denied being near the ramp on the 27th around 10:30 in the morning or at any time except for a time between 11 and 12 o'clock; denied having any knowledge of the events related by Davison; said he was not there when Davison and Hall were working on the winch and cable; did not even know Hall or Davison, or Freitas, although he may have seen one of them sometime but did not know him; said he had never heard any such statements that were ascribed to him, Casey; that he was at the union hall that morning and somebody said there was trouble over there (at the ramp) and he came over, drove over, stayed not over 30 minutes, sat in his car all but about 5 minutes, then went directly back to the union hall in Rodeo. He said he saw approximately 15 people there, present there; that he parked about 50 feet from the ramp and Mattos, a union member, came over to his car and said the trouble was all over.

Petitioners claim that the evidence against Casey is too slight to sustain the judgment. They predicate this claim upon Casey's denials and upon conflicts on incidental points produced by the testimony of other witnesses, such as the estimate by two deputy sheriffs (who were at or near the ramp but a part of the time) that about 25 people were there (instead of the 60 to 100 estimated by Davison, Hall and Freitas). But

the evidence which supports the judgment is substantial, and the function of resolving the conflicts was that of the trial court, not that of a reviewing court. The trial judge saw the witnesses, heard their testimony, determined their credibility, and weighed the testimony of each with that of the others.

A further question is presented by the fact that this ramp near Rodeo is about one mile from Oleum and respondent's refinery. Were the acts done and the threats made at and near the ramp within the territorial scope of acts proscribed by the temporary restraining order? The first paragraph of that order, as we have already indicated, concludes with the phrase "while entering, attempting to enter, leaving or attempting to leave plaintiff's refinery at Oleum, Contra Costa County, California," a phrase clearly that modifies all that precedes it in that paragraph. Similarly, the sixth paragraph (which enjoins interference with the movement of automobiles, trucks, railroad trains or other vehicles) concludes with the qualifying phrase "which enter or leave or attempt to enter or leave or are about to enter or leave plaintiff's refinery at Oleum, Contra Costa County, California." If all that happened in connection with this episode occurred only at the ramp, a mile distant from Oleum, petitioners' claim that such acts were not proscribed by the restraining order would probably be good. But that is by no means all that happened.

[22] It is not the interference with the loading of the gondola car near Rodeo that is the gist of the charge. It is the interference with, and the threats concerning, the removal of the coke from the refinery. The testimony of Freitas concerning the threats and warnings given him at the refinery premises (against moving the coke), coupled with the threats given Davison and Hall by Casey (at the ramp), followed by the threats to dump the truck (compromised by suffering Freitas to haul the coke back to the refinery, which he did), quite clearly produced in the mind of the trial judge conviction beyond a reasonable doubt that this series of events constituted but a single transaction, that of intimidating, obstruct-

ing, molesting and harassing persons doing business with the respondent while entering and leaving the refinery, and of interfering with the movement of a truck entering and leaving the refinery, and that Casey (who had notice and knowledge of the restraining order and its provisions) was an active participant therein and directed the proscribed activities. The evidence would support such a finding. The trial judge made the finding. A reviewing court cannot reweigh the evidence and undertake to disturb that finding. The trial court had jurisdiction to render the judgment which it entered against Casey on the Davison complaint.

The Hemmen complaint, an affidavit by G. H. Hemmen, filed October 14, 1948, alleged that the International Union and the Local Union and Frank M. Casey, James P. Kenny, Walter V. Holt, Montell H. Bullock, Stanley Shulman, Herman Phillips, Jr., Curtis C. Page, Clifford Kierstad, Elmer E. Smart, Frank M. Silva, and Ernest Swan, on September 28, 1948, at Oleum, violated the restraining order in that they intimidated, molested, harassed and threatened bodily harm to and threw rocks at J. W. Buddenberg, John Norton, Robert Diehl and other employees of plaintiff who were then on the property of the refinery of plaintiff.

The court found all of the allegations true except that Shulman, Kierstad and Swan at the time alleged had neither notice nor knowledge of the restraining order or its provisions; dismissed as to Shulman, Kierstad and Swan; and adjudged each union and Casey, Kenny, Phillips, Silva, Bullock, Page and Holt guilty of contempt of the authority of the court. As punishment therefor, the court ordered the International Union to pay \$500, the Local Union \$150; Casey and Kenny, each, imprisonment two days in the county jail and a fine of \$50; Phillips, Silva, Bullock, Page and Holt, each, to be imprisoned one day in the county jail.

[23] Substantial evidence was adduced that would probably support the judgment if the complaint stated facts sufficient to show upon its face the commission of acts enjoined by the restraining order, except

that we doubt if there was substantial evidence that Holt and Bullock had knowledge of the pertinent provisions of the order. Counsel for the respondent company direct attention to the fact that Holt did not take the witness stand to rebut the prima facie showing against him and that Bullock's evasiveness on the witness stand (when testifying concerning his participation in the picketing activities charged in the Ritchey complaint) was evidence that each, respectively, possessed such knowledge. Whatever evidentiary value such conduct may have (assuming but not deciding that Bullock's conduct in the Ritchey case was evidence in the Hemmen case), we do not consider that such conduct alone, unaided by other evidence on the subject, amounts to substantial evidence that either Holt or Bullock had the requisite knowledge to support a finding that they disobeyed the order of the court.

However, a question as to the sufficiency of the complaint to state facts constituting contempt is presented. Were the acts charged proscribed by the restraining order? Those acts were: Intimidating, molesting, harassing, threatening bodily harm to, and throwing rocks at, certain "employees of the plaintiff who were then on the property of the refinery of the plaintiff." These are essentially the same allegations as those of the Diehl complaint, and insufficient for the same reasons as those of the Diehl complaint are insufficient.

We conclude that jurisdiction to render judgment on the Hemmen complaint was wanting and that the judgment should be annulled.

The Ritchey complaint, an affidavit by Donald Ritchey, filed October 14, 1948, alleged that the International Union and Local Union, and William F. Waldren, Montell H. Bullock, Albin Erickson, Mansfield B. Lowery and Charles A. Madison, on October 4, 1948, at Oleum and Tormey, violated the restraining order in that they intimidated, molested, harassed and threatened bodily harm to, and threw rocks at the train crew of the Southern Pacific Company and other employees of that company while the crew was operating the train from

plaintiff's refinery; that while the train was leaving the refinery they stationed themselves as pickets for the purpose of accomplishing the foregoing acts and of interfering with the movement of the train; that in the course of said acts and with the intent to accomplish said acts they struck Stanley Bray, one of the employees of the Southern Pacific Company, with a rock.

The court found all of the allegations true except that the International Union on said day did not violate the restraining order and that Waldren, Erickson, Lowery and Madison on that occasion had neither notice nor knowledge of the restraining order or of its provisions; dismissed as to the International Union, Waldren, Erickson, Lowery and Madison; and adjudged the Local Union and Bullock guilty of contempt of the authority of the court. As punishment therefor, the court directed the Local Union to pay a fine of \$175; Bullock to be imprisoned in the county jail for two days following the end of the term imposed upon him in the contempt proceeding based upon the G. H. Hemmen affidavit.

On October 4, 1948, a Southern Pacific crew took an engine and caboose from Oakland to Oleum and thence easterly to Selby, where they did some switching. Then they returned to Oleum, picked up 40 freight cars and hauled them from the refinery easterly through the tunnel toward Selby. The train stopped for a few minutes after it emerged from the east portal of the tunnel, and then proceeded and again stopped, with the engine at Tormey Crossing, a point near and westerly from Selby. After a time the train proceeded easterly, beyond Selby. The railroad tracks between the tunnel and Tormey Crossing run close to the water's edge. Prior to and during the time that the train moved back and forth between the tunnel and Tormey Crossing, there were three rowboats in the waters of the bay, near the shore, in this area. In these three boats, respectively, there were five, four, and two men.

Among the men in the boats, the witness Fifer recognized Lowery, Waldren, Erickson and Bullock; said that as the engine and caboose returned toward the tunnel, men in the boats made throwing motions

with their arms, motions which he illustrated by demonstration in court, identified Waldren as making such motions. He observed that, as the engine with the string of cars passed from the tunnel to Tormey Crossing, these throwing motions were repeated by men in the boats, as though they were throwing rocks at the train. The boats followed the train a considerable distance toward Tormey. He said the two-man boat (Bullock and Waldren in it) carried a sign reading "Strike Picket"; so also did the five-man boat, the one Erickson was in. Shown a photograph (Ex. 34), depicting two boats, this witness identified Waldren and Bullock in one boat, and Mock, Erickson and Madison among the five in the other. Shown another photograph (Ex. 35), he identified Lowery as one of the four men in the boat there portrayed. The witness Bower testified to substantially the same facts as did Fifer. Bower observed Erickson and Waldren making throwing motions, saw rocks hit the engine and caboose, and observed that when the engine with the string of cars left Tormey, going easterly, the boats went back, around the pier, toward Rodeo. The witness Eber testified to the same effect as did Fifer concerning the train movements and the men in the boats making throwing motions. The witness Stanley Bray was riding in the engine cab, described the train movements and testified that he was hit in the head by a hard object which caused a scalp wound and bleeding. He did not see that object coming but observed the fireman (who was on his left, between him and the bay) move out of the way, off of the seat box, and the witness was hit from that side. The engine was 100 to 200 feet east of the tunnel at the time. Ritchey testified that 8 to 10 rocks were thrown. He heard rocks striking. During part of the time the boats were 50 feet offshore and within 70 to 75 feet of the train; saw one of the men in the two-man boat throw two rocks, observed all of the men in the five-man boat throw rocks.

Bullock testified that he and Waldren planned a fishing trip the night before and that day fished possibly an hour opposite the Southern Pacific depot at Oleum, then

for a time right off from the Union Oil dock, then over to Selby Flat but there an oil spill interrupted their fishing. So, then they went in between two of the Union Oil wharves, and there were possibly four boats in there. Then a railroad engine came along and started switching into Oleum, "and so we thought possibly that they were going into Oleum to haul out some tank cars of gas and oil or something * * * and we swung along as near to the switch as we could, to see what was going on; and it was quite apparent that these fellows were going in and get these cars; so we immediately started following the train down along the track and started hollering and trying to ask the engineer or the men that was on the train * * * not to go in there, because the company was on strike * * *." As to what happened after the engine returned with a string of cars, he could not say that very much happened, did not see any one throw rocks; if any rocks were thrown at the train, he did not know; he saw Waldren (in the same boat as Bullock) throwing two or three times but did not know what the object was, might have been rocks or most anything; on that day, he had no knowledge of the restraining order; no officer or member of the strike committee of the union, or anybody else, told him and Waldren to go out in the water that day; and Bullock threw no rocks, and could not say there were any rocks in his boat, he noticed none when he got in and did not see any when he got out of the boat. Waldren said he threw a couple of rocks as the train was going easterly; the rocks were in the boat when he got in it, not more than three; he had heard about the restraining injunction, but only about four pickets to the gate, heard several fellows talking about the injunction around the union hall and various places, it was the subject of conversation along with other things such as how the strike was progressing. Lowery said the boys were talking about going fishing and so he volunteered to take them out; they fished for one to one and a half hours and then the current became swift because of the tide, so they stopped fishing, and as they passed the wharf they saw a bunch of cops

along the shore and went in to see what was going on; saw two or three boats anchored by Selby; a half hour later, saw a train coming out of the tunnel; stayed around an hour; threw no rocks himself and did not believe any of the others in his boat did, and had no recollection of noticing anyone in the other boats throwing rocks; had read in the paper about the injunction but thought it pertained just to Union Oil people alone, not to the Southern Pacific. He recognized himself in a photograph (Ex. 35), in a boat, at the rudder, and the man in the front of the boat holding a sign, a picket sign; said that "every boat had a picket sign in it, no matter where you went" and you raised the sign after you got there. Erickson testified he was at the union hall in the morning of that day; was scheduled for picket duty at one of the gates at the refinery in the afternoon; he and Madison went for a walk, down to the bay, and Mock asked them if they would like to go out in a picket boat and do a little picket duty; so they went back to the union hall for lunch and the witness notified their picket captain they were going out in a picket boat as soon as they left; that when he heard about the train coming in he decided to ask to have his assignment transferred to the boat; he guessed it was all right with the picket captain, and he told the captain he was going out and picket in the boat. (The union's picket list [Ex. 75-B] bore Erickson's name among those listed for picket duty that afternoon, marked "P", indicating he reported for duty, and opposite his name the word "Boat" was written in.) Mock, Erickson, Madison and two others went out in the same boat, the five-man boat shown in one of the photographs (Ex. 36). They proceeded from near Rodeo, around the Union Oil wharf, toward Tormey Flat; as they proceeded the talk was that if they put a picket sign up and threw a few rocks they might be able to scare the crew of the engine and maybe the crew would change their mind and not take the cars out; the train arrived after they did, coming through the tunnel; the engine looked like it was going to couple onto these tank cars, and the boats were kind of circling around, and they started to throw a few rocks at the

engine. Erickson threw about three rocks. The "engine did get the cars and pulled them out, and so we exploded there for about five or ten minutes, and then we proceeded around the Long Wharf again and then back to the dock." He said the other boats did not leave the port at the same time as his, "It was 10 minutes either way, I think maybe we were the first one out; I believe so." He said the only thing he knew, that day, about an injunction was talk about something that limited picketing to four men to a gate. Others in his boat threw rocks; the rocks were in the boat when he got in it; the boat was 50 to 100 feet from the train when the rocks were thrown. Madison's testimony was substantially the same as Erickson's. Madison said Mock "asked us if we wanted to go out in the boat, because he was going to go over and picket the train, and we thought we would. So, we waited around there for some time. They were making preparations with the boat." After he got into the boat he noticed some rocks a box of rocks, on the floor. Madison's name also appeared on the picket list (Ex. 75-B) and opposite it the letter "P" and the word "Boat" penciled in.

[24] We find here substantial evidence in support of the finding that Bullock violated the restraining order, save as to the element of his knowledge of its pertinent provisions. Counsel for the respondent company invoke the evasiveness of Bullock (in this case as in the Hemmen case) as substantial evidence that he possessed such knowledge. We do not consider that such conduct alone, on the facts here presented, furnishes substantial support for such a finding. We conclude that the judgment against Bullock on the Ritchey complaint was without jurisdiction and should be annulled. It does not necessarily follow that the judgment against the Local Union, on the same complaint, should be annulled.

As to the Local Union, adjudged in contempt of court upon each of the six complaints, we have but four to consider in view of our conclusion that the Diehl and Hemmen complaints stated facts insufficient to confer jurisdiction to render judgment. As to those four, there can be no question

concerning the Local Union's knowledge of the temporary restraining order. The union was a party defendant in the action and was served on September 14, 1948, with copies of the restraining order, order to show cause, and the affidavits and memorandum of points and authorities upon which those orders were based, as well as the summons and complaint in the action.

[25] The principal question, in each case, is whether or not the Local Union bore such a relation to the transaction that it was a participant, directly or through its member actors, and legally responsible for the acts done, as acts enjoined by the restraining order. That is the scope and extent of the inquiry. We are not at all concerned with the question whether the union might or might not be found legally responsible, upon the same set of facts, in a civil action for alleged damages or in a criminal action for an alleged violation of some provision of the Penal Code.

In respect to the judgments of contempt rendered against the Local Union on the Davison complaint, it is clear that the evidence in support of the judgment is substantial. Casey was financial secretary and business agent of the union (its one full-time officer) and a member of its strike committee. He was the principal actor in that transaction and director of it. The evidence supports the implied finding of the trial court that his acts upon that occasion were the acts of the Local Union. There is additional evidence that tends to support the judgment against the Local in the Davison case; also, those rendered in the Grant, Briggs and Ritchey cases.

A. A. Marcos, president of the Local Union, testified that the elective officers of the union consist of the president, first and second vice-presidents, financial secretary, recording secretary, guide, guard, a grievance committee of 11 members, and three trustees; that there is an executive committee consisting of the elective officers; and that a strike committee was set up September 3 or 4, 1948, consisting of A. A. Marcos (president), J. P. Kenny (first vice-president), G. A. Malkos (second vice-president), Frank Casey (financial secretary),

Loyd Cooper (recording secretary), John McKeown (guard), L. J. Kenny (trustee), J. L. Bradley, William Law, Tom Coughlan, Frank Devine, and W. E. Bates (the last three were members of the grievance committee); and that Bradley and Law replaced Leo Doty and Harold Lowery, original appointees who had resigned. There was also a negotiating committee, which consisted of A. A. Marcos, Frank Casey, Loyd Cooper, and Frank Devine. There was a welfare committee to find food and housing for members and to screen applications for financial assistance; it had no function with reference to picketing.

The strike committee, said Marcos, had the authority of conducting the strike, subject to the approval of the membership at regular meetings held once a week; they had members picketing at other places than Oleum but assigned only their own members to picket at Oleum; that Marcos did not have authority over anything or anybody, individually or as president of the union; the general conduct of the strike was the responsibility of the strike committee; none of the members of the strike committee had specific duties, they did whatever it was necessary to do, "We just handled matters as they came up"; the picket captains were appointed, as were the members of the strike committee, by a joint committee (the executive board and the grievance committee) subject to the approval of the local; the governing body of the union; the strike committee instructed the pickets to limit picketing to four at each gate, instructions that were given the picket captains who were told to pass these instructions along to the pickets assigned to their shifts. When giving those instructions, said Marcos, they told the picket captains they had been served with an injunction and the injunction said there shall be no violence of any kind and the pickets shall be limited to four to each gate, and they told the captains to follow those instructions; it was the duty of the picket captains to carry out those instructions and to advise the pickets; all the pickets were members of the Local Union; picket lists were prepared by the coordinating commit-

tee, headed by Mr. Alt, and the lists were handed to the captains, who administered the lists; the captains first selected were William Ahern, Lou Cargo, Bill Law, and Elmer Smart, and possibly one or two others, with some changes later on; the captains had helpers, called lieutenants, selected by the captain. Shown a list of names of persons, which bore the legend "Wednesday 8 A M to 4 P M" and "Sept. 15, 1948," Marcos said it was a picket list for the day indicated and that the names listed were of members assigned to picket duty during the hours indicated; the entry "P" after a member's name indicated he answered for duty down at the hall; not all on the list who answered did picket duty, some were given other assignments, and some did picket duty whose names did not appear on the list. Marcos said he received his copy of the restraining order on the 14th of September, read it and offhand did not understand what he was reading; that on September 16 Casey and Cooper went to San Francisco and met with their attorney, Lindsey Walden (that Aljets, who served the papers, said he would give them a day or two to get some legal advice), to get a clarification of what was meant; they did not post the restraining order at the union hall, nor did the witness recall having any discussion of the restraining order at any meeting of the union; "The membership of the Committee discussed the advisability of attempting to interpret it and we decided against it for the reason that at that time through the press and through letters to all the employees of the Company the Company was using every weapon that they had in their command to put out the story to the members, and we felt this injunction was just another move on the part of the Company to break the strike and weaken the morale of the members, and none of us had a clear enough understanding of the injunction to act as interpreters. As a matter of fact, we had been advised by our regular counsel that probably all the members were going to be served now; that seemed to be what was done in the southern part of the State and there was no reason why it shouldn't hold true up here. So, we did not post it, did

not discuss it, and certainly didn't advise anyone of it. What we did do is this: As we assigned pickets to the line, we told them there should be absolutely no violence, and not more than four pickets to a gate. That was all we did, and we maintained that and we still do; that there should be nothing more than peaceful picketing up there, and there should not be more than four men on any gate. As to the rest of the injunction, right now I can't tell you what is in it." He said they reduced the number of pickets at the gates to four on September 15 or 16.

As to picketing by boats, Marcos believed there was some picketing around Petaluma and around the Port of Oakland, and out in the channel off of Oleum as the tankers were approaching the docks; if boats were picketing tankers, he imagined they would have signs. Before September 15 he never saw any boat picketing within 100 feet or so of the Union Oil property; he did not instruct or authorize any persons to picket in the waters within 200 feet of that property before September 15; did not know about anyone else on the strike committee doing so, though he normally attended meetings of the committee when he was in this area; there were times when he was in Los Angeles, attending negotiations; he was at Rodeo September 15, 16 and 17, could not say whether he was at Rodeo on September 22, 26, or 27, or on October 4, 1948; that on the days he was away from local headquarters, first vice-president James P. Kenny acted in his place, and if Kenny were also absent, second vice president Malkos would act. This witness did not know whether the strike committee at any time instructed Frank Silva to do anything.

Tom Coughlan, recording secretary and member of the strike committee of the Local Union, testified that the picket captains were appointed by the strike committee. He did not know who was assigned to the picket boats on September 17, 1948. The minutes of the meeting of September 16, 1948, of the Local Union contained the following entries: Under "Report of the Boat Committee," an entry that "Brother Malkos reported for the Boat Committee

as to the number of boats we have working for our efforts and their duties"; under "Report of the Co-ordination Committee," the entry that "Brother Alt again discussed the functions of the Co-ordination Committee regarding picket assignments and office force duties"; and under "Report of Publicity Committee," the entry that "Brother McCord discussed the functions of a publicity committee, saying that local and immediate news is published, that all press releases would come from the International. The paper is called 'Off Stream.' Human interest stories, committee functions and picket line news will be featured." G. A. Malkos (second vice-president and a member of the strike committee), who made that report for the boat committee, testified that he had some authority over the boats; assigned some boats on the bay on September 16 for fishing and they had picket signs on them also; did not know that he did so on September 22, could not remember what happened that day; during the last two weeks in September he did not make any assignments, there were some boats out there with picket signs on them, he did not tell them to do anything; he had so much to do he would not say he gave definite orders for anybody to go out there in September or October; he knew there were boats out there during the first week in October with picket signs on them, they may have been fishing; these boats sometimes went to Oakland or Petaluma or various other places around the bay; he knew when they were going to Petaluma and Oakland and various points in the bay.

Harold Alt, chairman of the co-ordinating committee, produced picket lists for the various days upon which violations of the restraining order were charged, and explained the lists and their use, as did Marcos. The entry "P" opposite a man's name indicated "Present," that he responded for duty, at the union hall; the captains detailed the men to the picket gates. On the picket list for September 17, opposite "M. P. Lowery" (one of the members charged in the Grant complaint) the word "Boat" was entered. The witness did not know for sure what that entry meant. (We have, above, noted similar entries opposite

the names of Erickson and Madison on the picket list for October 4, 1948.)

The strike was voted on September 4, 1948, by 90 per cent of the approximately 1050 members of the Local Union, according to the witness Marcos.

Here is presented a picture of an organization that by vote of its membership authorizes a strike and by and through its elected officials and specially constituted committees conducts the strike, giving its strike committee general authority to conduct the strike subject to approval of the members expressed at regular weekly meetings, using pickets selected and listed by a duly constituted co-ordinating committee and assigning the pickets to their stations and supervising them through picket captains duly appointed for that purpose; using, also, a boat committee, as evidenced by the minutes of the meeting of September 16 and by certain issues of the union's news bulletin. The testimony of the officers and strike committeemen concerning assignments to strike duty by boat was somewhat evasive, but they did say that such assignments were made for the picketing of tankers in the channel and at Petaluma and the Port of Oakland and that the boats carried picket signs, and none said that no assignments were made for offshore picketing of railroad train movements in the vicinity of Oleum. Phillips' testimony that the union furnished the picket sign for his boat and the transfer of Erickson and Madison from land to boat picket duty with the sanction of the picket captain on the 4th of October, coupled with the circumstantial evidence furnished by the entries opposite their names on the picket list for that day, are added indicia which support the implied finding that the picketing by boat activities here involved were those of the union as an organization, not the activities of individual members of the union acting on their own. The duly constituted officers and committees of the union, clothed with general authority to conduct the strike (including the picketing) for and on behalf of the organization as a unit, cannot in good conscience, with knowledge of the

restraining order and its provisions and early advice thereon by their attorney, withhold from the members, particularly those assigned to and performing picket duty, adequate information concerning acts enjoined by the restraining order. Those members were not acting merely on their own. They were acting for the union as an organization and would quite naturally look to their captains for guidance as well as for station assignments. The responsible and directing officers and committeemen could not suffer the communication of this information to the picket men to break down at the level of the captains, and then say that neither they nor the union whose affairs they had in charge disobeyed the mandates of the restraining order. That order was addressed to the Local Union and to four of its officers and six members of its strike committee (all parties to the action in which the order was made), and "restrained and enjoined" them "and each of them, their agents, servants, representatives, officers, employees, members and pickets" from "committing or performing directly or indirectly or by any means whatsoever any of" the acts proscribed in the seven paragraphs of that order quoted earlier in this opinion. A duty thus cast upon the union cannot be evaded by withholding from its agents, its representatives, its member-pickets, information quite evidently needed by them to enable the union to conduct its strike without violating the injunction.

Cumulative evidence to the effect that violent picketing activities were not mere sporadic outbreaks by individual members of the union, is furnished by the active participation and leadership of Casey in the prevention of removal of coke from the refinery. Indeed, such action by the financial secretary and business agent, a member of its strike committee and clothed with power to do whatever it was necessary to do in the conduct of the strike (as stated by president Marcos), was no mere closing of the eyes and suffering individual members sporadically to commit acts enjoined by the restraining order. Such conduct by this officer was evidence of a substantial

character in support of an implied finding that the union encouraged and sanctioned disobedience of the court's order.

[26] We conclude that the judgments severally rendered upon the Grant, Briggs, Davison, and Ritchey complaints, adjudging the Local Union guilty of contempt of the authority of the court, were supported by substantial evidence and were within the jurisdiction of the trial court to render.

The International Union was adjudged guilty of contempt of the authority of the court as a participant in the doing of the acts charged in the Briggs, Diehl, Davison, and Hemmen complaints. In accordance with our conclusion that the judgments in the Diehl and Hemmen cases were based upon insufficient complaints, those judgments should be annulled as to the International Union as well as to the other petitioners affected thereby.

The acts alleged in the Briggs and Davison complaints were committed on the 22nd and the 27th of September, 1948, respectively. The evidence is substantial that the International had knowledge of the temporary restraining order and its provisions on those dates, for it was served with copies thereof and of the moving papers and the summons and complaint in the action by service on O. A. Knight, its president, on September 17, 1948, and by service on J. Elro Brown, its district director, on September 20, 1948. Knight and Brown were also served therewith, on those dates respectively, as individuals.

The question in each of these two cases is whether or not there was substantial evidence that the International Union bore such a relation to the transaction as would and did characterize it in law a participant legally responsible for the acts done as acts enjoined by the restraining order.

The constitution and by-laws of the International Union for 1948-1949 are in evidence. That document indicates the relationship between the International and Local Unions and the members. A person attains membership in the International by becoming a member of a Local (art. X, § 3) and has the right of transfer of membership from one Local to another

when he moves from the jurisdiction of the one to the other (X, § 10). The legislative and governing body of the International is the National Convention (III, §§ 6-12). Every member of the International is represented in the National Convention by the delegate or delegates chosen to represent his Local. The voting strength of the Locals is based upon their average per capita payments to the International. No member of a Local is eligible to serve as a delegate unless he has been a member in good standing of the International at least six months and of a Local at least 90 days, unless the Local has been organized less than six months (III, §§ 4 & 9). The elective officers of the International are a president, a vice-president, a secretary-treasurer, seven International executive council members, and seven International vice-council members. The president, subject to confirmation by the council, appoints seven district directors, one for each of the seven geographical districts of the International. (V, § 1.) The president presides at the National Convention, is chairman of the executive council, is chief administrative officer, and responsible for all activities of the International other than those assigned by convention to other elected officers, and plans and supervises all programs, negotiations and other activities necessary for the advancement and welfare of the members. It is his duty to conduct all authorized strikes. He appoints all International representatives and organizers, and procures legal advice when necessary. It is his function to interpret the constitution of the International and decide all questions, laws and usages, and his decision is binding unless amended or reversed by the executive council or the convention. (VI, §§ 1 & 2; IX, § 1.) Minimum qualifications are prescribed for individual members (I, §§ 4 & 5). The mandates of the International must be obeyed at all times and in it alone is vested the power to establish Local Unions and to regulate and determine all matters for their guidance, while to the Locals is conceded the right to make necessary laws for Local government which do not conflict with the laws of the International (I, §

2). The International executive council must revoke the charter of a Local in case of continued violation or refusal to obey the laws of the International (IX, § 3). Minimum and maximum rates for initiation fees and dues are prescribed by the constitution. Of the dues which the constitution requires each Local to collect from the members (\$2.50 per month, which a Local may increase to \$3.00), \$1.15 per month (until November 1, 1948, and thereafter \$1.25) is a per capita tax payable monthly by the Local to the International but is at all times the property of the International; the remainder is the property of the Local, to be disbursed as the laws of the Local provide, subject to the International constitution governing the conduct of Locals. (X, § 6.) The constitution allocates these per capita revenues to certain funds (X, § 1). Defense fund moneys may be drawn only for the sustenance of lockouts and strikes of Local Unions when such strikes are authorized, endorsed and conducted in conformity with article XII of the constitution, which requires the recipients to report for strike duty as directed by the Local. During a strike, the International representative in charge must make weekly reports to the International showing amounts of money distributed and to whom paid. (XII, §§ 8-10.) If a Local desires that other Locals be circularized for financial assistance, it may appeal only to the International for that aid. If the appeal is found warranted, the International officers make the appeal to the other Locals. Money contributed must be sent to the International and is then forwarded to the Local, which shall account therefor to the International. (XII, § 14.) A standard set of by-laws is prescribed for each Local to govern its procedure until modified by the Local, except that certain provisions thereof are not subject to change by the Local. No Local may declare the products of any oil company "unfair" or place such products on any "We don't patronize list," unless such action has first been submitted to and approved by the International executive council, which shall grant such authority on request whenever the International has

abandoned efforts to reach agreement with such company in matters affecting any portion of its membership concerned (X, § 11). A Local may not call a strike without first calling a meeting thereon, with notice to all its members, nor unless three-fourths of the affected members by secret ballot decide on a strike. If they so decide, the president of the Local must notify the International president of the cause of the matter in dispute and all relevant facts. The International president must then endeavor to adjust the difficulty, and if his efforts prove futile he must notify the executive council, and if the council decides a strike is necessary the union shall be authorized to order a strike. No strike except on contract work is deemed legal or moneys expended from the International expense fund on that account, unless the strike is first authorized and approved by the International president and executive council. Strikes on contract work may be approved by the International president in the interest of expediency. (XII, §§ 1 & 2.) In any question pertaining to the welfare of the organization as a whole, the International president, with the approval of the executive council, shall take such steps as will best preserve the interests of the organization, subject to a referendum vote of the Local Unions within 30 days when requested by 20 per cent of the Local Unions; a provision which the International president may invoke as a result of an unauthorized strike (VI, § 10). A Local Union inaugurating a strike without executive council approval shall not receive benefits on account of the strike. No monthly dues shall be collected from members affected during the period of a strike. (XII, §§ 4 & 7.)

[27] It is apparent that the constitution and by-laws vested in the International Union, acting through its International officers, the power to authorize a strike called by a Local Union, and cast upon the International president the duty to conduct all authorized strikes. That alone might not make the International legally responsible and amenable for acts done by its members or by one of its Locals in contempt of the authority of a court. We

entertain the further inquiry whether or not there is substantial evidence in support of the trial court's implied finding that in the instant case the International assumed its prerogative of conducting this particular strike.

This strike was authorized by the International. The witness O. A. Knight, president of the International, testified that "Under the terms and provisions of the Constitution and with the representations that are implied therein, the International Executive Council authorized it, indicating by such authorization that, in their opinion, the further negotiations would not be fruitful, and that there was no use therefore proceeding with further negotiations." He further testified that other strikes were simultaneously called against other oil companies in California, including the Standard, Richfield, Associated, Shell, and Texaco companies, and that the International approved the strike against each of those companies under the same conditions that it did the strike against the Union Oil Company. Eight oil companies were involved. On September 4, 1948, approximately 15,000 employees went out on strike.

About nine or ten days after September 4, president Knight arrived in California from his headquarters at Fort Worth, Texas. He was in the Contra Costa area for a number of days and met with various Local Union officials, and addressed meetings of members. He addressed an open air meeting of the Richmond Local at Richmond on September 15, and meetings at Martinez on the 16th and Richmond on the 28th of September. A recordation was made of the address delivered at the September 15 meeting at Richmond. That recordation was played in court and a portion thereof transcribed into the record. From that transcription it appears that International district director J. Elro Brown (his district included California and four other western states) acted as chairman, and in introducing president Knight as a speaker said that Knight "has now set up headquarters in this district for the purpose of assisting, advising and directing the strike against the oil companies, or oil

trust on the West Coast. Under the Constitution and By-Laws of the Oil Workers' International Union, all strikes are under the direction of the President, and our President is here to direct this strike against the oil trusts on the West Coast. It gives me great pleasure to introduce to you A. O. (Jack) Knight, President of the Oil Workers' International Union, CIO." In response to this introduction, president Knight's initial remarks were: "Thank you, Mr. Chairman, and to the members of Richmond Local Union of the Oil Workers' International Union: I wish to bring to you the rousing good wishes of the oil workers throughout the Nation and express the hope that you are able in this fight of yours to bring out of it the type of victory you set out to bring—that you are successful in bringing about a condition here in Richmond, California, where you can work for wages at least commensurate with those being paid to our workers throughout the Nation." During the course of his address, president Knight said: "It has been suggested by a certain oil company official, not a member of the local Standard, that the control of this strike has gotten out of the hands of the Oil Workers' International Union, the implication being that the President of another organization is now directing it here. That statement is so absolutely ridiculous that insofar as I am concerned it does not need denial. (Automobile horns.) I wish, however, to assure all of the oil company officials that I am the President of the Oil Workers' International Union and I will continue to fulfill the duties of that office without interference from anyone, just so long as you see fit to continue to elect me to that office. (Applause.) This is our fight. It's a fight against the oil industries in the United States and it's particularly against the oil industries in the State of California. There is only one fight and only one union involved, and I think we're big enough to do the job we have set out to do." He said, further, that "for a long number of years I have represented what I consider to be the greatest labor organization the world has ever produced—our own Oil Workers' International Union.

We are going forward in this fight, not only here in Richmond, but we're going to continue in Rodeo. We are going to continue it at Avon, at Martinez, throughout the State of California until we have won this strike," and "As I said earlier, we have but one fight and there's only one union involved, the Oil Workers' International Union against the oil industry of the State of California"; also, "I'm going to conclude this little talk to you by again expressing to you the solid support of the oil workers throughout the Nation," and "I am going to conclude, as I say, by assuring you that your International Union is solidly behind you 100%. You do your part, we'll do our part, and victory will certainly come, and this organization of ours will continue to grow. It will continue to carry out its function." These statements, some made by Knight, others made in his presence by Brown, furnish substantial support for the implied finding of the trial court that the International Union, through its president, took charge of and conducted the authorized strike which had been called by the Rodeo Local against the respondent herein.

In addition, it appears by the testimony of Knight that he and his attorney, on the 14th or 15th of September, met at the Rodeo union headquarters and advised the Local leaders, who were asking about their legal right to institute picket lines around a plant adjacent to the Oleum refinery, a plant that supplied steam to the refinery, and the attorney advised against such picketing. It also appears by the testimony of Knight, Brown, and other International officers that the International solicited and received contributions from Local Unions and other persons and groups throughout the country and distributed the funds thus received through its International representative to the Rodeo union for financial assistance of members in need thereof. Knight said that the International did not thereby use its defense fund, which had been nearly depleted, but merely acted as a disbursing agency and that the moneys distributed were not in the nature of strike benefits. It was, however, an International Union activity conducted ap-

parently in accordance with the provisions of the constitution relating to the solicitation and distribution of moneys by the International when requested by a distressed Local and approved by the International. Knight also testified that his personal activities in California consisted, principally, of assisting in the negotiation of new agreements with the oil companies, conducted at Los Angeles. Such activities alone might not furnish substantial evidence that the International exercised its power to conduct this strike, but they are not inconsistent with the independent evidence which tended to prove the exercise of that power upon the part of the International.

It is true that Knight upon the witness stand denied the material allegations of each of the six complaints, insofar as they related to the International, disavowed having had anything to do with the picketing conducted by the Local Union, or the selection or instruction of any of its pickets, or knowledge at the time of anything which any of the asserted individual contemnors did.

Knight further stated that it was his practice at all times to counsel peaceful picketing and respect for the law. His testimony concerning such counseling is somewhat impeached by the fact that the transcription in this record of the address which he made at Richmond on September 15 shows that on that occasion he said that he and others had worked out an understanding whereby persons who had been going to work at the Standard Oil Company "will no longer attempt to take people through the picket lines of the Oil Workers' International Union," and that "out of these attempts to run people through the picket lines, there had developed between large numbers of people—there's developed the use of many things which we don't ordinarily use in strike situations. Because of this understanding, I am requesting this local union to no longer encourage in any way any situation which might result in violence, damage to property, or in danger to human beings. I am asking that *just so long as your picket lines remain inviolate * * **" (Emphasis added.) Asked if he made such

a statement on that occasion, Knight said he could not answer it "yes" or "no." Asked if he would deny making a statement to that effect, he said, "It is neither affirmed nor denied. My memory does not serve me quite that well, sir," adding that he always speaks extemporaneously and that he addressed that group at least 45 minutes.

[28, 29] The significant evidence bearing upon the International's legal responsibility is that furnished by the constitution and by-laws concerning the element of control over the Local by the International and the right of the International and the duty of its president on its behalf to "conduct all authorized strikes," and the statements by Brown and Knight at the Richmond meeting, which support the implied finding that the International, through its president, was conducting these strikes, including the strike against the respondent herein. Picketing, it is clear, was deemed an important part of the conduct of a strike. That part, in contrast to the negotiation of new agreements and the solicitation and distribution of funds for the assistance of members in need thereof, the parent body did not conduct immediately and directly by and through its International officers. It conducted that part of the strike through the Local Union and its officers and committeemen, and the member-pickets, as agents and representatives of the International. The parent body cannot escape responsibility for the acts of these, its agents and representatives, done in violation of the restraining order after the International received notice and knowledge of the order and its provisions. The same duty of guiding and controlling the acts of its agents and representatives in the observance of the injunction rests upon the International as upon the Local in its relation to the individuals who were the member-pickets. It happened, according to the witness Marcos, president of the Local, that within a day or two of the service upon them of the restraining order two of the Local officials, Casey and Cooper, "went to San Francisco with copies of the injunction and met with Lindsay Walden [attorney to the International] and attempted to get from him a clarification of

what was meant." In explaining why the Local officials did not specifically bring the terms of the restraining order to the attention of the membership at large, Marcos, among other things said, "As a matter of fact, we had been advised by our regular counsel that probably all the members were going to be served now; that seemed to be what was done in the southern part of the state and there was no reason why it shouldn't hold true up here. So, we did not post it, did not discuss it, and certainly didn't advise anyone of it," except to tell the picket captains there should be no violence, and not more than four pickets to a gate, and to direct the captains to pass those instructions along to the pickets. It would appear that the Local Union and the member-pickets acted in the line and within the scope of their authority as agents and representatives of the International Union, but without that degree of guidance, direction and control by the International officers which would enable the International, after it received notice and knowledge of the restraining order, to perform its duty of complying with the mandates of that order in the conduct by the International of this strike. We conclude, therefore, that the judgments severally rendered upon the Briggs and Davison complaints, adjudging the International Union guilty of contempt of the authority of the court, were supported by substantial evidence and were within the jurisdiction of the trial court to render.

2. *As to the Validity of the Temporary Restraining Order.*

Petitioners contend that the temporary restraining order was void because, they say, it prohibited peaceful picketing and included within its proscription acts of a character not presented to the court by the verified complaint and the supporting affidavits which furnished the factual basis for the issuance of that order.

[30] The acts which petitioners committed for which they were adjudged in contempt of court were in disobedience of that portion of the restraining order which forbade them from "threatening bodily harm or injury to" plaintiffs' "of-

ficers, agents, employees, customers, or any other persons having business with plaintiff, or attempting to serve" plaintiff "while entering, attempting to enter, leaving or attempting to leave plaintiff's refinery at Oleum * * *" No one claims, nor could anyone successfully claim, that such acts constitute peaceful picketing or that they come within the constitutional guaranty of freedom of speech. Nor could a claim successfully be made that such acts were not of the type specifically described in the verified complaint and the supporting affidavits.

It is unnecessary to decide whether or not other provisions of the restraining order might be construed as prohibiting mere peaceful picketing or as prohibiting conduct not within the scope or of the type of acts described in the complaint and the affidavits.

In *re Bell*, 19 Cal.2d 488, 122 P.2d 22, was a habeas corpus proceeding for the review of a judgment rendered upon the conviction of petitioners for violating a county ordinance which proscribed certain types of picketing. The Supreme Court found that petitioners could have been lawfully convicted only under that portion of the ordinance which read as follows: "'Section 3. It is unlawful for any persons to beset or picket the premises of another, or any approach thereto, where any person is employed or seeks employment, or any place or approach thereto where such employee or person seeking employment lodges or resides, for the purpose of inducing such employee or person seeking employment, by means of compulsion, coercion, intimidation, threats, acts of violence, or fear to quit his or her employment or to refrain from seeking or freely entering into employment.'" 19 Cal.2d at page 491, 122 P.2d at page 25. The Supreme Court further found that those provisions of the ordinance were valid in part and invalid in part. That part which prohibited picketing by acts of violence was deemed valid. The court considered that part separable from the invalid portion, and because petitioners failed to show whether the acts for the commission of which they had been convicted were proscribed by the valid or

by the invalid portion of the ordinance, the court concluded that the petitioners had failed to meet the burden which the law cast upon them of showing that the trial court did not have jurisdiction to render the judgment under review.

The same principles and a like line of reasoning apply to paragraph 1 of the restraining order and the judgments of contempt under review in the instant proceeding. In addition, it is manifest that the judgments of contempt here involved were based upon disobedience of the valid portion of the restraining order, assuming for the purpose of this phase of the discussion, but not deciding, that some other portion of the restraining order may have been invalid.

In this case, as in the *Bell* case, the sole inquiry is whether or not the trial court had jurisdiction to render the judgment which it did render,—quite different from cases of direct attack of a judgment upon appeal, some of which petitioners have cited in support of their position upon this point, but which we consider inapplicable here.

3. *Applicability of the Restraining Order to the Local and International Unions, Unincorporated Associations, and Enforcement as to Them of the Provisions of That Order, if Applicable.*

The Local and International Unions claim that because they are unincorporated associations neither is an entity; hence, neither of them is a "person" within the meaning of the applicable statutes. It necessarily follows, they say, that the trial court was without jurisdiction to render judgment of contempt against them, and that each such judgment as to either of them was void and should be annulled.

[31] We do not so view the law. Each union was in court as a party defendant in an action in which the plaintiff sought an injunction against each union restraining the conduct of certain types of picketing. Each was in court as a party defendant by virtue of a statute which declares that "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the

summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability." Code Civ.Proc., § 388.

When such an association becomes a party to an action, it necessarily follows that the court acquires jurisdiction over it to the same full extent as the jurisdiction it has over any other party during the pendency of the action. This includes the jurisdiction and authority of the court to "determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; * * *." Code Civ. Proc., § 389. Among the powers of a court is that of compelling "obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein". Code Civ. Proc., § 128. The authority and jurisdiction of the court includes the power of a judicial officer "To preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty" and "To compel obedience to his lawful orders as provided in this code." Code Civ.Proc., § 177. "For the effectual exercise of the powers conferred by the last section [§ 177], a judicial officer may punish for contempt in the cases provided in this code." Code Civ.Proc., § 178. "An injunction is a writ or order requiring a person to refrain from a particular act. It may be granted by the court in which the action is brought, or by a judge thereof; and when granted by a judge, it may be enforced as an order of the court." Code Civ.Proc., § 525. Section 526 of the Code of Civil Procedure enumerates the types of cases in which an injunction may be granted, including the case "When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action". These statutes furnish ample sanction for

the issuance by the trial court of the restraining order in question, an order directed to the Local and International Unions as parties to the action, ordering them to refrain from the doing of certain acts.

[32] Such an order of a court would be ineffectual in many cases were not some means of enforcing its requirements provided. Various means of enforcement have been provided by statute. Certain types of contempt of court (including "Willful disobedience of any process or order lawfully issued by any court") are made punishable as misdemeanors by section 166 of the Penal Code, enforceable through the ordinary processes of a criminal action. Another method of enforcement is provided by sections 1209 to 1222, inclusive, of the Code of Civil Procedure. Section 1209 declares that "Disobedience of any lawful judgment, order, or process of the court" is a contempt of the authority of the court. The remaining sections of this group prescribe the procedure which was invoked and followed in the proceeding which culminated in the judgments of contempt here under review. This type of proceeding is not a criminal action or proceeding. It is a special proceeding, criminal in character, governed by the provisions of the Code of Civil Procedure, not by those of the Penal Code; not for the punishment of an offense against the state, but intended to implement the inherent power of the court to conduct the business of the court and enforce the lawful orders of the court. *Bridges v. Superior Court*, 14 Cal.2d 464, 473-477, 94 P.2d 983.

[33] But, say the petitioners, sections 1209 to 1222, inclusive, were not intended by the Legislature to apply to unincorporated associations because by their terms they apply to "persons" and section 17 of the code does not include unincorporated associations in its definition of "persons." That section says that "the word 'person' includes a corporation as well as a natural person". That is not to say that the word "person" under no circumstances includes an unincorporated association. The statement that the word person "includes" a natural person and a corporation leaves

open for consideration what other types of entities that word includes when used in a particular context to meet a given situation. The word "includes" is not ordinarily a word of limitation but rather of enlargement. *Johnson v. Monson*, 183 Cal. 149, 152, 190 P. 635; *Fraser v. Bentel*, 161 Cal. 390, 394, 119 P. 509. The Legislature used it as a word of enlargement in section 17.

[34] Now, of course, in a proceeding under sections 1209 to 1222, inclusive, it must appear that an unincorporated association when involved as a party defendant must be such a person as possesses the capacity to obey the order under consideration. Without that capacity there could be no "disobedience" of the order. That each of these two unions had that capacity abundantly appears from the facts adduced at the trial, discussed earlier in this opinion. It is not a case of a simple partnership where in dealing with others each active partner has a legal right to act for all of the partners and bind the firm. No member of these unions could, merely as a member, go to the union hall at Rodeo, take over and conduct the business of the union, nor could he go to the International headquarters at Fort Worth and assume and exercise the powers of the International vested in its president by the constitution and by-laws of that body. Each union has its own well-defined functions and bears a certain relation each to the other, and each of them toward the members. Each has all of the aspects of an entity. Each, in a very practical sense, is a real person, especially in its dealings with others. Each exemplifies the fact that labor unions are no longer the small unimportant organizations they were once considered. The labor union is a developing institution and with its tremendous growth in importance and power has come to be more akin to the corporation than the partnership or the social or fraternal order. Recently, we had occasion to consider this trend and development and found that, for the purpose of venue, a labor union's place of business is its residence.⁴ In fact, as early as 1888 it

was recognized in this state that "Courts will interfere for the purpose of protecting property rights of members of unincorporated associations in all proper cases, and, when they take jurisdiction, will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character." *Otto v. Journeymen Tailors' Protective & Benevolent Union*, 75 Cal. 308, 17 P. 217, 219. It is obvious that such organizations are no longer comparable to voluntary fraternal orders or partnerships; that they are sui generis, and approximate corporations in their methods of operation and powers. This being so, wherever it can be done without violation of some rule of law, the ends of justice will be more properly served if the courts apply to such organizations the rules applicable to corporations rather than the rules applicable to voluntary fraternal orders or partnerships, at least at the procedural level and in respect to the conduct of the business of a court and the enforcement of its lawful orders. While there may be associations which are more similar to partnerships than to corporations, as the Venice Road Race Association was held to be in *Leake v. City of Venice*, 50 Cal.App. 462, 195 P. 440, the modern labor union is far more similar to a corporation than to a partnership. To consider such organizations under present day conditions as mere social or fraternal orders or partnerships is to close one's eyes to the realities now existing.

Earlier decisions interpretive of section 388 of the Code of Civil Procedure lend support to the views which we have expressed. In *Herald v. Glendale Lodge No. 1289*, 46 Cal.App. 325, 189 P. 329, the court held that this section authorized the joining of an unincorporated lodge of a fraternal order as a party defendant in an action seeking an injunction restraining the lodge from serving liquor to the members at luncheons and banquets. That decision was cited with approval in *Jardine v. Superior Court*, 213 Cal. 301, at pages 317-318, 2 P.2d 756, 79 A.L.R. 291. In the *Jardine* case, the Supreme Court held that sec-

4. *Juneau Spruce Corp. v. International Longshoremen's & Warehousemen's Un-*

ion, Cal.App., 229 P.2d 424, an opinion written by Justice Bray.

tion 388 authorized the joining of the Los Angeles Stock Exchange, an unincorporated association, as a party defendant, observing that "In California, the entity theory has been established by a number of decisions." 213 Cal. at page 309, 2 P.2d at page 760. In *Armstrong v. Superior Court*, 173 Cal. 341, 159 P. 1176, it was held that section 388 authorizes the maintenance of an action against a labor union to enjoin it from certain types of picketing and that "all members of any such association having knowledge of the terms of any injunction issued therein, as well as all their officers, agents, representatives, and employees having such knowledge, are bound thereby, and guilty of contempt in any willful violation thereof." 173 Cal. at page 342, 159 P. at page 1176.

In other jurisdictions, labor unions have been found amenable to judicial process. Illustrative thereof are: *Moran v. International Alliance, etc.*, 139 N.J.Eq. 561, 52 A.2d 531; *United Packing House Workers of America v. Boynton*, 240 Iowa 212, 35 N.W.2d 881; and *United States v. United Mine Workers of America*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884.

4. Were the Acts Proscribed by the Temporary Restraining Order within the Federal Domain to the Extent of Precluding a State Court from Enjoining Their Commission?

Petitioners claim that the trial court was without jurisdiction to restrain the commission of the acts it enjoined, for the asserted reason that Congress, by enacting the Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq., regulated the same subject matter and thereby occupied the field to the exclusion of the states.

They further claim that some of the acts (picketing by boat) occurred upon navigable waters and for that reason were within the federal jurisdiction to the exclusion of the state.

As to the Labor Management Relations Act of 1947, Pub.Law 101, ch. 120, 61 Stat. 136, petitioners direct particular attention to subsection (b) of section 8, especially subparagraphs (B) and (C) of (4) of said subsection, and section 10 of the National

Labor Relations Act of 1935, as revised by section 101 of the Labor Management Relations Act, 1947. They also direct attention to section 303 of the 1947 act.

The Supreme Court of the United States has decided this question adversely to the position taken by the petitioners. In 1942, the question was presented to that court whether an order of the Wisconsin Employment Relations Board entered under the Wisconsin Employment Policy Act was unconstitutional and void, as being repugnant to the provisions of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C.A. § 151 et seq. The state board, after a hearing held pursuant to the provisions of the state statute, found appellants guilty of certain unfair labor practices and ordered the union, its officers, agents and members to desist from mass picketing, threatening employees, obstructing or interfering with factory entrances, obstructing or interfering with free use of public streets and sidewalks, and from picketing the domiciles of employees. It was admitted that the company was subject to the federal act although the federal board had not undertaken in this case to exercise the jurisdiction which the federal act conferred upon it.

Confining its attention to the specific facts of the case before it and carefully refraining from giving consideration to any of the other and separable provisions of the state statute, the Supreme Court of the United States directed attention to the fact that the only employee or union conduct and activity forbidden by the state were, in this case, "mass picketing, threatening employees desiring to work with physical injury or property damage, obstructing entrance to and egress from the company's factory, obstructing the streets and public roads surrounding the factory, and picketing the homes of employees. So far as the fourteen individuals are concerned, their status as employees of the company was not affected." *Allen-Bradley Local No. 1111, United Electrical Radio and Machine Workers of America v. Wisconsin Employment Relations Board*, 315 U.S. 740, 748, 62 S.Ct. 820, 825, 86 L.Ed. 1154.

The court then said, "We agree with the statement of the United States as *amicus curiae* that the federal Act was not designed to preclude a State from enacting legislation limited to the prohibition or regulation of this type of employee or union activity." 315 U.S. at page 748, 62 S.Ct. at page 825. The court distinguished its decision in *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581, upon the ground that the federal statute there involved provided a complete federal system of alien registration and thereby superseded any state system of alien registration, holding that the federal labor relations act did not govern employee or union activity of the type enjoined by the Wisconsin board, adding: "And we fail to see how the inability to utilize mass picketing, threats, violence, and the other devices which were here employed impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal Act. Nor is the freedom to engage in such conduct shown to be so essential or intimately related to a realization of the guarantees of the federal Act that its denial is an impairment of the federal policy." 315 U.S. at page 750, 62 S.Ct. at page 826. In conclusion the Supreme Court said: "In sum, we cannot say that the mere enactment of the National Labor Relations Act without more excluded state regulations of the type which Wisconsin has exercised in this case. It has not been shown that any employee was deprived of rights protected or granted by the federal Act or that the status of any of them under the federal Act was impaired. Indeed if the portions of the state Act here invoked are invalid because they conflict with the federal Act, then so long as the federal Act is on the books it is difficult to see how any State could under any circumstances regulate picketing or disorder growing out of labor disputes of companies whose business affects interstate commerce." 315 U.S. at page 751, 62 S.Ct. at page 826.

We have found no subsequent decision of the United States Supreme Court that disapproves the decision which it made or the principles which it applied in the Allen-

Bradley case. See *Hill v. State of Florida, ex rel. Watson*, 325 U.S. 538, at pages 539, 545, 65 S.Ct. 1373, 1376, 89 L.Ed. 1782 [concurring opin. by Mr. Chief Justice Stone], 325 U.S. 555, 559-560, 65 S.Ct. 1381, 1383 [dissenting opin. by Mr. Justice Frankfurter]; *Southern Pacific Co. v. State of Arizona ex rel. Sullivan*, 325 U.S. 761, at page 776, 65 S.Ct. 1515, 89 L. Ed. 1915; *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, at page 95-96, 65 S.Ct. 1483, 89 L.Ed. 2072; and *International Union, of United Auto, Aircraft and Agr. Implement Workers v. O'Brien*, 339 U.S. 454, at page 459, 70 S.Ct. 781, 94 L.Ed. 978.

In 1949, in considering the question whether or not the Labor Management Relations Act of 1947, including its revision of the National Labor Relations Act of 1935, precluded the Wisconsin Employment Relations Board, pursuant to the provisions of the Wisconsin Employment Peace Act, from ordering a union and others to cease and desist from instigating certain intermittent and unannounced work stoppages and otherwise interfering with production except by leaving the premises in an orderly manner for the purpose of going on strike (an order interpreted and limited by the Wisconsin Supreme Court as forbidding individual defendants and members of the union from engaging in concerted effort to interfere with production by doing the acts instantly involved), the Supreme Court of the United States observed that "Congress has not seen fit in either of these Acts [the 1935 and 1947 acts] to declare either a general policy or to state specific rules as to their effects on state regulation of various phases of labor relations over which the several states traditionally have exercised control." *International Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Employment Relations Board*, 336 U. S. 245, at page 252, 69 S.Ct. 516, at page 521, 93 L.Ed. 651. "However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Act of 1947, that 'Congress designedly left open an area for state control' and that 'the intention of Congress to exclude states from exerting

their police power must be clearly manifested" 336 U.S. at page 253, 69 S.Ct. at page 521, citing the Allen-Bradley case. "We therefore turn to its legislation for evidence that Congress has clearly manifested an exclusion of the state power sought to be exercised in this case." 336 U.S. at page 253, 69 S.Ct. at page 521. After reviewing the salient features of the 1947 act, including section 8(b)(4), the court concluded: "It seems to us clear that this case falls within the rule announced in Allen-Bradley that the state may police these strike activities as it could police the strike activities there, because 'Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board.' There is no existing or possible conflict or overlapping between the authority of the federal and state Boards, because the federal Board has no authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the state or it is entirely ungoverned." 336 U.S. at page 254, 69 S.Ct. at page 521. With reference to the "right to strike" mentioned in section 13 of the revised 1935 act, the court said that this recognition of the right to strike plainly contemplates a lawful strike, the exercise of the unquestioned right to quit work and did "not operate to legalize the sit-down strike, which state law made illegal and state authorities punished." In addition, the court gave particular consideration to the provisions of sections 7 and 10(a) of the federal act. In conclusion, the court said, "We find no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate a course of conduct neither made a right under federal law nor a violation of it and which has the coercive effect obvious in this device." 336 U.S. at page 265., 69 S.Ct. at page 527.

[35] In February, 1951, the Supreme Court declared invalid provisions of the Wisconsin Public Utility Anti-Strike Law which prohibited strikes against public utilities and provided for compulsory arbitration of labor disputes after an impasse in collective bargaining had been reached.

Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees v. Wisconsin Employment Relations Board 71 S.Ct. 359, 95 L.Ed. 364. The court found those provisions in conflict with the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1947. Such provisions, if effective, would operate to restrain the exercise of rights protected by section 7 of the federal act. We find nothing in that decision which disallows or overrules in any way the holding which the same court made in the Allen-Bradley and International Union cases. The judgments of contempt here under review were rendered to enforce the observance of provisions of an injunction which forbade picketing by means of acts of violence, entirely different from an attempted restraint of the exercise of the right to call a strike and conduct it peacefully.

The picketing by boat occurred upon navigable waters. Because of this fact petitioners claim that such picketing was within the exclusive jurisdiction of the federal courts and therefore beyond the jurisdiction of a state court. This point is not well taken.

[36, 37] The picket boats were within the territorial waters of the state. A state has policing jurisdiction over its territorial waters, a jurisdiction that may be exercised by a state for all proper purposes. *People v. Stralla*, 14 Cal.2d 617, 96 P.2d 941. The Judiciary Act of 1789 and later statutes reenacting its pertinent provisions, in declaring that federal district courts have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, placed a limitation upon that exclusive feature by "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it * * *." 28 U.S.C.A. § 41, subd. 3, and § 371. This clause was interpreted in *Moore v. Purse Seine Net*, 18 Cal.2d 835, at page 837, 118 P.2d 1, at page 3, as meaning that "a case involving a maritime cause of action may properly be brought in a state court if the type of remedy pursued is traditionally within the jurisdiction of

the common law courts." The court concluded that "If the action is of a type that was cognizable in both admiralty and common law courts the state courts retain a concurrent jurisdiction with the federal admiralty courts to entertain the action." (18 Cal.2d at page 837, 118 P.2d at page 3.) The Moore case was affirmed in *C. J. Hendry Co. v. Moore*, 318 U.S. 133, 63 S.Ct. 499, 87 L.Ed. 663. Those decisions leave no doubt that even if the boat picketing involved herein were a civil case of admiralty or maritime jurisdiction, the trial court under the saving clause quoted had jurisdiction of the subject matter thereof.

This saving clause was modified and enlarged by the 1948 revision of Title 28 of the United States Code. The saving clause became a part of section 1333, 28 U.S.C.A., which declared that the federal district courts have original jurisdiction exclusive of the courts of the states of "Any civil case of admiralty or maritime jurisdiction, saving to the libellant or petitioner in every case any other remedy to which he is otherwise entitled." Pub.Law 773, 80th Cong.2nd Sess., ch. 646, U.S. Code Cong.Serv.1948, p. A3, at A84. In this form the saving clause became effective September 1, 1948, Pub.Law 773, § 38, ch. 646, U.S. Code Cong.Serv.1948, p. A164, 28 U.S.C.A. note preceding section 1, prior to the filing of the action and commencement of the contempt proceedings in the court below. In that form the saving clause continued in effect until section 1333 was amended in 1949 to read "saving to suitors in all cases all other remedies to which they are otherwise entitled." Pub.Law 72, 81st Cong. 1st Sess., ch. 139, U.S.Code Cong.Serv.1949, p. 107.

[38] Petitioners also invoke sections 526 to 526t, inclusive, of Title 46 of the United States Code Annotated as a statute through the medium of which the federal government has asserted and exercises exclusive jurisdiction over every vessel propelled by machinery and not more than 65 feet in length, except tug boats and tow boats propelled by steam. The fact that the picket boats in question were propelled by outboard motors would proba-

bly bring them within the scope of the regulatory provisions of the statute cited. However, that statute relates only to the boat (requiring that it be equipped with lights, a whistle, a life preserver and other safety devices) and prohibits its operation in a reckless or negligent manner so as to endanger the life, limb or property of any person. In enacting that statute the Congress certainly did not assert exclusive federal jurisdiction, or any jurisdiction, over the types of conduct which the trial court in its judgments here under review found and declared constituted contempt of court.

[39, 40] A complete answer to this contention of petitioners is the fact that the transaction under consideration is not a cause of admiralty or maritime jurisdiction. What certain of the petitioners did in the picket boats took effect on land. It has long since been established that for a tort to be maritime the alleged injury to person or property must be consummated on or in navigable waters, and not on land. See *Ex parte Phenix Insurance Company*, 118 U.S. 610, 7 S.Ct. 25, 30 L.Ed. 274; *Johnson v. Chicago & Pacific Elevator Co.*, 119 U.S. 388, 7 S.Ct. 254, 30 L.Ed. 447; *Cleveland Terminal & U. R. Co. v. Cleveland Steamship Co.*, 208 U.S. 316, 28 S.Ct. 414, 52 L.Ed. 508; *The Raithmoor*, 241 U.S. 166, 173-175, 36 S.Ct. 514, 60 L.Ed. 937. The same principle applies to the disobedience of a court order when it takes effect on land, as in the case here under review.

5. *As to the Use of Documents Produced in Court in Response to Subpoenas Duces Tecum, Assertedly Based upon Insufficient Affidavits.*

Petitioners claim that the trial court lost jurisdiction to render judgment because, as they say, certain documents were produced in court and introduced into evidence in response to subpoenas duces tecum, based upon an affidavit therefor which petitioners claim was insufficient to furnish a basis for such an order. In this connection, they claim that their constitutional immunity from unlawful search and seizure was violated, rendering the use of the docu-

ments incompetent and the entire proceeding void.

The documents in question were in the possession or in the control of the Local Union. The subpoenas were addressed to the appropriate officers of the union requiring production of the documents, which consisted of the constitution and by-laws of the International Union; the minutes and minute books of the Local and its members, of meetings on certain specified dates in September, October and November, 1948, and of all special meetings of the Local held during that period; each issue of the publication "Off Stream" distributed by the strike committee of the Local from September 4 through September 26, 1948; all of the records of the Local showing the persons who were members of the International and of the Local from September 13 through November 22, 1948; the list of all members of the Local who picketed the Oleum refinery of the Union Oil Company; the time and dates of picketing duty assigned to and credited to each such picket; the dates and hours of picketing duty performed by each member of the Local who picketed the refinery; and the assignments of the pickets to the refinery on September 15, 16, 17, 22, 24, 28, and October 4, 1948, the days upon which the complaints before the trial court severally alleged disobedience of the restraining order occurred.

During the trial, petitioners moved to quash the service of most, if not all, of these subpoenas, which motions were denied. These documents were brought into court and, when called for, objections to their use as evidence were made by petitioners, and overruled. The documents, or pertinent portions of them, then went into evidence. The record of the minutes of the meetings of the Local was submitted to the trial judge, who selected from them those portions only which he considered relevant to the issues before the court, whereupon those portions only were read into evidence.

[41-43] The question whether or not the order directing the issuance of these subpoenas had a sufficient foundation in

the facts stated in the affidavit which accompanied the application for that order is not a question for consideration and determination by this court in this proceeding. Our inquiry is limited to the question of jurisdiction. The manner of the production of these documents which went into evidence did not affect the jurisdiction of the trial court to render judgment. In *Selig Cahn, Inc., v. California Wrecking Company*, 9 Cal.2d 617, 71 P.2d 1113, on appeal from a judgment rendered in a civil action the appellant complained that "the trial court by an order made without authority compelled it to produce certain of its books and records upon the trial." 9 Cal. 2d at page 619, 71 P.2d at page 1114. In response to that contention the Supreme Court ruled that "The remedy of the appellant, if it wished to resist the order, was by appropriate proceedings for that purpose. It could not comply with the order and then object to the introduction of the records which it produced upon the ground that the order was improper. *People v. Mayen*, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383." In the *Mayen* case, on an appeal from a judgment of conviction of grand larceny and of attempted grand larceny, the appellant assigned as error the use of certain photographs, letters and other papers assertedly taken from appellant's place of residence under color of a search warrant based upon an insufficient affidavit. During the trial, and prior to the use of these papers, appellant moved for an order requiring the district attorney to return the papers to him, a motion which the court denied. Later, when certain of the papers were offered in evidence, appellant objected to their reception upon the grounds upon which he had made the motion for their return, but the objection was overruled and various of the documents were admitted in evidence. The Supreme Court held that where competent evidence is produced on a trial, the courts, under the law of this state, may not stop to inquire or investigate the source from which it comes or the means by which it was obtained. A proceeding for the recovery of property unlawfully seized, said the court, is independent of the criminal

proceeding in which it is sought to use such article in evidence. As stated later in *People v. Gonzales*, 20 Cal.2d 165, at page 169, 124 P.2d 44, at page 46, "the accepted rule in this state, as in many others, permits the introduction of improperly obtained evidence on the ground that the illegality of the search and seizure does not affect the admissibility of the evidence."

6. *As to the denial of Petitioners' Motion for a Continuance to Enable Their Counsel to Prepare for and Present Oral Argument.*

Upon the conclusion of the taking of evidence in the afternoon of December 31, 1948, counsel for petitioners indicated a desire for oral argument. The court said, "You want to make it, well, start in right now." Counsel stated he could not start in right then because of the size of the transcript. After some discussion, the court again said to counsel, "If you want to argue it today, I will be glad to hear you." Counsel responded that he could not argue it that day. The court ruled that it would not keep this matter open longer because the court was going to try to give prompt decision, that the court owed it to the many alleged contemnors to make a prompt decision. Counsel then asked and was granted permission to file an affidavit in support of his motion for a continuance for the purpose of argument, a continuance pursuant to section 595 of the Code of Civil Procedure, predicated upon the fact that counsel had been elected to the Legislature, which would convene at Sacramento January 3, 1949, and continue in session for approximately four weeks. The affidavit stated that counsel had been elected a member of the state Legislature which would convene on January 3, 1949, at Sacramento; that it was therefore necessary for him to attend the Session and that he did not consent to the trial or hearing on any proceedings then before the court before the expiration of 30 days next following final adjournment, or the commencement of a legislative recess of more than 35 days. As it turned out, the state Legislature convened on January 3, 1949; recessed on January 29, reconvened

on March 7, and continued in session until adjournment on July 2, 1949.

[44] The statute invoked, § 595 was not available to counsel at the time. It applies only when a party or an attorney of record is a member of the Legislature and objects to proceeding with a trial or hearing, and does not then apply unless the Legislature be in session or in a recess not exceeding 35 days. On that day, counsel was not a member nor was the Legislature in session or in recess.

[45, 46] Petitioners do not now assert a right under section 595. They claim that denial of the motion operated to deprive them of the right of representation by counsel, a denial of due process. We do not so view it. Oral argument in a civil proceeding tried before the court without a jury, is a privilege, not a right, which is accorded the parties by the court in its discretion. Here the court did accord that privilege, but petitioners sought instead a postponement of long duration (not less than 30 days in any event) in a type of proceeding which the law requires shall go ahead to a conclusion with all reasonable expedition. In addition, the record shows that during the course of the trial the court entertained and received the benefit of the expression of the views of counsel at every stage. Denial of the motion in no way impaired the jurisdiction of the court to proceed.

7. *The Propriety of the Joinder of Union Oil Company as a Party Respondent in this Proceeding.*

The petitioners joined Union Oil Company of California as a party respondent when they applied for the writ of review. In their briefs they claim that the company is not a real party in interest nor a party whose interest would be directly affected by this proceeding; therefore, not a proper party. They urge that this proceeding be dismissed as to the company. The company, upon the other hand, claims it is a proper party and was appropriately joined as a respondent.

[47] The burden of petitioners' argument is that a contempt proceeding is criminal in nature and that a criminal

proceeding must be prosecuted by the authority of the People of the state and not by a private person. That argument would be sound if this were strictly a criminal proceeding, which it is not. The company, as a person for whose protection the temporary restraining order was granted, would be a "party beneficially interested" and thus qualified under section 1069 of the Code of Civil Procedure to apply to an appellate court for a writ of review, if the trial court had dismissed the contempt proceeding upon the ground that the temporary restraining order was invalid for some reason and the company desired to test the jurisdiction of the court to make the order of dismissal. *Taylor v. Superior Court*, 20 Cal.2d 244, 247, 125 P.2d 1. In *Sheldon v. Superior Court*, 42 Cal. App.2d 406, 108 P.2d 945, it was held that in a proceeding to review an order removing a special administrator and appointing another in his stead, the latter is a real person in interest and therefore a proper party respondent. These principles demonstrate the propriety of petitioners having joined the company as a party respondent herein.

As a corollary to this phase of their argument, petitioners in their answering brief make the suggestion that it was improper to permit the attorneys for the plaintiff in the action to prosecute the contempt proceeding, i. e., that "the prosecution of this case by the attorneys representing a partisan party in the case in chief cannot be permitted," and that "it is highly improper and prejudicial for them so to do." It is not clear that petitioners claim that such prosecution deprived the court of jurisdiction to enter judgment. We entertain no doubt that it did not.

[48] In a brief filed by amicus curiae the additional point is made that it is against public policy to permit the prosecution of a contempt proceeding by private individuals without the consent or cooperation of the district attorney. We find this point to be without merit, upon the authority of *Taylor v. Superior Court*, supra, 20 Cal.2d 244, 125 P.2d 1, and cases collected in 5 Cal.Jur. 936, Contempt, section 35.

The order under review is hereby affirmed in every respect and as to all of its provisions, save and except only the following provisions, which are hereby annulled: (1) The provisions of said order which adjudged the Local Union, the International Union, and Frank M. Silva guilty of contempt for acts done September 27, 1948, as alleged in the affidavit of Robert C. Diehl which was filed October 14, 1948; (2) the provisions of said order which adjudged the Local Union, the International Union, Frank M. Casey, James P. Kenny, Herman Phillips, Jr., Frank M. Silva, Montell H. Bullock, Curtis C. Page, and Walter V. Holt guilty of contempt for acts done September 28, 1948, as alleged in the affidavit of G. H. Hemmen which was filed October 14, 1948; and (3) the provisions of said order which adjudged Montell H. Bullock guilty of contempt for acts done October 4, 1948, as alleged in the affidavit of Donald Ritchey, which was filed October 14, 1948.

BRAY, J., concurs.

PETERS, Presiding Justice (concurring and dissenting).

I concur and dissent.

Except in one particular, I concur with everything that is said and decided in the majority opinion. That opinion fully and fairly states the facts, and, except in this one respect, correctly applies the law to those facts. I disagree with the majority only with their disposition of the contempt order against Frank M. Silva based upon the Briggs complaint. It is my opinion that there is no evidence to support the finding that Silva had notice of the restraining order when these acts were committed, and therefore did not violate the restraining order.

The Briggs complaint charged Silva and others with certain acts in violation of the restraining order alleged to have been committed on September 22, 1948. I have no doubt at all that the evidence supports the finding that Silva committed the charged acts. The evidence recited in the majority opinion demonstrates that to a certainty.

The question is whether the evidence supports the finding that Silva knew of the provisions of the order when the acts were committed. This element of proof was indispensable. The burden of proof rested on those asserting knowledge to prove it.

The majority concede that there is no direct evidence of knowledge on the part of Silva on or before September 22, 1948, but hold that the trial court indulged in a reasonable inference that Silva then had knowledge on that date. This inference is based upon the following facts:

1. When directly asked if he knew of the restraining order on September 22, 1948, Silva testified that he did not, and that he did not gain such knowledge until October 6th or 7th when first told by a deputy sheriff. Earlier in the trial he had testified as to certain events which occurred on September 15th. During that testimony, when asked if he had knowledge of the injunction on September 15th—and no other date was then involved—he testified that he then did not have such knowledge, but that later he found out from a deputy sheriff, who told him about the injunction “and that was, say, about, I should say, maybe a week or so after this happened, maybe; I am not sure now.” When confronted with this testimony after he had testified that he did not have such knowledge on the 22nd, he testified: “You must remember I said I wasn’t sure what time it was—might be a week, might be two weeks, might be three weeks.”

This is treated by the majority as an admission from which the trial court could reasonably infer that Silva had the requisite knowledge on September 22nd, a week to the day after September 15th. This evidence cannot be distorted into an admission that Silva had knowledge on the 22nd. This case is *quasi* criminal in character, and the burden of proof is on those asserting knowledge. At best, the quoted evidence supports a guess, surmise or conjecture that Silva might have had the requisite knowledge on the 22nd, but no reasonable inference to that effect can be predicated thereon.

2. Considerable weight is given in the majority opinion to the evidence that small

placards setting forth the terms of the restraining order were posted at each entrance, and that Silva admittedly, prior to the 22nd, picketed near various entrances to the plant. A guess is made that he may have seen the notices. The majority state that it taxes “human credulity” to believe that Silva did not read the signs because he had the opportunity to read them. He testified that he did not read them, and there is no contradiction of his testimony. Even if his testimony was disbelieved by the trial court, as it apparently was, is mere opportunity to acquire knowledge to be substituted for proof of knowledge, where that element of proof is essential? Does proof of opportunity meet the burden of proof? I think not.

3. In the statement of facts relating to the acts committed by Silva great emphasis is laid upon the evidence that Silva knew Casey, a union official who knew of the restraining order, and that Silva was frequently seen in Casey’s company prior to the 22nd. It is implied, apparently, that Casey must have told Silva about the restraining order and that Silva must have learned of it in this fashion. If this is the proper interpretation of the majority opinion, the conclusion reached is certainly not sound. Again, proof of opportunity of acquiring knowledge cannot be substituted for proof of knowledge. This is carrying the concept of guilt by association far beyond permissible limits.

Whether these bits of evidence be considered separately or together they furnish no logical or reasonable basis for the inference that Silva knew of the provisions of the restraining order on the 22nd. The majority, in my opinion, have indulged in mere guess, surmise and conjecture on this issue.

The majority opinion sets forth at length the evidence showing that Silva committed several of the prohibited acts. Undoubtedly, he committed those acts. Undoubtedly, he committed acts that not only violated the restraining order, but constituted violations of the criminal law. They were bad acts and wrongful acts. But he is not charged with simply committing those acts. He is charged with violating the terms of a re-

straining order. He cannot be held to have violated the restraining order unless he knew of it. This is the key issue. In my opinion, those asserting such knowledge failed to prove it. This portion of the order should be annulled.

In all other respects I agree with the majority opinion.



103 Cal.App.2d 690

In re RAUCH.
Civ. 4566.

District Court of Appeal, Second District,
Division 1, California.
April 23, 1951.

Proceedings in the matter of Judith Ann Rauch, a person under the age of 21 years, wherein the Superior Court of Los Angeles County, sitting in separate session as a Juvenile Court, A. A. Scott, J., entered an order declaring the child to be a ward of the court, and the father of the child appealed. The District Court of Appeal, White, P. J., held that the evidence was insufficient to establish the fact that the minor was a person over whom the juvenile court was given jurisdiction by statute.

Reversed with directions.

1. Appeal and error ⇨150(1), 151(2)

Any judicial proceeding which seeks to impair or take away a father's parental authority is litigation in subject matter of which father is interested, and, therefore, brings father within fundamental rule of appellate jurisdiction that any person having interest recognized by law in subject-matter of judgment, which interest is injuriously affected by judgment, is party aggrieved and entitled to be heard upon appeal.

2. Guardian and ward ⇨17
Infants ⇨19

Authority of parent ceases upon appointment of guardian of person of child, but such suspension of parental authority would not divest natural father of substan-

tial interest in proceeding initiated by officer of juvenile division of county probation department to have father's minor child declared ward of juvenile court. Welfare and Institutions Code, § 700; Civ.Code, § 204; Probate Code, § 1500.

3. Courts ⇨176½

When Juvenile Court order declared child to be ward of court and ordered that child be placed in custody of probation officer to remain in home of maternal uncle and aunt pending adjudication of probate court action in which child's father was seeking to revoke letters of guardianship previously granted by probate court to maternal uncle and aunt of child, father of child was party aggrieved by juvenile court order and entitled to appeal therefrom. Welfare and Institutions Code, § 700; Civ. Code, § 204; Probate Code, § 1500.

4. Infants ⇨19

In proceedings brought to have minor child declared ward of juvenile court, evidence was insufficient to sustain juvenile court's findings that minor was within provisions of juvenile court law granting court jurisdiction over minor children who have no parent or guardian or no parent or guardian willing to exercise or capable of exercising proper parental control. Welfare and Institutions Code, § 700; Civ. Code, § 204; Probate Code, § 1500.

5. Infants ⇨19

Purpose of juvenile court law is not adjustment of disputes between parent and duly appointed guardians of minor, and, where parent seeks to regain custody of child those matters are to be settled in guardianship proceedings. Welfare and Institutions Code, § 700; Civ.Code, § 204; Probate Code, § 1500.

Edward L. Butterworth, Los Angeles, for appellant, Louie M. Rauch, father of Judith Ann Rauch.

Landon Morris, Los Angeles, for respondents, guardians of said minor.

WHITE, Presiding Justice.

This is an appeal by Louie M. Rauch, father of a minor child, Judith Ann Rauch,

from an order of the superior court sitting as a juvenile court, declaring said minor child to be a ward thereof.

Ruth Calhoun Rauch, the mother of the child, died in October, 1948. Prior to her death she had petitioned the superior court to appoint her brother, Bernard P. Calhoun, and his wife, Patricia Calhoun, as guardians of the person of the child, which petition was granted. In December, 1948, a petition by the father to revoke the letters of guardianship was denied. In June, 1950, a second petition to set aside the order granting letters of guardianship and to revoke such letters was filed by the father, and a citation was issued requiring the guardians to appear on July 14, 1950, to show cause why such petition should not be granted. Notice of the citation was served upon Patrick L. Palace, Chief of the Juvenile Division of the Probation Department of Los Angeles County. The last-named official thereupon filed a petition with the juvenile court praying that the minor be declared a ward of the juvenile court. Following a hearing upon this petition, the court made its order declaring the child, Judith Ann Rauch, a ward of the court under subdivision (b) of section 700 of the Juvenile Court Law. Welfare & Institutions Code, sec. 700. It was further ordered that said minor be "placed in the custody of our probation officer, to remain in the home of the maternal uncle and aunt, Mr. and Mrs. Calhoun * * * pending the adjudication of the Probate Court action." The matter was then continued for further hearing. From this order the minor's father prosecutes this appeal.

A motion was made to dismiss this appeal upon the ground that appellant, the minor child's father, not being her guardian or entitled to her custody, was not a party aggrieved by the order appealed from. The motion was denied by this court without prejudice to its renewal in respondents' brief.

It is contended by appellant that the petition on its face discloses that the juvenile court is without jurisdiction, in that the facts alleged do not show the minor to be a person defined by subdivision (b) of sec-

tion 700 of the Juvenile Court Law, Welfare & Institutions Code, sec. 700; that the facts brought out at the hearing do not show the minor to be a person defined in said subdivision; and that the evidence presented does not support the allegations of the petition.

Section 700 of the Juvenile Court Law, Ch. 2, art. 6, Welfare & Institutions Code, provides, so far as here pertinent, that the jurisdiction of the juvenile court extends to any person under the age of 21 years who comes within any of the following descriptions:

"* * *

"(b) Who has no parent or guardian; or who has no parent or guardian willing to exercise or capable of exercising proper parental control; or who has no parent or guardian actually exercising such proper parental control, and who is in need of such control. * * *

In the petition filed in the within cause it was alleged that the minor child, seven years of age, "is a person defined in subdivision (b) of section 700 * * *, in that:

"Said minor, Judith Ann Rauch, has no parent exercising proper parental control and she is in need of same in that minor's father left her without provision, care, and support since on or about November 1, 1945. Minor's mother died on or about October 28, 1948. Bernard Calhoun, maternal uncle, was appointed minor's legal guardian in Superior Court of this County. Said minor's guardian, Bernard Calhoun, and minor's father Louis Martin Rauch are not in agreement as to the best interests and welfare of said minor and protection of the Court is sought."

The record reveals that Bernard Calhoun, one of the guardians, called as a witness by appellant father, testified that the child had been living with her guardians since about August, 1948; that the guardians had provided her with housing, food and clothing, sending her to school, furnishing music lessons, and providing adequate medical care; that she seemed to be happy and contented, but that she was aware of the conflict between her father and the guardians.

Under examination by the attorney for appellant the witness further testified:

"Q. And are you exercising normal parental control over Judith Ann Rauch? A. Yes, with this exception, Mr. Butterworth; that in view of all the conflicting—it is very—it has a very bad effect on the little girl.

"Q. * * * Are you able to control the child, Mr. Calhoun? A. Well, we can't control her when the father comes out there.

"Q. He comes out once every two weeks, is that right? A. Yes, sir.

"Q. And he sees her for one hour? A. Yes, and she doesn't even want to stay with him. I have to go and see where she is.

"Q. Other than that she would be leading the life of a normal child? A. No, these visits upset her, Mr. Butterworth, following his visits. She has been upset now ever since Mrs. Owens interviewed her about this hearing this morning, it has a very bad effect on the child."

The father of the minor child testified that he was employed, owned his own home and was willing to take and assume the care, support and parental control of the child; that he loved the child. He was asked how much money he had paid for the support of the child during the year 1950, but an objection to the question was sustained.

It further appeared from the colloquy between respective counsel and the court that while the probate court had previously denied the father's petition to set aside the guardianship, that court had not found the father to be an unfit person, but only that he was not a fit and proper person at the time the petition was denied. The probate court further found that the father had not abandoned the child. It further appears that the guardians had filed a petition to have the child declared an abandoned child, and had also sought to adopt the child.

We shall first give consideration to respondent's contention that the appeal should be dismissed on the ground that the father of the minor is not affected or aggrieved by the order appealed from, nor would its reversal restore him any rights of which he is now deprived.

Cal.Rep. 229-230 P.2d—33

[1] To say that the father of a child is not "affected or aggrieved" by an order declaring such child a ward of the juvenile court is to do violence to the American philosophy and system of government, in which the alien philosophy that the child is the creature of the state finds no countenance. Under the American way of life, the child belongs to the family, and any judicial proceeding which seeks to impair or take away a father's parental authority is certainly litigation, in the subject matter of which such father is interested, and, therefore, brings him within the fundamental rule of appellate jurisdiction that "Under our decisions, any person having an interest recognized by law in the subject-matter of the judgment, which interest is injuriously affected by the judgment, is a party aggrieved and entitled to be heard upon appeal". In re Estate of Colton, 164 Cal. 1, 5, 127 P. 643, 645.

[2] While it is true that the authority of a parent ceases upon the appointment of a guardian of the person of a child, Civ. Code, sec. 204; Prob.Code, sec. 1500, nevertheless, we are not disposed to hold that such suspension of parental authority divests a natural father of a substantial interest in a proceeding initiated by an officer of the juvenile division of a county probation department to have his minor child declared a ward of the juvenile court.

It is true, as contended by respondents, that should this court reverse the order appealed from the minor would remain in the custody of respondents as her guardians, but that is so only because, after the juvenile court declared the child a ward thereof, the court made an order directing that the child reside with such guardians. Should the order be affirmed, the juvenile court would be empowered to change such custody, and in the event of affirmance of the order now under consideration, even though the probate court should for good cause, revoke the letters of guardianship, the father could not have the custody or control of his child except upon order of the juvenile court. Such a situation is indeed one in which a natural father is affected and, legally speaking, an aggrieved party.

[3] Prior to the making of the order now before us, the minor was a ward of respondents as guardians duly appointed by the probate court, and, as such, in their custody. Now, as far as this litigation is concerned, the minor is no longer a ward of respondents, but a ward of the juvenile court, and in the custody of the respondents only by reason of the order of such said court. In other words, the action of the juvenile court, if it be held that it supercedes the prior action of the probate court, has altered the status of the minor from that of a ward of private guardians to that of a ward of the juvenile court. As a consequence of the instant action appellant, father of the minor, has had an additional obstacle placed in his path in so far as the recovery of his child is concerned. Before the juvenile court entered upon the scene, appellant could have recovered the care and custody of his child as the result of a single successful petition to the probate court. If the action of the juvenile court herein is sustained, appellant must not only petition the probate court successfully, but the juvenile court as well, before he can regain custody of his daughter. Manifestly, this result of the order herein has injuriously affected his rights and interest in his child. The motion to dismiss the appeal must therefore be denied.

[4] Appellant earnestly urges that the facts elicited at the hearing of the petition herein, are insufficient to establish the fact that the minor is a person defined in subdivision (b) of section 700 of the Juvenile Court Law. We are satisfied the evidence is insufficient.

Save and except for the testimony of Mr. Calhoun, one of the minor's guardians, that the child was "aware of all this conflict between her father and myself", and that the child was "upset" following visits by her father, there is no testimony in the record other than that the guardians were providing the minor with a good home, proper food and clothing, an education, including music lessons; that adequate medical care was provided and that the child appeared to be happy and contented, except as heretofore pointed out, on the occasions when

her father visited her. The juvenile court made no finding that the guardians were not actually exercising proper parental control, nor would any such finding be justified by the evidence. The only finding made is contained in the statement of the court as follows: "The court at this time is going to declare the youngster a ward of the court under subdivision (b) of section 700, feeling that the youngster does need some protection in view of the multiplicity of suits involved here. I will make an order she be placed in the custody of our probation officer, to remain in the home of the maternal uncle and aunt, Mr. and Mrs. Calhoun, at 3369 Laurel Canyon Boulevard, North Hollywood, pending adjudication of the Probate Court action".

We find nothing in section 700 (b), or for that matter, anywhere in the juvenile court law extending the jurisdiction of the juvenile court to a minor simply because such minor is involved in other pending litigation. Indeed, if such were the case, we might find the juvenile court injecting itself into actions for divorce, separate maintenance or appointment of guardians, where the custody of a minor was involved. No citation of authority is necessary for the statement that no such jurisdiction of the juvenile court was ever intended in enacting the legislation establishing it.

We are unable to find in the record before us any substantial evidence that the minor's guardians were incapable of exercising proper parental control over the child or that they had failed to do so.

[5] It is manifest that the personal differences between the guardians and the father of the minor—not the welfare of the child—were the moving cause of the proceeding. The purpose of the juvenile court law is not the adjustment of parental disputes between a parent and duly appointed guardians of a minor as in the instant case. These matters, insofar as the case now before us is concerned, are to be settled in the guardianship proceedings where the guardians and the parent are the actual parties. *People ex rel. Jones v. Savage*, 44 Cal.App.2d 670, 677, 112 P.2d 892.

The foregoing conclusion at which we have arrived makes it unnecessary to discuss or decide other points raised.

Notwithstanding we are fully satisfied that the motives actuating the juvenile court may be praiseworthy, we are convinced that neither the law nor the facts in the case now under review justified the order appealed from.

The motion to dismiss the appeal is denied. The order appealed from is reversed with directions to grant appellant's motion to dismiss the proceeding.

DRAPEAU, J., and HANSON, Justice pro tem., concur.



**EQUITABLE SAVINGS & LOAN ASS'N v.
SUPERIOR COURT IN AND FOR LOS
ANGELES COUNTY.**

Civ. 18384.

District Court of Appeal, Second District,
Division 2, California.

April 20, 1951.

Rehearing Denied May 7, 1951.

Hearing Granted June 18, 1951.*

Petition by the Equitable Savings and Loan Association, a corporation, against the Superior Court of the State of California, in and for the County of Los Angeles, to review and annul an order of the court. The District Court of Appeal, Wilson, J., held that Superior Court did not have jurisdiction to stay operation of an order and decision of building and loan commissioner authorizing petitioner to engage in loan business.

Order annulled.

1. Mandamus ☞171

When a writ of mandate is petitioned for and issued pursuant to statute governing inquiry into validity of administrative order or decision, court may stay operation of administrative order. Code Civ.Proc. § 1094.5 and (a, f).

* Dismissed Aug. 16, 1951.

**2. Declaratory Judgment ☞258
Mandamus ☞1**

Where loan associations instituted action in Superior Court for declaratory relief and petitioned for alternative writ of mandate in which they charged various irregularities in proceeding before building and loan commissioner wherein incorporators received license to engage in loan business but did not apply for writ nor join in incorporators' motion to issue an alternative writ, and court refused to grant writ and ordered that question of issuing writ be determined upon trial of action, action had been regarded as one for declaratory relief and not mandamus proceeding and accordingly court was without authority to stay commissioner's order authorizing incorporators to engage in loan business. Gen. Laws, Act 986, § 2.04; Code Civ.Proc. § 1094.5.

3. Mandamus ☞172

In a proceeding for a writ of mandate for purpose of inquiring into validity of administrative order or decision court may not reweigh evidence and its sole function is to determine from review of record whether there is sufficient evidence to sustain ruling of commissioner. Gen.Laws, Act 986, § 2.04; Code Civ.Proc. § 1094.5.

4. Declaratory judgment ☞1

Where plaintiffs instituted action in Superior Court attacking an order of building and loan commissioner which authorized certain individuals to engage in loan business, but did not apply for a writ of mandate to inquire into validity of commissioner's order or decision since neither plaintiffs nor court purported to proceed under statute governing inquiry into validity of commissioner's order by writ of mandate, they would be deemed to have considered and acted upon action as one for declaratory relief. Code Civ.Proc. § 1094.5.

5. Mandamus ☞1

Purpose of proceeding under statute governing inquiry into validity of administrative order or decision, as in case of any mandamus proceeding, is to obtain an early hearing in order that rights of parties may be speedily determined and that such pro-

ceedings are to be expedited is made manifest by another statute requiring that writ of mandate issue in all cases where there is not a plain, speedy, and adequate remedy, in ordinary course of law. Code Civ.Proc. §§ 1086, 1094.5.

6. Administrative law and procedure ⚖660
Declaratory judgment ⚖1

Statute governing inquiry into validity of any administrative order or decision, does not contemplate nor permit a trial in the nature of an action for declaratory relief. Code Civ.Proc. § 1094.5.

7. Administrative law and procedure ⚖791,
816

Mandamus ⚖172

In a proceeding where writ of mandate is issued for purpose of inquiring into validity of administrative order or decision, court's power is limited to determining whether commissioner's findings are supported by substantial evidence in light of whole record, and if substantial evidence appears in record, court is without power to set aside the order of commissioner, even though such order is not supported by weight of evidence. Code Civ.Proc. § 1094.5(b-e).

8. Administrative law and procedure ⚖657,
660

Declaratory judgment ⚖1

Mandamus ⚖1

Procedure under subdivisions of statute governing inquiry into validity of administrative order dealing with evidence not introduced or improperly excluded, and form and effect of judgment, is to be had pursuant to writ of mandate and not by an action for declaratory relief. Code Civ.Proc. § 1094.5(d, e).

9. Administrative law and procedure ⚖744
Licenses ⚖22

When application of party who is seeking privilege of engaging in business and in obtaining a permit or license so to do is denied, such party is not entitled to a trial de novo.

10. Administrative law and procedure ⚖741
Building and loan associations ⚖3

An objector to building and loan commissioner's order approving loan business'

articles of incorporation and licensing it to engage in business is not entitled to any greater latitude in a proceeding to review such order than loan business would have had if commissioner's decision had been adverse to its application. Code Civ.Proc. § 1094.5.

11. Declaratory judgment ⚖258

Where loan associations instituted action in Superior Court for declaratory relief and petitioned for alternative writ of mandate in which they charged various irregularities in proceedings before building and loan commissioner wherein incorporators received license to engage in loan business, court order postponing issuance of writ of mandate until termination of trial of declaratory relief action was not compliance with statute pertaining to issuance of writ on inquiry into validity of administrative order or decision or with other statutory provisions relating to writ of mandate, in view of fact that such provisions contemplate issuance of alternative writ of mandate and speedy hearing. Code Civ.Proc. §§ 1086, 1094.5.

12. Administrative law and procedure ⚖674
Injunction ⚖205

An order entered by court purporting to stay operation of order and decision of building and loan commissioner authorizing incorporators to engage in loan business imposed a restraint upon incorporators and operated as an injunction prohibiting it from continuing business which it had been authorized to conduct. Code Civ.Proc. § 1094.5; Gen.Laws, Act 986, § 12.02.

13. Constitutional law ⚖88

Right to engage in a lawful business is a valuable property right which is protected by the constitution and laws and in enjoyment of which one is entitled to be secured. Const. art. 1, § 1.

14. Constitutional law ⚖87

Protection extended to property by constitution is not limited to tangible goods or real estate but extends to a business and right to conduct it without unlawful or unauthorized interference or impediment. Const. art. 1, § 1.

15. Constitutional law ⇨87

Possession of right to carry on business necessarily embraces included right to purchase and sell commodities and to make contracts relating thereto.

16. Constitutional law ⇨313**Eminent domain** ⇨53

Legislature is without power to expropriate one's property by mere legislative enactment, and court has no power so to do without notice and a hearing. Const. art. 1, § 1.

17. Building and loan associations ⇨3

Preservation from competition is not a right which of itself would entitle plaintiff loan associations to seek relief from commissioner's order which authorized incorporators to engage in loan business, nor to question commissioner's order licensing incorporators. Code Civ.Proc. § 1094.5.

18. Action ⇨1

An injury is a wrong done in violation of a right, and damage without injury does not furnish foundation for an action, since if an act does not violate a legal right of a party, though he is damaged, he has no cause to complain.

19. Trade-marks and trade-names and unfair competition ⇨68(1)

Loss, consequent upon competition of a rival engaged in same business, will not support a cause of action.

20. Constitutional law ⇨306

Where loan associations instituted an action in Superior Court in which they charged various irregularities in proceedings before building and loan commissioner wherein incorporators received license to engage in loan business, and court entered an order purporting to stay operation of commissioner's order and decision pending judgment of court, and incorporators, who had engaged in loan business under commissioner's order, ceased doing business, stay order operated against existing property rights of incorporators and since property rights of plaintiff loan associations were not involved such ex parte order was in violation of due process. Code Civ.Proc. § 1094.5; Const. art. 1, § 1.

21. Injunction ⇨157

An order entered by Superior Court which purported to stay operation of building and loan commissioner's order authorizing licensees to engage in loan business, pending judgment of court, which was not limited to period of effectiveness, which was issued in absence of order to show cause which was issued without hearing and without points and authorities, and without undertaking stay order could not be sustained on theory that it was either a temporary restraining order or a preliminary injunction. Code Civ.Proc. §§ 526, 527, 529.

22. Courts ⇨26

When power of court is expressly defined and delimited by statute, provisions of statute measure extent of court's power.

23. Declaratory judgment ⇨258, 386

In a declaratory relief action, court is without power to issue an ex parte injunction or writ of mandate.

24. Injunction ⇨143(1)

Before an injunction may issue the defendants in such an action are entitled to notice and hearing. Code Civ.Proc. § 527.

25. Mandamus ⇨170

A writ of mandate may not be issued otherwise than as authorized by statutes which also require a hearing. Code Civ. Proc. §§ 1084-1094.

26. Administrative law and procedure ⇨750
Injunction ⇨126

In proceeding for inquiry into validity of administrative order or decision, burden rests upon party in whose behalf restraint on such order is issued, to show that for purpose of protecting his property rights it is necessary to restrain enforcement of order. Code Civ.Proc. § 1094.5.

27. Administrative law and procedure ⇨228

The Superior Court has no statutory, inherent or constitutional power to decide issues of fact before an administrative commissioner has acted.

28. Certiorari ⇨37

In a proceeding to review and annul a purported order of Superior Court made in a pending action which purported to stay

operation of order and decision of building and loan commissioner whereby he approved petitioner's proposed incorporation and its articles of incorporation and authorized petitioner to engage in loan business, commissioner was not affected by stay order and was not a necessary party to the proceeding. Code Civ.Proc. § 1094.5.

29. Building and loan associations ⇨45(1)

Where building and loan association by reason of building and loan commissioner's order was authorized to conduct a loan business, required capital had been paid up, and it had actually commenced doing business by making loans and performing other acts, its right to do business became vested and could be terminated only in manner provided by law.

30. Licenses ⇨36

The right to do business in which a license is a prerequisite to engaging therein, exists until holder is legally divested thereof.

31. Administrative law and procedure ⇨674
Building and loan associations ⇨3

Order of building and loan commissioner authorizing individuals to incorporate and do business as loan association is not analogous to a judgment of court which is suspended by an appeal, and is not suspended by a filing of a petition to review it.

32. Judgment ⇨563(1)

Even though petitioner had made motion to vacate an order entered by Superior Court which purported to stay operation of order and decision of building and loan commissioner authorizing petitioner to do business, petitioner was still entitled to maintain a subsequent proceeding to review and annul the order of the court in view of fact that order was void ab initio.

33. Injunction ⇨175

By petitioner's motion to vacate Superior Court's stay order, petitioner raised only question of court's jurisdiction and did not request additional relief on merits of controversy.

34. Appearance ⇨10

When a party relies on special defense of absence of jurisdiction or of notice, he

must limit himself to such ground, and if in addition he seeks relief on merits he has made a general appearance and waived his special plea.

35. Certiorari ⇨7

Fact that aggrieved party filed notices of appeal both from stay order entered by Superior Court and from court's order denying motion to vacate such stay order, did not divest District Court of Appeal of jurisdiction to review stay order when such order was void and not appealable, and therefore motion to vacate would likewise be nonappealable.

36. Judgment ⇨552

Where, prior to filing of petition in a proceeding to review and annul a stay order entered by Superior Court, petitioner had filed petition for writ of prohibition to restrain enforcement of order, and one division of District Court of Appeal had denied such writ, without written opinion, and petition for hearing in Supreme Court had been denied, without written opinion, such orders denying petitioner relief, were not res judicata.

37. Judgment ⇨552

Denial without opinion of an application for a prerogative writ, except habeas corpus, is merely a refusal to exercise court's original jurisdiction and is not res judicata upon merits of facts and legal issues presented by application.

Trippet, Newcomer, Yoakum & Thomas, Los Angeles, Ball, Hunt and Hart, Long Beach, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Roland G. Swaffield, Charles K. Chapman, Long Beach, for real parties in interest.

WILSON, Justice.

The principal question to be determined is whether the superior court had jurisdiction to stay the operation of an order and decision of the building and loan commissioner when no previous application

had been made or notice of motion given therefor, and no opportunity of hearing afforded to the commissioner or to the real party in interest.

Equitable Savings and Loan Association has presented a petition to review and annul a purported order of the superior court made in an action there pending entitled Long Beach Federal Savings and Loan Association and First Federal Savings and Loan Association of Bellflower vs. Frank C. Mortimer, [as] Building and Loan Commissioner, and others, on the grounds that the alleged order is void in that the court was without jurisdiction to make it. The order purports to stay the operation of the order and decision of the commissioner whereby he approved the proposed incorporation of petitioner Equitable, approved its articles of incorporation and the filing thereof with the Secretary of State, and the order authorizing, permitting and licensing Equitable to engage in business.

In response to the writ of review respondent court, in lieu of certifying its records to us, has lodged in this court the complete, original files in such action.

As shown by the petition herein and by the files of the superior court, the events leading to the instant proceeding are these: On May 11, 1950, an application for approval of articles of incorporation of a proposed building and loan association, to be known as Equitable Savings and Loan Association, was presented to the Building and Loan Commissioner. Pursuant to section 2.04 of the Building and Loan Association Act as amended, Stats. 1949, ch. 952, p. 1723; 1 Deering's Gen. Laws, 1949 pocket supp. p. 74, Act No. 986, the commissioner conducted a hearing and on July 12, 1950, issued findings, decision and an order approving the application and the articles of incorporation which were filed with the Secretary of State. A certified copy of the articles was filed with the County Clerk of Los Angeles County. On or about August 18, 1950, the commissioner issued his permit authorizing Equitable to issue its guarantee stock in the amount of \$250,005.

The petitioner alleges that such sum was paid into Equitable by various persons, and, on or about August 20, 1950, the commissioner issued a license authorizing Equitable to transact the business of a building and loan association, such license being for the unexpired period of the year 1950; that thereafter the corporation commenced to do business as a building and loan association and accepted money from various investors in accordance with the purposes recited in its articles of incorporation.

At the hearing had before the building and loan commissioner Long Beach Federal Savings and Loan Association and First Federal Savings and Loan Association of Bellflower and other like associations appeared and sought to introduce evidence purporting to establish various grounds upon which they asserted the commissioner should deny Equitable's application for the approval of its articles of incorporation.

On August 21, 1950, Long Beach Federal and First Federal filed in the superior court a combined complaint for declaratory relief and petition for alternative writ of mandate in which the Building and Loan Commissioner, the Secretary of State, Equitable, and various individuals and other corporations were made defendants. In that complaint and petition the plaintiffs made various and sundry charges concerning alleged irregularities in the proceedings before the commissioner and asserted the lack of character, experience and general fitness of the incorporators of Equitable to engage in the building and loan business. Among the alleged irregularities it is asserted that the commissioner refused to receive or act upon the evidence offered by the objectors and refused to issue subpoenas duces tecum for the purpose of bringing before the commissioner various documents and writings which, it is asserted, would have operated against Equitable's application.

The prayer of the complaint is for a declaratory judgment adjudicating that the order of the commissioner approving the proposed incorporation of Equitable and approving its articles of incorporation and licensing it to do business are all null and

void, and for an alternative writ of mandate commanding the Building and Loan Commissioner to vacate and revoke his proceedings or to show cause before the court why his orders and proceedings should not be annulled, vacated and set aside. Plaintiffs did not apply for the issuance of an alternative writ of mandate and none was ever issued.

The Building and Loan Commissioner and the Secretary of State demurred to the complaint and made a motion to strike out parts thereof. Defendants Equitable and other individual and corporate defendants likewise demurred, presented a motion to strike parts of the complaint, and at the same time filed a notice of motion either to dismiss the petition for a writ of mandate or to issue an alternative writ, with prompt return day, directed to the state officials and to Equitable, on the ground that the latter corporation is entitled to a prompt hearing of the application for writ of mandate which was brought by its business competitors in an effort to prevent or delay competition.

Upon the hearing of the several demurrers and motions the court, on November 29, 1950, by its minute order overruled the demurrers, denied the motions to strike portions of the complaint and adjudged " * * * that the order and decision of the building and loan commissioner be stayed pending judgment upon the trial of the action, in accordance with formal order this day filed."

On the same day the court signed and filed a written order overruling demurrers and denying motions to strike and further providing:

[1] "That the question of issuing a writ of mandate be determined upon the trial of the action.

[2] "That the operation of the order and decision of the Building and Loan Commissioner be stayed pending the judgment of the court."

Thereafter Equitable filed and presented to the court a motion to vacate that portion of the foregoing order contained in paragraph 2, which motion was by the court denied.

The petition now before this court seeks to have reviewed and annulled that portion of the order of November 29, 1950, purporting to stay the operation of the order and decision of the building and loan commissioner pending judgment of the court, which will hereafter be referred to as the "stay order."

Since we have reached the conclusion that the stay order is void and should be annulled it will not be necessary to consider: (1) whether Long Beach Federal and First Federal had a right to offer evidence at the hearing before the commissioner; (2) whether Long Beach Federal and First Federal may maintain either (a) an action for declaratory relief to test the validity of the commissioner's orders and decisions, or (b) a petition for a writ of mandate for the purpose of reviewing the orders and decisions of the commissioner, and other questions argued by the parties.

[1,2] When a writ of mandate is petitioned for *and issued* pursuant to Code Civ.Proc. section 1094.5 the court may stay the operation of the administrative order pursuant to subdivision (f). The court was without jurisdiction to exercise such power in the case under consideration since plaintiffs in the superior court, Long Beach Federal and First Federal, did not proceed or purport to proceed under section 1094.5. Subdivision (a) of that section provides: "Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. * * *" Plaintiffs in the superior court action did not apply for a writ, and when Equitable made a motion for the issuance of such writ in order that it might have an early hearing concerning its right to do business, the plaintiffs did not join in the motion and the court refused to grant it but ordered "That the question of issuing a writ of mandate be determined upon the trial of the action."

[3,4] It is manifest that plaintiffs and the court regarded the action as one for declaratory relief and not a mandamus proceeding authorized and contemplated by section 1094.5. If the proceeding is under that section the trial court may not reweigh the evidence and its sole function is to determine from a review of the record "whether there is sufficient evidence to sustain the ruling of the [commissioner]." *Southern Cal. Jockey Club v. Cal. Horse Racing Board*, 36 Cal.2d 167, 175, 223 P.2d 1, 6. Since neither plaintiffs in the superior court nor the court purported to proceed under section 1094.5 they must be deemed to have considered and acted upon the action as one for declaratory relief. Such being the case the court was without jurisdiction to grant the stay order without notice to Equitable or a hearing, whether the court deemed the order to be a writ of mandate, a temporary restraining order or a preliminary injunction.

Inasmuch as the proceedings before the building and loan commissioner have not yet been certified to the superior court the order complained of was made before that court had had an opportunity to examine the record, hence its order was made solely on the allegations in the complaint upon which a declaratory judgment was sought. If the commissioner's proceedings had been before the court below it is possible that it would have concluded that there is no basis for the court's interference with the order.

[5] The purpose of a proceeding under section 1094.5, as in the case of any other mandamus proceeding, is to obtain an early hearing in order that the rights of the parties may be speedily determined. That such proceedings are to be expedited is made manifest by the provisions of section 1086 of the Code of Civil Procedure requiring that the writ issue in all cases "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law."

The action insofar as it is for declaratory relief must proceed to trial and judgment "in the ordinary course of law", including the introduction of evidence by both parties upon the issues raised by the pleadings, the possible taking of depositions, and other

proceedings attendant upon the trial of an ordinary lawsuit.

[6,7] No such trial is contemplated or permitted under section 1094.5. Subdivision (b) provides that the inquiry to be made by the court shall extend to questions whether the administrative officer or board has proceeded without or in excess of jurisdiction, whether there was a fair trial, and whether there was any prejudicial abuse of discretion; that abuse of discretion is established if the board or officer has not proceeded in the manner required by law, if the order or decision is not supported by the findings, or if the findings are not supported by the evidence. The court's power is limited to determining whether the commissioner's findings are supported by substantial evidence in the light of the whole record. Section 1094.5(c). If *substantial* evidence appears in the record the court is without power to set aside the judgment of the commissioner even though the judgment is not supported by the weight of the evidence. *Housman v. Board of Medical Examiners*, 84 Cal.App.2d 308, 315, 190 P.2d 653, 192 P.2d 45.

[8] The procedure under subdivisions (d) and (e) is to be had pursuant to a writ of mandate and not in an action for declaratory relief.

[9,10] Had Equitable's right to engage in business been refused by the commissioner, or had it been dissatisfied with any ruling of the commissioner it would not have been entitled to a trial de novo, but the court's inquiry would have been limited to an examination of the record before the commissioner. *Housman v. Board of Medical Examiners*, supra, 84 Cal.App.2d at page 312, 190 P.2d at page 655 and cases cited. Since, when the application of a party who is seeking the privilege of engaging in business and in obtaining a permit or license so to do is denied, such party is not entitled to a trial de novo, it manifestly follows that an objector to the commissioner's order approving Equitable's articles of incorporation and licensing it to engage in business is not entitled to any greater latitude in a proceeding to review

such order than Equitable itself would have had if the commissioner's decision had been adverse to its application. If the case may proceed at all for declaratory relief and evidence be received on the allegations in the complaint, a question we do not decide, it would amount to a trial de novo of the proceedings before the commissioner which is just what is not permitted in a proceeding for review by mandamus.

[11] The postponement of the issuance of the writ of mandate until the termination of the trial of the declaratory relief action is not a compliance with section 1094.5 or with the other provisions of the code relating to a writ of mandate. Such provisions contemplate the issuance of an alternative writ of mandate (section 1088) and a speedy hearing.

Subdivision (f) of section 1094.5 provides that "The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, * * *." Since the proceedings in the superior court are not under section 1094.5, the power granted by subdivision (f) to stay proceedings is inoperative and the court was not authorized to issue the stay order.

[12] Respondent's argument is novel, though impotent, that the stay order merely deferred the operation of the commissioner's order and did not impose any restraint upon any person or upon an act of any person. The provisions of the statute negate such statement. A building and loan association is forbidden by law to engage in business without a license from the commissioner and without procuring renewal annually of its license. B. & L. Ass'n Act, sec. 12.02, Stats. 1931, ch. 269, pp. 483, 530; 1 Deering's Gen.Laws, 1944 Ed., p. 579, Act No. 986. A renewal must have an original license as a basis, hence a stay of the operation of the commissioner's original order would suspend such order, thus destroying, temporarily at least, the foundation on which a proposed renewal must necessarily rest. Manifestly the stay order, if valid, imposed a restraint upon Equitable and operated as an injunction prohibiting

it from continuing the business which it had been authorized to conduct since, without the renewal, it is forbidden by the statute above cited to continue to function as a building and loan association.

The petition before this court states that a copy of the stay order was served on the Building and Loan Commissioner; that the license of Equitable to do business expired on December 31, 1950; that on January 1, 1951, Equitable filed its application for a renewal of its license for the calendar year 1951; that the commissioner, on advice of the attorney general, has declined to issue such license; that the commissioner has advised Equitable that he cannot renew the license by reason of the stay order; that as a result of such refusal Equitable cannot do business as a building and loan association and has been compelled to cease all business activity, to its irreparable damage and to the damage of its investors and stockholders. This situation makes it clear that petitioner, its stockholders and its customers, have been and will be damaged in an immeasurable amount if its petition be denied.

[13-16] The right to engage in a lawful business is a valuable property right which is protected by the constitution and laws of the state and in the enjoyment of which one is entitled to be secured. Brecheen v. Riley, 187 Cal. 121, 125, 200 P. 1042; Hewitt v. Board of Medical Examiners, 148 Cal. 590, 592, 84 P. 39, 3 L. R.A., N.S., 896; Bley v. Board of Dental Examiners, 87 Cal.App. 193, 196, 261 P. 1036; Laisne v. California State Board of Optometry, 19 Cal.2d 831, 835, 123 P.2d 457; Suckow v. Alderson, 182 Cal. 247, 249, 187 P. 965. The right of every person, and this includes corporations, American De Forest Wireless Tel. Co. v. Superior Court, 153 Cal. 533, 535, 96 P. 15, 17 L.R. A., N.S., 1117; Riley v. Stack, 128 Cal.App. 480, 483, 18 P.2d 110, to the protection of his property is as securely safeguarded by both federal and state constitutions as is any other right. One of the "inalienable rights" named in section 1 of the Constitution of this State is the right of acquiring, possessing and protecting property. The protection extended to "property" is not limited to tangible goods or real estate but

extends to a business and the right to conduct it without unlawful or unauthorized interference or impediment. Possession of the right to carry on a business necessarily embraces the included right to purchase and sell commodities and to make contracts relating thereto. Without the privilege of so doing the business and the right to conduct it must cease. So in the instant proceeding if the stay of the operation of the commissioner's order remains in force, ipso facto Equitable's right to carry on the business for which it was organized, including the sale of its certificates and the making of loans, is prohibited. The Legislature is without power to expropriate one's property by a mere legislative enactment. *Charnock v. Rose*, 70 Cal. 189, 191, 11 P. 625. The court has no power so to do without notice and a hearing.

The case of *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229, does not sustain respondent's argument that the court had power to make the stay order in question. In the cited case the commission had granted without a hearing a permit to change the frequency and increase the power of a broadcasting station. In the action brought by the operator of a neighboring station, which had been granted and had previously operated on the same frequency, to have the commission's order set aside, it was held that the court had power to defer its enforcement. Such a stay preserved the existing rights of the station which had had the prior use of the frequency and the public was not deprived of the broadcasting service of such station, thus preserving antecedent rights pending hearing and appeal. Without the stay order in the *Scripps* case vested rights would have been interfered with by the newcomer's use of the same broadcasting frequency.

[17-20] The contrary results from the order of the superior court in question here. Existing property rights of Equitable are not safeguarded but are destroyed to the benefit of its competitors in the building and loan business. Preservation from competition is not a right which of itself entitles the plaintiffs in the superior court

action to seek relief in a court of equity, nor to question the order of the commissioner licensing Equitable to do business. Legally speaking, an injury is a wrong done in violation of a right. Damage without injury does not furnish the foundation for an action, since if an act does not violate a legal right of a party, though he is damaged, he has no cause to complain. Hence, loss consequent upon competition of a rival engaged in the same business will not support a cause of action. *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479, 58 S.Ct. 300, 82 L.Ed. 374, 378; *Tennessee Elec. Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 140, 59 S.Ct. 366, 83 L.Ed. 543, 551; *Eastern Airlines, Inc. v. Civil Aeronautics Authority*, D.C.Cir., 185 F.2d 426, 429. Since the stay order operates against existing property rights of Equitable and since the property rights of plaintiffs in the superior court action are not involved the ex parte order is in violation of due process.

[21] The order cannot be sustained on the theory that it is a temporary restraining order, since it is not limited as to time, or a preliminary injunction, since it is not a case in which an injunction is authorized by section 526 of the Code of Civil Procedure. Moreover, the order was made in violation of section 527. It was granted without notice to the opposite party. It is not limited as to the period of its effectiveness. *McDonald v. Superior Court*, 18 Cal. App.2d 652, 655, 64 P.2d 738; *Kelsey v. Superior Court*, 40 Cal.App. 229, 236, 180 P. 662. No order to show cause why such order should not be made was issued. *Smith v. Superior Court*, 64 Cal.App. 722, 730, 222 P. 857. No hearing was had. Points and authorities were not served. *Kelsey v. Superior Court*, supra; *Northcutt v. Superior Court*, 66 Cal.App. 350, 353, 355, 226 P. 25. No undertaking was required by the court which is a necessary prerequisite to the issuance of an injunction. Code Civ.Proc. sec. 529; *Maier v. Luce*, 61 Cal.App. 552, 555, 556, 215 P. 399. The theory that the stay order is either a temporary restraining order or a preliminary injunction is therefore without support.

[22-25] Respondent's contention that the court had inherent power to delay enforcement of the directive of the building and loan commissioner ex parte is without merit. When the power of the court is expressly defined and delimited by statute the provisions of the statute measure the extent of the court's power. In a declaratory relief action the court is without power to issue an ex parte injunction or writ of mandate. Before an injunction may issue the defendants in such an action are entitled to notice and hearing as provided by section 527 of the Code of Civil Procedure. A writ of mandate may not be issued otherwise than as authorized by sections 1084-1094 of the same code which also require a hearing.

[26] Section 1094.5 restricts the court's jurisdiction to stay the operation of an administrative order to cases in which the proceedings are carried on pursuant to that section. In any event the burden rests upon the party in whose behalf the restraint is issued definitely to show that for the purpose of protecting his property rights it is necessary to restrain the enforcement of the order. *Champlin Refining Co. v. Corporation Comm.*, 286 U.S. 210, 238, 52 S.Ct. 559, 76 L.Ed. 1062, 1080. Plaintiffs in the superior court action did not show that their property rights were directly or at all affected by the order of the building and loan commissioner which the court purported to suspend.

[27] Instead of issuing a writ of mandate as provided in section 1094.5 requiring the bringing up of the proceeding before the commissioner the court expressly refused so to do when requested by Equitable itself and ordered that the question of issuing the writ "be determined upon the trial of the action." We have not been cited to any case in which such a method has ever been attempted or even suggested in reviewing an administrative decision. Such procedure is incompatible with the provisions of section 1094.5. There is no authority for such procedure. It is apparent that the court, in requiring a trial before determining whether or not a writ shall issue, is attempting to place itself in the same position as that occupied by the commissioner before

Equitable's articles of incorporation were approved and filed, notwithstanding the only function of the court is to pass upon the proceeding before the commissioner pursuant to the provisions of the statute and the rules hereinbefore stated. The court, by the method contemplated by its proposal to try the action and then determine whether a writ should issue, is attempting to proceed in a manner exactly the reverse of that specified by law. Section 1094.5 requires the issuance of the writ to precede the trial and that the court pass upon the proceedings certified to it pursuant to the writ. The court is without power, as it essayed to do, to substitute "for the statutory procedure a trial de novo before a jury without regard to what had happened before the commissioner—that is, just as if no proceedings had taken place before the commissioner." This method was declared to be "palpably erroneous, because thereby the jury and not the Commissioner became the primary licensing agency of the state" in direct violation of the statute "and of the legal doctrines built up by the courts during the past ten years for the review of the determination of state-wide administrative boards. An approval of the substituted procedure so adopted by the trial court would clearly operate as a complete nullification of all statutes regulating the issuance of licenses by state agencies and require juries primarily to pass upon the qualifications of all applicants for licenses." *McDonough v. Garrison*, 68 Cal.App.2d 318, 332, 156 P.2d 983, 991. "The Superior Court has no statutory, inherent or constitutional power to decide" issues of fact before the commissioner has acted. *Id.*, 68 Cal.App.2d at page 333, 156 P.2d at page 991. The decision in the *McDonough* case was written four years before the adoption of section 1094.5 which codifies the law as previously declared by the Supreme Court in a long line of cases:

[28] Likewise without merit is respondent's contention that the building and loan commissioner is a necessary party to the instant proceeding. The commissioner is not affected by the stay order since the business of his office is not interfered with in any particular. Inasmuch as Equitable's right to do business is suspended as a re-

sult of the order it is the only party in interest in opposition to the superior court action. There is no foundation for respondent's contention that the commissioner may be content with the stay order and that he may desire the court to pass upon his proceedings, to examine witnesses, issue subpoenas duces tecum—in other words, to do the things which the objectors sought to have done in the hearing before the commissioner. The commissioner's resistance to the contentions of plaintiffs in the superior court is shown by his answer denying all material allegations of their complaint.

[29-31] Respondent contends that Equitable did not acquire a vested right by reason of the commissioner's decision, asserting, as did the trial judge, that its right to do business is dependent upon the finality of the decision of the commissioner and that because that decision is subject to review by the court it is not final until the decision of the superior court shall have become final. Since, by reason of the commissioner's order and decision Equitable has been authorized in the manner provided by law to conduct a building and loan business, and since its required capital has been paid up and it has actually commenced doing business by making loans and performing other acts that such associations may do, its right has become vested and can be terminated only in the manner provided by law. The situation of Equitable is not different from that of a person who has obtained a license to practice law, medicine or other profession in which a license is a prerequisite to engaging in such business. The right exists until the holder is legally divested thereof. The order of the commissioner is not, as respondent contends, analogous to a judgment of a court which is suspended by an appeal; it is not suspended by the filing of a petition to review it.

[32-34] Respondent contends that petitioner, having made a motion to vacate the stay order and having had a hearing thereon, has had its day in court and therefore has no right to maintain this proceeding to review the order. Since the

order was void *ab initio* the motion to vacate it did not breathe vitality into something that had not been imbued with life. Furthermore, by its motion to vacate, petitioner raised only the question of jurisdiction. It did not, as did the moving party in *Lacey v. Bertone*, 33 Cal.2d 649, 203 P.2d 755, relied on by respondent, request additional relief on the merits. It is a familiar rule, as stated in the *Lacey* case, that when a party relies on the special defense of absence of jurisdiction or of notice he must limit himself to such ground, and if in addition he seeks relief on the merits he has made a general appearance and has waived his special plea. Equitable did not so do.

[35] Equitable filed notices of appeal both from the stay order and from the order denying its motion to vacate the same. Respondent maintains that such appeals divest this court of jurisdiction to review the order of the superior court. Since the order was neither an injunction nor a writ of mandate but is void and is not appealable, the motion to vacate is likewise nonappealable. Therefore the purported appeals are not an impediment to our determination of the question in issue.

[36, 37] Prior to the filing of the petition in the instant proceeding Equitable filed a petition for a writ of prohibition to restrain the enforcement of the order now in question. In Division 1 of this court the petition was denied without written opinion. A petition for hearing in the Supreme Court was denied, also without written opinion. Such orders are not, as respondent contends, *res judicata* in the matter now before us. The confusion found in prior decisions as to whether an *ex parte* denial of an application for an original writ was deemed to be an adjudication on the merits and conclusive upon the parties in a subsequent proceeding has been resolved by the Supreme Court in *Funeral Directors Association v. Board of Funeral Directors*, 22 Cal.2d 104, 105 ff. at page 110, 136 P.2d 785, in which it was determined that the denial without opinion of an application for a prerogative writ (except habeas

corpus) is merely a refusal to exercise the court's original jurisdiction and is not res judicata upon the merits of the facts and the legal issues presented by the application. The exceptions noted in *McDonough v. Garrison*, 68 Cal.App.2d 318, 325, 156 P.2d 983, 987, are not present in the instant proceeding, to wit, it does not appear that the "sole possible ground of the denial was that the court acted on the merits," or "that such denial was intended to be on the merits."

Since the court cannot review the order of the building and loan commissioner and determine its validity without examining the commissioner's record, certified and transmitted to the court in the manner provided by law, which is by a writ of mandate as required by section 1094.5, and since such writ has not been issued, manifestly the action in the superior court is not in compliance with that section and the court is without jurisdiction to suspend the commissioner's order.

The order of the superior court purporting to stay the operation of the order and decision of the building and loan commissioner is annulled.

MOORE, P. J., and McCOMB, J., concur.



103 Cal.App.2d 776

MORGAN v. MORGAN.

Civ. 4303.

District Court of Appeal, Fourth District,
California.

April 25, 1951.

Action for divorce by Elsie V. Morgan against William H. Morgan, wherein defendant filed a cross complaint. The Superior Court of Kern County, Robert A. Lambert, J., rendered judgment granting plaintiff a divorce and from portion of judgment awarding custody of two and one-half year old

son to defendant, plaintiff appealed. The District Court of Appeal, Griffin, J., held that awarding custody of son, though of tender years, to father was not abuse of discretion, in view of substantial evidence that such award would be for the best interests of child.

Judgment affirmed.

1. Divorce ⚡298(1)

The best interest of the children was the controlling consideration in awarding custody of minor children in divorce action.

2. Divorce ⚡298(3)

The custody of a minor child may be awarded to offending party notwithstanding the fact that a divorce has been granted against him on the grounds of his adultery or cruelty.

3. Parent and child ⚡2(3.2)

Under Civil Code provision that "other things being equal," custody of child of tender years should be awarded to mother, quoted phrase vests a large measure of discretion in trial court. Civ.Code, § 138, subd. 2.

4. Divorce ⚡296

Where trial court in granting mother a divorce found that both father and mother were fit persons to have custody of minor children, awarding custody of son who was two and one-half years of age to father was not abuse of discretion, in view of substantial evidence that such award would be for the best interests of child. Civ. Code, § 138, subd. 2.

5. Divorce ⚡312.6(8)

Appellate court could not disturb the determination of trial court as to custody of minor children of divorced parents, where record contained substantial evidence that such determination would be for the best interests of children and nothing to impeach the fairness or good faith of the decision.

T. R. Clafin, Bakersfield, for appellant.
Hyman Gold, Harry Gold, Santa Monica, for respondent.

GRIFFIN, Justice.

In an action by plaintiff for a divorce on the grounds of extreme cruelty the court granted her a divorce, awarded her custody of one minor child (then aged 3½ years) and awarded custody of another child (Robert Morgan, then aged 2½ years) to defendant.

The plaintiff appeals only from that portion of the judgment awarding custody of the child to defendant. She contends that since the trial court found that "both parties are at this time fit persons to have the custody of the minor children" it was obligated to award the custody of both children to her under section 138 of the Civil Code, subdivision 2, which section recites that neither party is entitled to the custody as of right; but "other things being equal" if the child is of tender years, it should be given to the mother. In support of this contention she cites *Loomis v. Loomis*, 89 Cal.App.2d 232, 201 P.2d 33.

[1-3] We have carefully read the record before us. Plaintiff accused defendant of intoxication and infidelity. Defendant accused plaintiff of the same acts. Evidence was produced which might warrant such a finding as to either. The question for the trial court to determine was not which one was "not a fit person" to have the custody of the children, but what was the best interest of the children. *Miller v. Higgins*, 14 Cal.App. 156, 111 P. 403. The custody of a minor child may be awarded to the offending party notwithstanding the fact that a divorce has been granted against him on the grounds of his adultery or cruelty. In *re De Leon*, 70 Cal.App. 1, 232 P. 738. The expression "other things being equal" leaves a large measure of discretion with the trial court. It has been held that where a divorce has been denied and both parties were found fit persons to have custody, the award of the child to the father was not an abuse of discretion. *Priest v. Priest*, 90 Cal. App.2d 185, 202 P.2d 561. The court there

stated, 90 Cal.App.2d at page 187, 202 P. 2d at page 562: "In view of the finding of equal fitness of the parents herein to have custody of the three-year-old child and of the provisions of section 138, Civil Code, it would not have been amiss for the court to award exclusive custody to the mother. But a generous discretion is vested by the qualifying clause of subsection (2), to wit, 'other things being equal'. * * * In the exercise of such discretion the court below has impliedly found that the best interests of the child will be served by dividing its custody between the parents. * * * Since no showing is made of the court's abuse of its discretion, its conclusion cannot be disturbed."

This section leaves a large measure of discretion with the trial court. *Phillips v. Phillips*, 48 Cal.App.2d 404, 119 P.2d 736; *Booth v. Booth*, 69 Cal.App.2d 496, 159 P.2d 93; *Runsvold v. Runsvold*, 61 Cal. App.2d 731, 143 P.2d 746.

[4, 5] After hearing all of the conflicting evidence the trial court disapproved a separation agreement entered into between the parties respecting the custody of the minor children and ordered that custody be awarded as indicated "until the further order of the court" and allowed reasonable visitation privileges by the parents. There is substantial evidence in the record to support a rational inference that the order is for the best interests of the child and such evidence does not appear incredible. Since there is nothing to impeach the fairness or good faith of the decision it would be in excess of our authority to disturb the determination of the trial court. *Lefebvre v. Lefebvre*, 48 Cal. App. 483, 192 P. 76; *Di Giorgio v. Di Giorgio*, 87 Cal.App.2d 576, 197 P.2d 213; *Jones v. Jones*, 49 Cal.App. 165, 192 P. 867; *Nave v. Nave*, 35 Cal.App. 27, 169 P. 253.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

103 Cal.App.2d 609

OSBORN v. CITY OF WHITTIER.

Civ. 17959.

District Court of Appeal, Second District,
Division 3, California.

April 19, 1951.

Rehearing Denied May 15, 1951.

Hearing Denied June 14, 1951.

Edith E. Osborn brought action against City of Whittier, to recover for damages to plaintiff's property allegedly caused by fire which spread from defendant city's rubbish disposal dump. A judgment of dismissal pursuant to order sustaining demurrer of defendant city to the complaint without leave to amend was entered in the Superior Court of Los Angeles County, William B. McKesson, J., and the plaintiff appealed. The District Court of Appeal, Vallee, J., held that the complaint met requirements of public liability act and was not vulnerable to general demurrer.

Judgment reversed with directions.

1. Municipal corporations ⇨736

Under Public Liability Act, if officers or employees of municipality had actual or imputed knowledge or notice of dangerous condition on property of municipality and neglected to remedy it within a reasonable time after knowledge or notice, or neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as might be reasonably necessary to protect public against such dangerous condition, liability ensued. Government Code, §§ 53050-53056.

2. Municipal corporations ⇨736

If dangerous condition on property of municipality is proximate cause of injury or damage, liability ensues. Government Code, §§ 53050-53056.

3. Negligence ⇨59

"Proximate cause" means that the injury or damage was the natural and probable consequence of the wrongful or negligent act or omission and the ability on part of person of ordinary intelligence reasonably to have foreseen or anticipated the harmful consequence of his act or omission.

See publication Words and Phrases, for other judicial constructions and definitions of "Proximate Cause".

4. Negligence ⇨59

In determining whether defendant's wrongful act or omission was the proximate cause of the injury or damage, the question is not whether defendant did foresee, or by exercise of ordinary care should have foreseen, the identical consequence that happened, but rather the question is whether it was reasonably foreseeable that injury or damage would likely occur, and defendant's duty is measured by standard of foreseeability of injury or damage to eyes of a reasonably prudent person having regard for the accompanying circumstances.

5. Negligence ⇨56(1.12)

Though an act or omission be removed from the injury and damage by intermediate causes or effects, yet if, in natural and continuous sequence, unbroken by any superseding cause, it produces that injury or damage, and if without it the injury would not have happened, it is a "proximate cause" of such injury or damage.

6. Municipal corporations ⇨742(6)

Whether defendant city should have foreseen that a fire from its rubbish disposal dump might spread to adjoining property and thence to property more distant was a question of fact. Government Code, §§ 53050-53056.

7. Municipal corporations ⇨742(4)

Allegation in complaint seeking to recover from defendant city for damages to plaintiff's property allegedly caused by fire which spread from defendant city's rubbish disposal dump that the damage was a direct and proximate result of dangerous condition of the dump was a sufficient allegation of proximate cause. Government Code, §§ 53050-53056.

8. Municipal corporations ⇨739(2)

In collecting garbage, trash and other refuse, hauling it to its dumping ground and disposing of it by fire, defendant city was exercising a "governmental function" which was not completed until the ashes were disposed of. Government Code, §§ 53050-53056.

See publication Words and Phrases, for other judicial constructions and definitions of "Governmental Function".

9. Negligence $\hookrightarrow$ 56(2), 62(1)

It is not necessary for plaintiff to show, in order to recover for damage caused by fire, that fire was directly communicated to property consumed, and there may be recovery where fire burned across intervening lands before reaching property damaged for which recovery is sought, if there was no superseding cause between original wrong and loss complained of.

10. Negligence $\hookrightarrow$ 59, 62(1)

Time, distance, and fact that fire burned over intervening tracts of land do not affect question of defendant's liability except insofar as they relate to probability of a superseding cause and unforeseeability to an intelligent person that injury or damage would accrue as result of act or omission causing the fire.

11. Negligence $\hookrightarrow$ 56(2)

Generally, a fire, however it may go, is one continuous fire and is the proximate cause of all injuries and damage it may produce in its destructive march, whether it goes to abutting property or several miles.

12. Municipal corporations $\hookrightarrow$ 739(2), 742(6)

Liability of defendant city for damages to plaintiff's property allegedly caused by fire which spread from defendant city's rubbish disposal dump was not, as matter of law, dependent upon proximity of damaged property to the dangerous condition on the dump resulting from continued burning of rubbish therein, but was dependent upon the dangerous condition being a proximate cause of the damage, and the question of proximate cause was one of fact. Government Code, §§ 53050-53056.

13. Municipal corporations $\hookrightarrow$ 741(2)

Fact that opening statement of affidavit accompanying plaintiff's claim against defendant city for damages to plaintiff's property allegedly caused by fire which spread from defendant city's rubbish disposal dump did not state that plaintiff was first duly sworn was not fatal, where it appeared that affidavit was "subscribed" by plaintiff and was "sworn to" before notary whose signature was affixed. Government Code, §§ 53050-53056.

14. Affidavits $\hookrightarrow$ 1

The object of a verification is to insure good faith in the averments or statements of a party. Pol.Code, § 4076; Code Civ. Proc. §§ 446, 2009.

15. Municipal corporations $\hookrightarrow$ 741(2)

The term "verified", as applied to claims against municipalities, has a settled meaning, and refers to an affidavit attached to the claim, as to truth of the matters therein set forth. Government Code, §§ 53050-53056.

See publication Words and Phrases, for other judicial constructions and definitions of "Verified".

16. Affidavits $\hookrightarrow$ 9

The chief test of sufficiency of an affidavit is whether it is so clear and certain that an indictment for perjury may be sustained on it if false.

17. Municipal corporations $\hookrightarrow$ 741(2)

Where statute under which claim against municipality was filed provided that claim must be filed within ninety days, and claim was filed within the prescribed period, statement in affidavit copied verbatim from Political Code "that the same is presented within one year after the last item thereof has accrued" would be disregarded as surplusage. Government Code, §§ 53050-53056; Pol.Code, 4076.

18. Municipal corporations $\hookrightarrow$ 742(4)

Complaint to recover from defendant city for damages to plaintiff's property allegedly caused by fire which spread from defendant city's rubbish disposal dump, which alleged facts showing a dangerous condition of public property, actual knowledge of dangerous condition by persons having authority to remedy the condition, lapse of reasonable time after knowledge within which to remedy the condition, or to take such action as might be reasonably necessary to protect public against the dangerous condition, failure to remedy dangerous condition, that dangerous condition was a proximate cause of the damage, and that a verified claim was presented within ninety days, met requirements of Public Liability Act, and was not vulnerable to general demurrer. Government Code, §§ 53050-53056.

Clay & Staples, Herbert G. Staples and C. F. Zimmerman, all of Los Angeles, for appellant.

Jennings & Belcher, R. P. Jennings, Stevens Fargo, Los Angeles, Thomas W. Bewley, City Atty., Whittier, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of dismissal entered pursuant to an order sustaining a demurrer of defendant city of Whittier to the complaint without leave to amend in an action for damages for injury to property.

The complaint alleged these facts:

The city of Whittier maintained, managed, and operated a rubbish disposal dump within the city near Savage Canyon for its use, convenience, and benefit, and that of its residents.

Plaintiff was the owner of property on Turnbull Canyon Road in Puente which was improved with bearing avocado trees, a sprinkler system, fences, and tree props. On June 22, 1949, there was fruit on the trees.

Defendant, over a period of years and particularly on June 21 and 22, 1949, when a high wind was blowing, maintained the rubbish disposal dump in a dangerous condition, permitting the continued burning of rubbish therein, under all weather conditions, without supervision. The dangerous condition was known to defendant for a long period of time prior to June 21 and 22, 1949. Defendant neglected to take any measures to remedy the condition. (The specific allegations are set forth in the margin.¹)

On June 22, 1949, a fire started in the rubbish disposal dump and spread through and over surrounding property to plaintiff's property, burned and destroyed 248 avocado trees, full grown and bearing, and the crops thereon, damaged the sprinkler system and fence posts, and destroyed 750 tree props, to her damage in the sum of \$21,130.97. The fire loss and damage was a proximate result "of the negligent failure and neglect to remedy the dangerous and defective condition" of the rubbish disposal dump.

On September 16, 1949, plaintiff filed with the clerk and city council of defendant a

1. "That said fire and the loss and damage to plaintiff by reason thereof, was a direct and proximate result of the negligent failure and neglect to remedy the dangerous and defective condition of the said Disposal Dump by the defendants and each of them, as is more particularly set forth as follows: that the defendants and each of them, and particularly the defendant City of Whittier, and the City Council thereof, maintained said Rubbish Dump in Savage Canyon in the City of Whittier; that the defendants and each of them permitted, allowed and failed to prevent the continual and habitual burning of rubbish over a long period of years, at all hours of the day and night under all weather conditions without adequate or proper control or supervision or fire prevention measures; that the defendants and each of them failed to attend or control said Dump while trash and materials were burning; that during said time the defendants and each of them permitted and allowed fires to burn in said dump without employees or other personnel present to control and supervise said burnings; that on or about the 21st and 22nd days of June 1949, the defendants and each of them allowed and permitted

fires to burn and continue to burn in said Dump; that on said dates said fire was allowed to continue to burn without supervision or attendance or fire equipment present to control said burning; that a high wind was blowing on said dates at said time and place; that dry and combustible brush materials and scrub undergrowth were allowed by said defendants to remain on adjoining premises immediately adjacent thereto; that the said dangerous, hazardous and defective conditions of said Dump and the portion thereof as aforesaid, were well known to the defendants and each of them long prior to and at the time of the said 21st and 22nd days of June 1949; that said defendants and each of them, failed to take any measures whatsoever to remedy said dangerous and defective operation and condition of said Dump; that as a direct and proximate result of said failure and neglect of the defendants and each of them, as aforesaid, fire spread from said Rubbish Disposal Dump to the premises of the plaintiff herein, and as a direct and proximate result of said spread of fire plaintiff's premises and property sustained severe damages and destruction as hereinafter set forth."

written claim for damages. A copy of the claim is made a part of the complaint.

The question for decision is whether the complaint states facts sufficient to constitute a cause of action against the city of Whittier. The controlling statutes in effect on June 22, 1949—the Public Liability Act of 1923 and The Claims Act of 1931—in pertinent part read: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition." Stats.1923, ch. 328, § 2, p. 675.² "Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the

injuries or damages received." Stats.1931, ch. 1167, § 1, p. 2475. The 1923 and 1931 statutes are now embodied in sections 53050–53056 of the Government Code.

Defendant states that plaintiff's property was located several miles from the dump. We are unable to ascertain the distance from examination of maps. For the purpose of this opinion only, we will assume that defendant's statement is correct.

Defendant argues that the maintenance, in a dangerous condition, of a rubbish disposal dump, where rubbish is burned, cannot give a right of action to a property owner whose property, *several miles away from the dump*, is damaged by a fire from the dump which ignited grass and brush and spread to plaintiff's property; that what is meant by "dangerous or defective condition" is that it "is dangerous to persons who might be expected to come in contact with the defective or dangerous condition or to property which might reasonably be expected to be injured thereby"; that there must be a close relation between the dangerous condition and the property damaged.

[1] The Public Liability Act of 1923 imposed on a municipality liability for injury or damage resulting from a dangerous condition of property. If the officers or employees of the municipality had actual or imputed knowledge or notice of the dangerous condition and neglected to remedy it within a reasonable time after knowledge or notice, or neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as might be reasonably necessary to protect the public against such dangerous condition, liability ensued. *Fackrell v. City of San Diego*, 26 Cal.2d 196, 157 P.2d 625, 158 A.L.R. 773; *Gibson v. County of Mendocino*,

2. The old maxim that the King can do no wrong—immunity of the sovereign for the torts of its officers and employees when acting in a governmental capacity—an unjust relic of the dark ages, is rapidly passing into oblivion. See "Should California Accept Tort Liability?" by Thomas H. Kuchel, State Controller of California, XXV Cal. State Bar J. 146; 22 So. Cal. L. Rev. 78; 34 Yale L. Jour., 1–45,

129–143, 229–258; 35 Yale L. Jour. 150; 36 Yale L. Jour. 1; 56 Yale L. Jour. 534; 30 Harv. L. Rev. 20; 4, Ill. L. Quar. 28; 4 Wyo. L. Jour. 96; 11 Am. Bar Ass'n Jour. 495; Federal Tort Claims Act of 1946, 28 U.S.C.A. §§ 2671–2680, 60 Stat. 843, as amended; *United States v. Yellow Cab Co.*, 71 S.Ct. 399, 404, 95 L.Ed. 523, particularly footnote 8.

16 Cal.2d 80, 105 P.2d 105; *Arellano v. City of Burbank*, 13 Cal.2d 248, 89 P.2d 113; *George v. City of Los Angeles*, 11 Cal.2d 303, 79 P.2d 723; *George v. City of Los Angeles*, 51 Cal.App.2d 311, 124 P.2d 872; *Allen v. City of Los Angeles*, 43 Cal.App.2d 65, 110 P.2d 75; *Bauman v. San Francisco*, 42 Cal.App.2d 144, 108 P.2d 989; *Sandstoe v. Atchison, T. & S. F. Ry. Co.*, 28 Cal.App.2d 215, 82 P.2d 216.

In *George v. City of Los Angeles*, 11 Cal.2d 303, 308, 79 P.2d 723, it was held that if a municipality creates a dangerous condition of its property, it is liable for any injuries to persons or property resulting from such condition provided it had knowledge thereof and neglected to remedy said condition within a reasonable time after acquiring such knowledge; that this liability is based upon negligence; and that the question of the negligence of the municipality is for the determination of the jury. See also *Brooks v. City of Monterey*, 106 Cal.App. 649, 654, 290 P. 540; *Sandstoe v. Atchison, T. & S. F. Ry. Co.*, 28 Cal.App.2d 215, 218, 82 P.2d 216.

[2, 3] If the dangerous condition is the proximate cause of the injury or damage, liability ensues. *Bosqui v. San Bernardino*, 2 Cal.2d 747, 760, 761, 43 P.2d 547; *Lorraine v. City of Los Angeles*, 55 Cal.App.2d 27, 30, 130 P.2d 140. "Proximate cause" means that the injury or damage was the natural and probable consequence of the wrongful or negligent act or omission and the ability on the part of a person of ordinary intelligence reasonably to have foreseen or anticipated the harmful consequence of his act or omission. *Chutuk v. Southern Counties Gas Co.*, 21 Cal.2d 372, 380, 132 P.2d 193; *Weck v. L. A. County Flood Control Dist.*, 80 Cal.App.2d 182, 189, 181 P.2d 935; *Johnson v. Union Furniture Co.*, 31 Cal.App.2d 234, 238, 87 P.2d 917.

[4] The precise consequence of a wrongful act or omission need not have been foreseeable. The question is not whether defendant did foresee, or by the exercise of ordinary care should have foreseen, the identical consequence that happened, in order that its act or omission be a proximate cause of the injury or damage.

The question is whether it was reasonably foreseeable that injury or damage would likely occur. Defendant's duty is measured by the standard of foreseeability of injury or damage to the eyes of a reasonably prudent person having regard for the accompanying circumstances. *Werkman v. Howard Zink Corp.*, 97 Cal.App.2d 418, 425, 218 P.2d 43. Whether the dangerous condition was a proximate cause of the damage is a question of fact. *Barker v. City of Los Angeles*, 57 Cal.App.2d 742, 748, 135 P.2d 573; *Allen v. City of Los Angeles*, 43 Cal.App.2d 65, 67, 110 P.2d 75; *Bauman v. San Francisco*, 42 Cal.App.2d 144, 154, 108 P.2d 989.

[5-7] Though an act or omission be removed from the injury and damage by intermediate causes or effects, yet if, in a natural and continuous sequence, unbroken by any superseding cause, it produces that injury or damage, and if without it the injury would not have happened, it is a proximate cause of such injury or damage. Proximity in point of time or space is no part of the definition. That is of no importance except as it may afford evidence for or against proximity of causation. *Hyer v. Inter-Insurance Exchange, etc.*, 77 Cal.App. 343, 347, 246 P. 1055. Whether defendant should have foreseen that a fire from the dump might spread to adjoining property and thence to property more distant, is a question of fact. *Adams v. Southern Pacific Co.*, 4 Cal.2d 731, 738, 53 P.2d 121; *Bauman v. San Francisco*, 42 Cal.App.2d 144, 154, 108 P.2d 989; *Butcher v. Vaca Valley & C. L. R. R. Co.*, 67 Cal. 518, 521, 8 P. 174; *Henry v. Southern P. R. R. Co.*, 50 Cal. 176, 183; *Paiva v. California Door Co.*, 75 Cal.App. 323, 331, 242 P. 887. The allegation that the damage was a direct and proximate result of the dangerous condition of the dump is a sufficient allegation of proximate cause. *Guilliams v. Hollywood Hospital*, 18 Cal.2d 97, 103, 114 P.2d 1.

[8] In collecting garbage, trash and other refuse, hauling it to its dumping ground and disposing of it by fire, defendant was exercising a governmental function which was not completed until the ashes were disposed of. *Pittam v. City of River-*

side, 128 Cal.App. 57, 62, 16 P.2d 768. In Pittam, the city maintained a dumping and burning ground similar to that alleged to have been maintained by defendant city of Whittier. The plaintiff's property was located more than 1,000 feet from the burning area. A fire from the dump spread across intervening lands to that of plaintiff, destroying an apiary. The court held, 128 Cal.App. at page 65, 16 P.2d at page 771: "It is evident from the evidence that the general plan of operation of the dumping ground adopted by the city provided for the consumption of garbage, trash, and other inflammable refuse by open fires. It is undisputed that winds from the north occasionally blew with considerable intensity at certain times of the year and carried charred and partly burned paper onto the property of respondent and his near neighbors. If the proper municipal authorities had notice of a dangerous or defective condition of the dumping ground prior to the fire and permitted such condition to continue for an unreasonable time; if the fire which consumed respondent's property had spread or was carried from a fire on the dumping ground burning at a place, or one of the places, where fires were to be kindled in accordance with the plan of operation established by the municipal authorities and in operation at the time of the destruction of respondent's property; and if the fire was not spread from one wrongfully started by another agency such as trespassers on the city property, then we are of the opinion that a dangerous or defective condition of the public grounds, works or property of the city of Riverside existed which would render it liable for damages to the property of respondent. *Huff v. Compton Grammar School Dist.*, 92 Cal. App. 44, 267 Pac. 918." The judgment for plaintiff was reversed because the trial court had instructed the jury on general negligence. Defendant suggests that the quoted portion of the opinion was dictum. We think not. In any event it was a correct statement of the law.

3. A person who allows a fire kindled or attended by him to escape from his control or to spread to the lands of any person other than the builder of the fire

230 P.2d—9½

[9-11] It is not necessary for a plaintiff to show, in order to recover for damage caused by a fire, that the fire was directly communicated to the property consumed; there may be a recovery where the fire burned across intervening lands before reaching the property damaged for which recovery is sought, if there was no superseding cause between the original wrong and the loss complained of. Time, distance, and the fact that the fire burned over intervening tracts of land, do not affect the question of defendant's liability except insofar as they relate to the probability of a superseding cause and the unforeseeability to an intelligent person that injury or damage would accrue as the result of the act or omission causing the fire. Generally, a fire, however far it may go, is one continuous fire—the same fire—and is the proximate cause of all the injuries and damage it may produce in its destructive march, whether it goes to abutting property or several miles. 22 Am.Jur. 625, § 47; *Ireland-Yuba Gold Quartz Min. Co. v. Pacific G. & E. Co.*, 18 Cal.2d 557, 560, 565, 116 P. 2d 611; *Butcher v. Vaca Valley & C. L. R. Co.*, 67 Cal. 518, 8 P. 174; *Henry v. Southern P. R. R. Co.*, 50 Cal. 176, 182, 183; *Viera v. Atchison etc. Ry. Co.*, 10 Cal.App. 267, 101 P. 690; *Paiva v. California Door Co.*, 75 Cal.App. 323, 327, 331, 242 P. 887; *Kennedy v. Minarets & Western Ry. Co.*, 90 Cal.App. 563, 566, 572 et seq., 266 P. 353; *Haverstick v. Southern Pac. Co.*, 1 Cal.App. 2d 605, 607, 611 et seq., 37 P.2d 146; *Dipold v. Cathlamet Timber Co.*, 111 Or. 199, 225 P. 202; *Prosser on Torts*, 349, § 48. In *Henry v. Southern P. R. R. Co.*, supra, it was said, 50 Cal. at page 183: "[C]onsidering the long dry season of California and the prevalence of certain winds in our valleys * * * it may be left to a jury to determine whether the spreading of a fire from one field to another is not the natural, direct or proximate consequence of the original firing."³

Miller v. City of Palo Alto, 208 Cal. 74, 280 P. 108, and *Hanson v. City of Los An-*

without using every reasonable and proper precaution to prevent the fire from escaping, is guilty of a misdemeanor. Health & Safety Code, § 13000.

ges, 63 Cal.App.2d 426, 147 P.2d 109, relied on by defendant, are not in point. The acts there relied on were single acts of negligence in the performance of a governmental function and not the maintenance of a dangerous or defective condition.

[12] We hold, therefore, that liability is not, as a matter of law, dependent upon proximity of the damaged property to the dangerous condition, but is dependent upon the dangerous condition being a proximate cause of the damage, and that the question is one of fact.

[13-17] Defendant asserts that the verification of the claim is insufficient in that "It nowhere purports to contain a statement over the signature of Edith E. Osborn that she swears to anything. She merely states certain things. The statement does not purport to follow the requirements of the Code Sections as to an affidavit of verification." The verification is set out in the margin.⁴ The fact that the opening statement of the affidavit does not state that plaintiff was first duly sworn is not fatal where, as here, it appears that the affidavit was "subscribed" by plaintiff and was "sworn to" before the notary whose signature is affixed. Defendant does not refer us to the code sections, the requirements of which it asserts plaintiff failed to follow. The statute involved here provides merely that the claim be verified. Stats.1931, ch. 1167, § 1, p. 2475. No particular form of verification is prescribed. Cf. Pol.Code, § 4076, where a prescribed form of verification is provided for claims filed against a county. A verification is an affidavit of the truth of the matters stated. Code Civ.Proc., §§ 446, 2009; Pol.Code, § 4076; McCaffey Canning Co., Inc. v. Bank of America, 109 Cal.App. 415, 420, 294 P. 45; Pasqualetti v. Hilson, 43 Cal.App. 718, 720, 185 P. 693.

Its object is to insure good faith in the averments or statements of a party. Patterson v. Ely, 19 Cal. 28, 39; Bittleston Law & Collection Agency v. Howard, 172 Cal. 357, 360, 156 P. 515. The term "verified," as applied to claims against municipalities, has a settled meaning, and refers to an affidavit attached to the claim, as to the truth of the matters therein set forth. Patterson v. City of Brooklyn, 6 App.Div. 127, 40 N.Y. S. 581, 582; Bristol v. Buck, 201 App.Div. 100, 194 N.Y.S. 53, 55. The chief test of the sufficiency of an affidavit is whether it is so clear and certain that an indictment for perjury may be sustained on it if false. Davis-Heller-Pearce Co. v. Ramont, 66 Cal. App. 778, 781, 226 P. 972; Gee Chong Pong v. Harris, 38 Cal.App. 214, 217, 175 P. 806; Kelley v. City of Flint, 251 Mich. 291, 232 N.W. 407, 408. The affidavit here meets this test and is sufficient. In passing, we note that the second paragraph in the affidavit is copied verbatim from Political Code section 4076, including "that the same is presented within *one* year after the last item thereof has accrued." The statute involved here provides that the claim be filed within ninety days; and since the claim was filed within the prescribed period, the quoted part was surplusage.

[18] The complaint contains factual allegations of all the elements essential to a cause of action under the Public Liability Act: (1) facts showing a dangerous condition of public property; (2) actual knowledge of the dangerous condition by persons having authority to remedy the condition; (3) the lapse of a reasonable time after knowledge within which to remedy the condition, or to take such action as might be reasonably necessary to protect the public against the dangerous condition; (4) failure to remedy the dangerous condition; (5) the dangerous condition was a proxi-

4. "State of California }
"County of Los Angeles } ss.

"The undersigned, under the penalty of perjury states:

"That the above claim and the items as therein set out are true and correct; that no part thereof has been heretofore paid, and that the amount therein is justly due this claimant, and that the

same is presented within one year after the last item thereof has accrued.

"Edith E. Osborn

"Edith E. Osborn

"Subscribed and sworn to before me this 15th day of September, 1949.

"Helen Harden

"Notary Public in and for said County and State"

mate cause of the damage; and (6) presentation of a verified claim within ninety days. *Arellano v. City of Burbank*, 13 Cal. 2d 248, 254, 89 P.2d 113; *Bosqui v. City of San Bernardino*, 2 Cal.2d 747, 759, 43 P.2d 547. The complaint met the requirements of the statute, and was not vulnerable to a general demurrer.

In view of our conclusion, it is not necessary to consider plaintiff's contention that the facts alleged are sufficient to state a cause of action on the theory that the maintenance and operation of the dump constituted a nuisance. See *Phillips v. City of Pasadena*, 27 Cal.2d 104, 162 P.2d 625; *Los Angeles Brick & Clay Products Co. v. City of Los Angeles*, 60 Cal.App.2d 478, 141 P. 2d 46; Annotation 156 A.L.R. 718.

The judgment is reversed with directions to overrule the demurrer and permit defendant to answer.

SHINN, P. J., and WOOD, J., concur.



103 Cal.App.2d 673

HOUGHAM v. EYHERABIDE.

Civ. 4099.

District Court of Appeal, Fourth District,
California.

April 20, 1951.

Hearing Denied June 18, 1951.

Action by E. B. Hougham against Ray Eyherabide to recover damages for trespass upon land. The Superior Court of Kern County, Warren Stockton, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Barnard, P. J., held that permitting amendment of complaint at beginning of trial by increasing amount of damages claimed for destruction of growing wheat crop was not abuse of discretion.

Judgment affirmed.

1. Pleading ⚡250

Permitting plaintiff to amend complaint at beginning of trial of action for

trespass upon land so as to increase amount of damages claimed for destruction of growing wheat crop from \$2,500 to \$6,000 was not abuse of discretion, in absence of request for continuance, though request for permission to amend was made without notice or a showing as to the reason therefor.

2. Appeal and error ⚡1071(1)

Failure of trial court's findings to segregate the different items of damage claimed is not reversible error unless such failure was prejudicial to defendant.

3. Appeal and error ⚡219(2)

Where, aside from prayer for punitive damages, the elements of damage itemized in amended complaint for trespass upon land were largely general in character, being for injuries done to the land and growing crops as a part thereof, material finding indicated that amount awarded was for damage to land and that no punitive damages were included in award, and the evidence was sufficient to sustain award on basis of injury to land and growing crops, trial court's failure to find separately upon the elements of damage alleged, in absence of request at trial for such segregation, was not reversible error.

Johnston, Baker & Palmer, Bakersfield,
for appellant.

Calvin H. Conron, Jr., Bakersfield, for
respondent.

BARNARD, Presiding Justice.

This is an action for damages resulting from a trespass upon about 300 acres of land, owned and farmed by the plaintiff.

The original complaint alleged that the defendant and his servants had trespassed upon the lands in question by driving and grazing a large flock of sheep thereon; and that as a direct and proximate result of said trespass these lands were damaged in that a partially grown crop of wheat was destroyed, the lands were beaten down by the hoofs of the sheep so as to require releveling and redisking, the cover crop was destroyed causing the lands to be-

come susceptible to wind erosion, and the lands have become infiltrated with noxious weed seeds carried on by the sheep, all to the plaintiff's damage in the sum of \$8500. There was also an allegation that said trespass was willful and malicious, with a prayer for an additional \$1500 exemplary damages. A demurrer was filed and sustained, on the ground of ambiguity in that the amounts of the several elements of damage were not separately stated. An amended complaint was filed, the only change being to allege that the lands of the plaintiff were damaged in that a partially grown crop of wheat was destroyed to his damage in the sum of \$2500, the lands were beaten down by the hoofs of the sheep so as to require releveling and re-disking to his damage in the sum of \$3500, the cover crop was destroyed causing said lands to become susceptible to wind erosion to his damage in the sum of \$1000, and the lands have become infiltrated with noxious weed seeds carried thereon by the sheep to his damage in the sum of \$1500, all to his damage in the sum of \$8500.

At the beginning of the trial, before any evidence was received, the plaintiff asked for and received permission to amend the allegation as to damage to the growing crop of wheat by raising the amount of damage from \$2500 to \$6000. After hearing the evidence the court found, among other things, that the defendant and his servants had trespassed upon the lands in question by driving and grazing thereon a flock of about 800 sheep. It was then found "that as a direct and proximate result of said trespass the lands of plaintiff were damaged in the sum of \$4500, by reason of which plaintiff has suffered damages in said sum." Judgment was entered accordingly, and the defendant has appealed.

[1] It is first contended that it was an abuse of discretion for the court to permit the amendment to the complaint at the trial without notice or without a showing as to the reason therefor. No continuance was asked for and no abuse of discretion appears. *Duffey v. General Petroleum Corp.*, 93 Cal.App.2d 757, 209 P.2d 986.

The only other point raised is that the court did not make findings on all the material issues, in that the findings did not designate what part of the damage allowed was awarded for each of the four items mentioned in the complaint, and because there was no finding "as to what part of the damages awarded were general and what part was punitive." The appellant cites *James v. Haley*, 212 Cal. 142, 297 P. 920; *Severance v. Knight-Counihan Co.*, 29 Cal.2d 561, 177 P.2d 4, 172 A.L.R. 1107; *Clements v. Lanning*, 89 Cal.App.2d 817, 202 P.2d 98; and *Wilcox v. Sway*, 69 Cal.App. 2d 560, 160 P.2d 154, as holding that a judgment must be reversed, unless findings are waived, if the court does not find on every material issue.

Appellant's main argument is that there was no finding on the issue of punitive damages; that the evidence failed to show any vindictiveness; that the undisputed evidence is that the appellant told his shepherd to say off the respondent's property; and that the rule of law that a finding must be had on every issue is important here because the appellant is unable to point out any insufficiency of the evidence because the findings are silent "as to what part of the judgment was for general damages and what part was for punitive damages." In his closing brief the appellant argues that there is no finding "covering the specific elements of damages upon which respondent went to trial" and that it cannot be told "what part of the lump judgment was based on the various special damages and what part was based on the loss for punitive damages."

The material finding here is that as a direct and proximate result of the trespass in question the lands of plaintiff were damaged in the sum of \$4500. It rather clearly appears that this amount was awarded for damage done to the lands of the plaintiff, and that nothing was awarded by way of punitive damages. The evidence, while conflicting, was amply sufficient to sustain the award on the basis of damage done to the land and to the growing crop, which was a part of the land. So far as the record shows, no request was made at the

trial to have the court segregate or itemize the various elements of damage. Aside from the matter of punitive damages, the elements of damage which were itemized in the amended complaint were largely, if not entirely, general in character, being for injuries done to the land and to the growing crops as a part thereof. The appellant has made no attempt to point out any of these items which should be considered as special damages.

In *James v. Haley*, 212 Cal. 142, 297 P. 920, several items of special damages were pleaded and the findings were silent on each and every issue of damage raised. It was found that this was prejudicial since three of the four items of damages specifically sued for were suffered by a partnership and not by the plaintiff alone. In *Clements v. Lanning*, 89 Cal.App. 2d 817, 202 P.2d 98, the court had made no finding at all on the main issues raised with respect to the breach of certain warranties. We find nothing in the cases of *Severance v. Knight-Counihan Co.*, 29 Cal.2d 561, 177 P.2d 4, 172 A.L.R. 1107, and *Wilcox v. Sway*, 69 Cal.App.2d 560, 160 P.2d 154, which is controlling here.

In other cases, the particular circumstances have prevented a strict application of the rule relied on by the appellant. In *Staub v. Muller*, 7 Cal.2d 221, 60 P.2d 283, 286, it was contended that the court should have found, separately, upon two elements of damage alleged: (1) damage to the freehold, and (2) damage to the crop. The court said: "At the trial appellant made no request for segregation of the items of damage. In the absence of such request, it was not absolutely necessary that the findings should contain the segregation (citing cases), and any uncertainty in said findings will be construed so as to support the judgment, rather than defeat it." The same principle was followed in the case of *Murphy v. Stelling*, 8 Cal.App. 702, 97 P. 672.

[2, 3] Judgments will not be reversed for a failure of the findings to segregate the different items of damage unless it appears that the appellant is prejudiced. *Scoville v. Kegl*, 27 Cal.App.2d 17, 80 P.2d 162. In *Wiley v. Wright*, 26 Cal.App.

2d 303, 79 P.2d 196, 199, this court said: "While it is true that his complaint alleged this personal type of damage under two separate specifications which we have referred to above under the respective letters (c) and (e), yet there was no intrinsic reason for so separating them, nor were they essentially severable either in their origin or in their effect. While, therefore, we do not doubt the correctness of the principle invoked that where damages of an essentially severable character are specially pleaded the findings should follow the pleadings, it does not seem to us that the mere circumstance that in plaintiff's pleadings an effort was made to break up this essentially single type of damage into two elements required the court to follow that course." It clearly appears that no punitive damages were included in the award made by the findings and judgment and, under the circumstances here appearing, it must be held that no reversible error appears.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; EDMONDS, TRAYNOR, and SCHAUER, JJ., dissenting.



103 Cal.App.2d 602

COUGHLIN v. HARLAND L. WEAVER,
Inc., et al.
Civ. 17771.

District Court of Appeal, Second District,
Division 3, California.
April 19, 1951.

Action by Kathleen E. Coughlin against Harland L. Weaver, Inc., Marshall D. Graham Corporation and others for injuries sustained by plaintiff in fall down basement stairway while inspecting a house owned by first named defendant and offered for sale by second named defendant as broker. The Superior Court, Los Angeles County, Harry J. Borde, Judge assigned, entered a judgment of nonsuit in favor of defendant Marshall D. Graham Corporation and judgment

on a verdict in favor of Harland L. Weaver, Inc., and plaintiff appealed. The District Court of Appeal, Wood, J., held that the evidence was sufficient to take action against real estate broker to jury, but that granting the nonsuit in favor of broker was not prejudicial error in trial of the issues as to co-defendant owner in view of instructions to jury.

Judgment as to defendant Marshall D. Graham Corporation reversed and judgment as to defendant Harland L. Weaver, Inc., affirmed.

1. Negligence ⇨32(1, 2, 8)

Prospective purchaser inspecting a house offered for sale was a "business visitor" toward whom those in possession of house owed a duty of reasonable care to discover actual condition of premises and either make them safe or warn visitor of dangerous conditions.

See publication Words and Phrases, for other judicial constructions and definitions of "Business Visitor".

2. Negligence ⇨48

A possessor of land is liable for bodily injury to business visitors if possessor knew or by exercise of reasonable care could have discovered the condition which caused injury, should have realized that it involved unreasonable risk to visitors, and had no reason to believe that they would discover condition or realize the risk involved, and if possessor invited or permitted visitors to enter or remain upon land without exercising reasonable care to make such condition reasonably safe or give adequate warning thereof.

3. Negligence ⇨134(7, 8)

Evidence warranted findings that real estate broker authorized to sell house on commission basis was a possessor of house bound to exercise reasonable care to discover actual condition of premises and either make them safe for business visitor or warn her of dangerous condition and that broker's agents were familiar with construction of basement stairway down which prospective purchaser fell.

4. Negligence ⇨136(14, 16)

In action against owner and real estate broker authorized to sell house on com-

mission basis for injuries sustained by prospective purchaser in fall down basement stairway allegedly constructed in violation of city ordinance, evidence was sufficient to take action against broker to jury on questions of whether prospective purchaser was a business visitor, whether broker was a possessor of the premises and whether broker's agents were familiar with manner in which stairway was constructed.

5. Negligence ⇨136(26)

Whether prospective purchaser in opening basement door while inspecting house offered for sale and in stepping forward through doorway was contributorily negligent so as to preclude recovery for injuries sustained in fall down stairway allegedly constructed in violation of city ordinance was a question of fact for jury.

6. Trial ⇨260(8)

Refusal to give requested instruction as to duty owed by possessor of land to business visitor was not error, where subject matter of proposed instruction was covered by other instructions which were given.

7. Trial ⇨206

Refusal to give requested formula instructions setting out plaintiff's theory of case was not error.

8. Appeal and error ⇨1061(3)

In action against owner and real estate broker authorized to sell house for injuries sustained by prospective purchaser in fall down basement stairway, erroneously granting a nonsuit as to broker was not prejudicial error in trial of issues as to owner, in view of instructions to jury.

9. Trial ⇨120(2)

Argument to jury in personal injury action as to defendant's knowledge of a previous similar accident on the same premises based on assumption as to negotiations for settlement of claim growing out of such other accident was objectionable in absence of evidence regarding negotiations.

10. Appeal and error ⇨688(1)

Record failed to sustain contention that trial judge by his attitude and demeanor

toward plaintiff had prejudiced her case before the jury.

Gandy & Cockins, Santa Monica, for appellant.

Tripp & Callaway and Toxey Hall Smith, Los Angeles, for respondent Harland L. Weaver, Inc.

Crider, Runkle & Tilson, Los Angeles, for respondent Marshall D. Graham Corp.

PARKER WOOD, Justice.

Action for damages for personal injuries. At the close of plaintiff's case the defendant corporations made motions for nonsuit. The motion of the Graham Corporation was granted, and the motion of Weaver, Inc. was denied. The verdict was in favor of defendant Weaver, Inc. Plaintiff appeals from the judgment of nonsuit and from the judgment entered on the verdict.

Defendant Harland L. Weaver, Inc., a corporation, was the builder and owner of a dwelling house in Los Angeles. That defendant authorized the defendant Marshall D. Graham Corporation, a real estate broker, to sell the property at a certain price and it agreed to pay the broker a commission for its services. On November 28, 1948, a Miss Hanen, who was an employee of the Graham Corporation, was at the property for the purpose of showing the property to prospective purchasers. In front of the house there was a sign which stated "Open for Inspection." About 4 p. m. of said day the plaintiff, who intended to buy a house, and three of her friends entered the house, upon invitation by Miss Hanen, for the purpose of inspecting it. Miss Hanen proceeded to show the house to them, and as they went from room to room she talked to them about the house. They all went into a hall and then two of plaintiff's friends went into a bedroom. The hall was well lighted. On one side of the hall there was a door to a linen closet and across the hall from that door there was a door to the basement. The basement door was constructed so that it opened away from the hall and over the stairway leading to the basement. There was no landing at the top of the basement

stairway—the stairway was flush with the bottom of the door or the floor of the hall. The stairway did not have a handrail. While Miss Hanen and plaintiff's friend (who remained in the hall) were looking toward the linen closet door, the plaintiff opened the basement door, stepped forward and through the doorway as the door opened, and fell into the basement. No one saw her open the door or saw her fall.

On the basement door there was a door-knob, and about 5 inches above the door-knob there was a smaller knob which was a part of a bolt lock. The bolt part of the lock was concealed in the wood of the door, and the bolt was operated by turning the small knob. Plaintiff testified that she did not see the lock above the doorknob; she went to the door, put her right hand on the doorknob, and said, "What's this room?"; then she turned the doorknob, opened the door, and stepped "with it" through the doorway into dark space. Miss Whittle, an employee of the Graham Corporation, who was called as a witness by defendant Weaver, Inc., testified that she opened the house about 10 a. m. on the day of the accident; that she left the house about 2 p. m., after Miss Hanen arrived there; and that the basement door was locked when she left. Miss Hanen, who was called as a witness by defendant Weaver, Inc., testified that she arrived at the house about 1 p. m.; and that the basement door was locked when she took plaintiff and her friends through the house. Mr. Weaver, president of defendant Weaver, Inc., testified that his company owned several houses in the tract where this house is located; that he had given instructions to the people in charge of the property that all basement doors had to be locked; and that the doors were locked, as a precautionary measure, to keep children from opening them. He also testified that about 4 p. m. on a clear day the visibility at the top of the basement stairway was fair.

Ordinances of the City of Los Angeles required that there should be a landing at the top of the basement stairway, and that the stairway should have a handrail.

[1-4] Appellant contends that the granting of the motion for a nonsuit as to the

Graham Corporation was erroneous. She alleged in her complaint that the Graham Corporation was an independent contractor. At the close of plaintiff's case, as above stated, defendant Weaver, Inc. made a motion for a nonsuit upon the grounds: that any violation of the ordinance is not a proximate cause of any injury sustained by plaintiff; and that plaintiff was guilty of negligence as a matter of law. The motion was denied. Thereupon counsel for defendant Graham Corporation made a motion for a nonsuit and stated that it was made upon the same grounds that were advanced by defendant Weaver, Inc. The trial judge said: "[T]he motion will be denied on that ground, but there is a ground upon which the Court will entertain a motion, and that is upon the ground that * * * there has been no evidence to substantiate the plaintiff's contention in his pleadings that this real estate company was an independent contractor. * * * And furthermore, there is nothing in his pleadings * * * basing any liability on the ground of an agency." Thereupon the court granted the motion of defendant Graham Corporation for a nonsuit. Counsel for plaintiff then asked to be heard, and he argued that plaintiff was a business invitee of both defendants. Thereafter the court said: "Had you proceeded on the theory of agency the Court would have sustained you, but you chose to proceed on a tenuous theory here which the Court is not going to grant. I grant you that the—it might have been the agent of either or both parties." Then counsel for plaintiff said that if the defendant Graham Corporation was not an independent contractor and was merely an agent that he (counsel) thought said defendant would not be liable. The court said: "The only question before the Court is one of an independent contractor. That is your pleading, and that is what you chose to stand on. * * * The motion will be granted." The evidence was sufficient to prove that plaintiff was a business visitor. In the Restatement of the Law of Torts, section 343, it is stated in part that a possessor of land is subject to liability for bodily harm caused to business visitors by a condition thereon if he (a) knows, or by

the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and (b) has no reason to believe that they will discover the condition or realize the risk involved therein, and (c) invites or permits them to enter or remain upon the land without exercising reasonable care to make the condition reasonably safe or to give a warning adequate to enable them to avoid the harm. In "Comment a" of said section (p. 939) it is said: "[T]he visit of a business visitor is or may be financially beneficial to the possessor. Such a visitor is entitled to expect that the possessor will take reasonable care to discover the actual condition of the premises and either make them safe or warn him of dangerous conditions." The evidence herein was sufficient to prove that defendant Graham Corporation was a possessor of the house within the meaning of said section. It was also sufficient to prove that the agents of Graham Corporation were familiar with the manner in which the basement stairway was constructed. The rule as to the duty of the trial court in considering a motion for a nonsuit and the duty of a reviewing court in considering an appeal from an order granting a nonsuit is stated in *Raber v. Tumin*, Cal.Sup., 226 P.2d 574. In that case the defendant Tumin, as lessee, had signed a lease of a storeroom and had commenced alterations of a partition in the room about 4 hours before the accident occurred therein. The other defendant in that case was a carpenter who, as employee of defendant Tumin, was making the alterations. The plaintiff was an electrician who had gone to the room at the request of defendant Tumin to check for any changes that might be necessary in the wiring. A ladder in the room fell upon plaintiff and injured him. The trial court therein granted the motions of both defendants for nonsuit. On appeal the judgment was reversed. The court said, 226 P.2d at page 576 that the evidence was sufficient to support a finding that both defendants had possession of the store and ladder and they were exercising dominion over such property, and that "Plaintiff was a business visitor toward whom Tumin, to-

gether with the servant through whom he was acting in altering the premises, 'was obliged to exercise ordinary care to keep the premises in a reasonably safe condition, or to warn * * * of danger. The duty was not limited to conditions actually known * * * to be dangerous, but extended also to conditions which might have been found dangerous by the exercise of reasonable care.'" In the present case, the motion for a nonsuit should not have been granted.

[5] Appellant contends, with reference to the judgment in favor of Weaver, Inc., that the question of contributory negligence on the part of plaintiff should not have been submitted to the jury. She argues to the effect that there was no evidence of contributory negligence on the part of plaintiff. The question of contributory negligence was one of fact for the determination of the jury.

[6,7] Appellant also contends that the court erred in refusing to give two instructions which she requested. One of those instructions was based upon the provisions of said section 343 of the Restatement of Torts, above referred to, relative to the duty a possessor of land owes to a business visitor. The subject matter of this proposed instruction was covered by other instructions which were given. As to the other proposed instruction, appellant asserts that it was definitely an exposition of plaintiff's theory of the case, and that although formula instructions are frowned upon by courts that instruction should have been given. The court did not err in refusing to give the instruction.

[8] Appellant also contends that the granting of a nonsuit as to the Graham Corporation adversely affected appellant's case against defendant Weaver, Inc., and that the granting of such nonsuit was prejudicial error in appellant's case against defendant Weaver, Inc. Appellant argues that since Mr. Weaver testified that he had instructed the Graham Corporation to keep the basement door locked, the jury might have concluded that the giving of such instruction by Mr. Weaver was all that Weaver, Inc. could have done and that the re-

sponsibility and the duty to warn were transferred to the Graham Corporation. She also argues that the judgment in favor of Weaver, Inc. should be reversed because it cannot be determined upon what theory the jury returned its verdict. This contention is not sustainable. It cannot be said properly that the granting of a motion for a nonsuit as to one defendant necessarily constitutes prejudicial error in the trial of the issues as to a codefendant. After granting the motion for a nonsuit the trial court instructed the jury that it should not draw any inferences from the fact that the Graham Corporation is out of the case as to whether the remaining defendant, Weaver, Inc. is or is not guilty of negligence, and it should determine that fact after it had heard all the evidence in the case and the rules of law applicable to the case as stated by the judge in his instructions. The issues as to negligence on the part of Weaver, Inc., and as to contributory negligence on the part of plaintiff, were questions of fact for the determination of the jury. Presumably the jury followed the instructions of the court and determined those issues independently and irrespective of the matter of the nonsuit.

[9] Appellant also asserts that the court erred in sustaining an objection to her argument as to the knowledge of Weaver, Inc. regarding a prior similar accident at the place involved here. A witness, called by plaintiff, had testified that he had informed Mr. Weaver regarding a similar accident at said place. Mr. Weaver testified that the first knowledge he had of the other accident was when he was served with summons and complaint regarding the other accident, and he had not had a discussion with said witness regarding the other accident. Plaintiff's counsel, in his argument to the jury, said that Mr. Weaver's testimony to the effect that he had not heard of the other accident until he was served with summons and complaint about a year after the accident was not in conformity with ordinary human experience, and that "You know the delay was occasioned because the parties were unquestionably negotiating—." Thereupon, counsel objected to the argument. There was no evidence regarding

negotiation. It was proper to sustain the objection to that argument.

[10] Another contention of appellant is that the trial judge by his attitude and demeanor toward appellant prejudiced her case before the jury. Her argument is to the effect that the statements of the judge to plaintiff and his tone of voice, while she was testifying, indicated that he was impatient and that his opinion of plaintiff's case was not very high. It is not necessary to recite herein all the statements upon which the contention is based. The judge said in part: "Lady, please don't keep talking. We can't get this in the record." This contention is not sustainable.

The judgment as to defendant Marshall D. Graham Corporation is reversed. The judgment as to defendant Harland L. Weaver, Inc. is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



103 Cal.App.2d 633

CHAMBERS et al. v. SILVER.

Civ. 17560.

District Court of Appeal, Second District,
Division 3, California.

April 20, 1951.

Rehearing Denied May 15, 1951.

Hearing Denied June 18, 1951.

Action by Frank W. Chambers, and others, against Duane Silver for personal injuries and for wrongful death resulting from automobile collision occasioned when defendant's vehicle veered onto wrong side of road. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., entered judgment upon verdict for defendant, and plaintiffs appealed. The District Court of Appeal, Wood, J., held that it was prejudicial error to refuse testimony on behalf of one of plaintiffs as to demonstration by which he sought to rebut defendant's sole theory of defense and prove that broken leaf in front spring of automobile did not render vehicle impossible to control.

Judgment reversed.

1. Appeal and error ⇨1056(1)

Evidence ⇨150

Where collision occurred when defendant's automobile veered onto wrong side of road and his sole defense, in suit for injuries to plaintiffs, was that main leaf in spring at front wheel had broken when wheel crossed two-inch deposit of soil on road and vehicle had thereby been rendered impossible to control, and mechanic testified for defendant that it was physically impossible to drive automobile with this type suspension in such condition, it was prejudicial error to refuse plaintiffs' rebuttal evidence as to an experiment in which automobile with same suspension system was driven without loss of control over 2 x 4 boards at a speed of 45 to 50 miles per hour.

2. Appeal and error ⇨205

Where objection was sustained to any further questioning in regard to any demonstration by which plaintiffs, in suit for injuries arising out of head-on collision with defendant's automobile occurring when defendant's vehicle veered onto wrong side of road, sought to rebut, defendant's sole theory of defense by proving that broken leaf in spring at front wheel did not render vehicle impossible to control, offer of proof was not required in order to preserve exception on appeal, since by sustaining objection in its form court indicated purpose to exclude any further evidence regarding demonstration.

3. Trial ⇨47(1)

When a trial court states or otherwise indicates that it will not receive evidence, a specific offer of proof is not necessary to save exception on appeal.

4. Appeal and error ⇨205

Where collision occurred when defendant's automobile veered onto wrong side of road, and sole defense to suit for injuries to plaintiff was that vehicle was rendered impossible to control when spring at front wheel broke while wheel was crossing two-inch deposit of soil on road, and witness for plaintiff testified, in rebutting defense, concerning demonstration in which he had driven automobile with spring in same condition over staggered

2 x 4 boards, but objection was sustained before specific results of demonstration were evident, offer of proof was not necessary to save exception on appeal since it was apparent that any answers to questions would be favorable to plaintiff and that they were material as rebutting evidence.

5. Appeal and error ⇨205

It is not necessary to make an offer of proof in order to preserve exception on appeal, where question to which an objection is sustained indicates that answer to question will be favorable to party seeking to introduce testimony and where question is material.

Walter T. Casey, Albert L. Casey, Bodkin, Breslin & Luddy, and Peter E. Gianini, Los Angeles, for plaintiffs and appellants.

Spray, Gould & Bowers and Malcolm Archbald, Los Angeles, for defendant and respondent.

WOOD, Justice.

Action for damages for personal injuries and for wrongful death resulting from an automobile collision. Plaintiffs appeal from a judgment, entered upon a verdict, in favor of defendant.

The collision occurred on Monday, December 30, 1946, about 7 a. m., on a highway known as a "cut off" which was near Palmdale. The pavement was 24 feet wide and was made of asphaltic concrete. There was a white line in the center of the pavement. Each shoulder was 12 feet wide and unpaved.

Defendant was driving his 1936 Ford sedan automobile easterly on the south half of the highway until he arrived at a point which, according to his testimony, was about 75 feet from the place where the collision occurred. At that point his automobile went upon the north half (wrong side) of the highway, collided with a Packard automobile which was being driven westerly on the north half of the highway by plaintiff Frank W. Chambers, and then defendant's automobile continued

across the north half of the paved highway and turned upside down on the north edge of the shoulder. The point of impact was near the north shoulder.

As a result of injuries received in the collision, Mrs. Pearl S. Chambers, the wife of Frank W. Chambers, who was a passenger in the automobile driven by him, died within a few hours after the collision. Mr. Chambers and his daughter-in-law, Mrs. Rae M. Chambers (a plaintiff), were severely injured in the collision. Also, as a result of the collision, Robert Hines, who was a passenger in the automobile driven by defendant Silver, died. The defendant was injured in the collision.

The right side of the front of the Ford was smashed in the collision. The Ford was towed to a garage in Palmdale, a distance of 5 miles, by a tow car. Photographs, which were taken at the garage and received in evidence as defendant's exhibits A and B, show that the tow hook (which was at the end of the tow cable) was attached to the left side of the front spring of the Ford, and that the front end of the Ford was suspended by the tow cable which extended through a pulley on the crane of the tow car. While the Ford was being towed from the scene of the collision, with the tow hook so attached to the left side of the front spring, the front end of the Ford (including the front wheels) was held "up" from the ground. The automobile mechanic who towed the Ford to his garage testified that after he had backed the Ford into the yard at the garage he observed that the left side of the main leaf of the front spring was broken; that he noticed it "because it was suspended down, still hanging on the tow truck"; that about three-fourths of the break was rusty and the other part was a new break.

At a place on the south side of the pavement, about 75 feet from the point of collision, there was a patch of hard substance which appeared to be clay or sand that had been washed by rain from a small embankment at the side of the road. The patch or substance was in the form of

a small alluvial fan and was about 2 inches high at the south shoulder of the highway.

On the day of the accident, defendant left Los Angeles about 5:30 a. m., intending to return to Muroc where he, a mechanical engineer, serviced airplanes. He had traveled the road involved here twice a week for 4 months. It was his custom to spend week ends in Los Angeles. He testified that as he approached the scene of the accident he was traveling slightly under 45 miles per hour, and he saw a "clay patch" on the south side of the pavement; there was no sharp bump or roll on the patch, and he did not pay much attention to it; he "had driven over that sort of thing many times before in that country"; that as the right front wheel hit this clay patch his car suddenly veered to the left at quite a sharp angle, and he swung to the left across the center line, and as he kept on going to the left he "twisted the wheel as far as" he could but "there was no reaction to the car," and then the collision occurred; that the car went to the left of its own accord; that when the car went to the left, Mr. Chambers' car was very close and, since defendant's car was not responding to his efforts to turn it, he (defendant) tried to get across the road as fast as he could to get out of Mr. Chambers' way. His counsel asked him if he tried to control the Ford. He replied that after the car swung to the left he attempted to swing it farther to the left in order to put it directly across the road, but nothing happened—there was no reaction to the wheel whatsoever. He also testified that on Sunday night (the night before the accident), while he was in Los Angeles, he believed that he and a friend went to a neighborhood tavern and had a bottle of beer; he returned home about midnight and went to bed soon thereafter; he got up about 5 a. m., Monday, and started to Muroc about 5:30 a. m.; and that he did not remember what he did on the Saturday night preceding the accident.

It was not asserted by pleading or at all that there was contributory negligence on the part of any plaintiff. The theory of the defense was that when the right front

wheel of defendant's Ford hit the clay patch the left side of the main leaf in the front spring broke, and by reason thereof the automobile could not be steered or controlled.

Plaintiff Mr. Chambers testified that when the approaching Ford automobile was about 200 feet away he saw it start to come over to the left side of the highway; it seemed to keep cutting or edging over a little bit at a time; the Ford came over on the wrong side of the highway gradually; he did not notice a sharp cut-across by the Ford; that as the Ford kept edging over on the north side of the highway he (Mr. Chambers) edged over onto the north shoulder; that the last he could remember as to the position of the Ford was that it "was clear across the highway out into the brush with the wheels up."

A witness, called by defendant, testified that he is a chemist, metallurgist, and teacher of science; he had done quite a bit of consulting work in the field of investigating the causes of breaks in metals; he examined the spring involved here in April, 1947; he observed a break in the spring, and a little over one-half of the break was rusty looking and the remaining portion was bright looking; he sawed a piece out of the spring at the place thereon where he observed the break and made a chemical and microscopic analysis of the piece; it was a normal piece of steel as far as chemical composition was concerned; that in his opinion the origin of the old break was a very tiny fatigue fracture. He testified further that he had studied physics; that, with reference to the old crack in the spring, it would take very little force to cause the spring to crack the rest of the way, the remaining portion of the spring was approaching the death mark of old age in the last 100 miles of driving; that in his opinion the driving of the right wheel of an automobile over the clay patch (shown in Exhibit 1) at 45 miles per hour would be sufficient to cause a complete and final rupture of what was left of the spring.

Mr. Harmon, called as a witness by defendant, testified that he had been in the business of repairing automobiles since

1929. Counsel for defendant asked him if he had had experience with a 1936 Ford to determine what happens as far as the steering of it is concerned when weight is shifted from one side to the other. He replied that the only experience he had "was to pick up a car one time and try to steer it back to the shop, that had a broken shackle on" one side of the spring. Counsel for defendant then asked him what the effect of the broken shackle was. He replied, "Very definite." Then counsel for defendant asked him what effect the broken shackle had so far as distributing the weight of the Ford to one side or the other is concerned. Counsel for plaintiffs asked counsel for defendant if he was talking about another case. Counsel for defendant replied to the effect that he was talking about another case. Counsel for plaintiffs objected to the question on the ground that "it is irrelevant, some other car. We don't know what else may have been wrong with it." The court overruled the objection, and the witness said, "I was just trying to simulate a similar condition." Counsel for defendant said: "With respect to this car with the shackle that you mention, did you observe what that did with respect to leaning the car one way or the other?" The witness replied: "The front end of the car dropped down on the wheel, or very close to the wheel, so it would not steer easy." Counsel for defendant asked him what experience he had had in connection with a 1936 Ford so far as knowledge of the spring and steering mechanism is concerned. He replied: "I have gone out to pick up cars and I have also tried to steer cars after they were in a garage for repairs that have been let down on one side through a faulty shackle bolt, or something bends in there, and it is nearly impossible to steer them."

Counsel for defendant then referred to a front assembly of a Ford—particularly the steering mechanism and front spring—which assembly had been brought into the courtroom by plaintiffs, and he asked the witness what happens to "this assembly" when that main spring leaf breaks. He replied that the weight of the car alone

would cause "it to rotate, or swing free on this side." Counsel for defendant then asked: "Would anything happen with respect to this drag-link when that spring broke?" He replied, "Yes, there would be no control. Inasmuch as you have an anchor here and an oscillating movement there which is not anchored,—this front end depends on those points to be solid. You could turn this part one way or the other and you would not get any response on the steering mechanism." The examination of said witness was continued to the next day, and then counsel for defendant asked the witness: "What effect would the spring breaking have upon the ability of a person to maintain the direction of the wheels, from a steering position?" Counsel for plaintiffs objected to the question upon the ground the witness was not qualified to answer. The objection was overruled, and the witness said: "It does not look like you would have any control over it at all for a moment, but there would be a time a few seconds, or even a minute later where a driver may be able to stabilize the car, bring it back under control. Everything would have to settle back to an assumed position, or whatever position it would take, after the spring broke. But for a moment, I do not believe anybody could control the car. One other point I left out yesterday." Counsel for defendant asked about the possibility of the left fender coming in contact with the tire of the left wheel if the left spring breaks. He replied that the tire would hit the fender and "if that fender had any control over the wheel, more control than the steering mechanism, it would override anything a person could do to control the steering." On cross-examination, counsel for plaintiffs asked him if he had driven a car that had a broken spring. He replied: "I have driven cars where the back spring has been broken * * * but I have never been able to drive a car with this particular suspension with a broken spring." He also testified on cross-examination as follows:

"Q. You will say then, it is a physical impossibility to steer this car without the spring being on it? A. Absolutely.

"Q. If the spring is on the car and one shackle is loose, you can still steer the car?

A. No.

"Q. You also state that would be a physical impossibility? A. I will say you can steer the car, but you wouldn't have control over it."

There was evidence on behalf of plaintiffs and defendant to the effect that the front end assemblies of 1936 and 1938 Fords, including the steering mechanism, are very similar. Witness Harmon, who was called as a witness by defendant as above stated, also testified that "if the same thing would happen to any of these models [referring to models of 1935 to 1938, inclusive], you would have similar results"; that a broken spring or an unfastened shackle upon a 1936 Ford would have the same effect upon the steering and control of the automobile.

A witness, called by plaintiffs, testified that within the week preceding the trial he drove a 1938 Ford automobile with the left front shackle of the spring unfastened, over a road where there were curves to the right and left, at a speed between 45 and 50 miles per hour, and that he did not have any difficulty whatsoever in driving the car and he was able to guide it; that in said experiment he drove the car more than 10 miles. Then counsel for plaintiffs asked him the following questions, and he gave the following answers:

"Q. Now with the same car in the condition last mentioned, did you put any other additional obstruction in the path of the car, to drive over? A. Yes, sir.

"Q. What obstructions did you put in the path? Just describe them first. A. I put two 2 x 4's.

"Q. Were those two 2 x 4's each on the same side so that the left or right wheels, whichever it might be, would run over them, or was one put on one side and one on the other? A. One on one side, and one on the other. They were staggered.

"Q. Did you have a 2 x 4 for both the lefthand wheels and the righthand wheels to run over? A. Yes, sir.

"Q. How many did you have on each side? A. One."

Thereupon counsel for defendant objected "to any further questioning in regard to this demonstration on the ground that it does not in any manner resemble the conditions present in the accident." The objection was sustained. Counsel for plaintiffs stated that the purpose of the testimony was to show the stability of a Ford with the front shackle unfastened, and that these conditions are more extreme conditions and they will show better the stability of the car. Counsel for defendant objected "to the proposed additional fact to the alleged demonstration on the ground that it does not compare in any manner with the conditions that occurred at the time of the accident." Counsel for plaintiffs said that plaintiffs had put something in the experiment which they thought was worse than a sand patch. The objection was sustained.

Two other witnesses, called by plaintiffs, testified that they rode in the automobile with the witness last above mentioned while he was making the experiment with the left front shackle unfastened, and that they did not notice anything wrong about the handling of the car.

One of appellants' (plaintiffs') contentions on appeal is that the trial court erred prejudicially in sustaining defendant's objection to evidence offered by plaintiffs regarding a demonstration with a 1938 Ford, whereby the operator of the Ford drove each front wheel, at different times, over a 2 x 4 board at a speed between 45 and 50 miles per hour while the left front spring shackle was unfastened. As above shown, the court permitted defendant's witness, over the objection of plaintiffs, to relate experiences of the witness in unsuccessfully attempting to drive Ford automobiles (not involved here) which had a broken shackle on one side of the spring. As to one of such experiences, the witness said the front end of the car dropped down so that the car would not steer easily and, as to other experiences, he said it was nearly impossible to steer the cars. The witness had stated also, on the first day he testified, that if the spring broke "there would be no control," and "you would not get any response on the steering mechanism," and the tire would hit

the fender and it would "over-ride anything a person could do to control the steering." It does appear, however, that when he testified on the second day he qualified his statements of the previous day by saying, "It does not look like you would have any control over it at all *for a moment*, but there would be a time a few seconds or even a minute later where a driver may be able to stabilize the car, bring it back under control. * * * *But for a moment* I do not believe anybody could control the car." He also said that was "*One point I left out yesterday.*" Thereafter, on cross-examination, he stated: "I have never been able to drive a car with this particular suspension with a broken spring"; and it is "Absolutely" a physical impossibility to steer the car without the spring on it; and if the spring is on the car and a shackle is loose the car could not be steered, and "I will say you can steer the car, but you wouldn't have control over it." Also, the defendant had testified that despite his efforts to steer and control the automobile, after one leaf (the main leaf) in the spring had broken, it could not be steered or controlled at all. The defendant's excuse for being on the wrong side of the highway was based solely upon a claim that the breaking of a leaf in the spring so affected the steering mechanism that, by reason of such mechanical defect, it was impossible to steer or control the automobile.

[1] The case presented several close questions. It was a close question as to whether the small clay patch was of such significance that running upon it with the right front wheel would break the left side of the front spring. There was testimony that defendant had driven over many such patches in that country, and he did not pay much attention to the patch. Even if it could be found that such a patch could break the spring, it was a close question as to whether the patch did cause the break. The break was not noticed until after the wrecked Ford was at the garage. The Ford had been in a terrific head-on collision with a Packard, and the front end of the Ford was smashed. The Ford had been towed 5 miles with the tow cable hooked on the left side of the front spring, and

with such cable so attached and extending through a pulley on the crane of the tow car the front end of the Ford was suspended or held "up" while it was being towed. The evidence showed that the cable so attached to the left side of the spring lifted the front wheels off the ground. It thus appears that it was a close question whether the spring was broken by reason of (1) the small clay patch, or (2) the terrific collision, or (3) towing the Ford, and suspending the front end of it, with a cable attached to the front spring. Also, even if it be assumed that the clay patch did cause the spring to break, there was a close question as to whether the automobile could then be steered or controlled. In view of (1) the several close questions involved in defendant's explanation of his presence on the wrong side of the road, (2) the several statements on behalf of defendant that the automobile could not be steered or controlled, (3) the court's ruling permitting defendant's witness to relate his experiences in unsuccessfully attempting to drive Fords which had a broken shackle, and (4) the fact that no plaintiff was negligent, it was highly important that plaintiffs have a full opportunity to present rebuttal evidence. In sustaining defendant's objection to evidence offered by plaintiffs regarding the above-mentioned demonstration in which the wheels of a Ford were driven over 2 x 4 boards, the plaintiffs were deprived of a fair trial and the court erred prejudicially.

[2-5] In regard to said demonstration, respondent asserts, among other things, that no question was asked to elicit the specific answer as to what was experienced with reference to driving over to 2 x 4 boards. It is to be noted (1) that, immediately after plaintiffs' witness said in effect that such a demonstration had been made with 2 x 4 boards, counsel for respondent (defendant) objected "to any further questioning in regard to this demonstration," and (2) that the objection was sustained. Of course, after such ruling, it was not to be expected that plaintiffs' counsel would ask a further question to elicit a specific answer as to the result of the experiment. Respondent also asserts that since plaintiffs made no offer of proof as to what was ex-

perienched by such demonstration, this court will not assume what the answer would have been regarding the result of the demonstration. An offer of proof was not required. As above shown, the court sustained the objection "to any further questioning in regard to this demonstration." It is clear that it was the purpose of the court to exclude any further evidence regarding the demonstration. In *Heimann v. City of Los Angeles*, 30 Cal.2d 746, at page 757, 185 P.2d 597, 604, it was said that defendant's objection was sustained to the entire line of proof sought to be introduced and "This being so, it cannot be held that the offer was insufficient or that a more specific offer was a prerequisite to review on appeal." In *Westman v. Clifton's Brookdale, Inc.*, 89 Cal.App.2d 307, at page 314, 200 P.2d 814, 818, it was said: "When a trial court states or otherwise indicates * * * that it will not receive evidence, a specific offer of proof is not necessary." See *In re Estate of Kearns, Cal.*, 225 P.2d 218. It is to be noted that counsel for respondent stated in his brief that "By the direct testimony of the witness and by the statements of plaintiffs' counsel above quoted in arguing the objection, no doubt was left in the minds of the jury that Mr. Chambers [the witness, son of plaintiff Frank Chambers] had driven over these 2 x 4's in connection with his experiment." From the questions of plaintiffs' counsel pertaining to the manner in which the boards were placed for the demonstration, which questions preceded defendant's objection to further questions, and from plaintiffs' argument (after the objection had been made) to the effect that the boards made a more extreme or "worse" condition for a demonstration than the sand patch, it is obvious that the testimony with respect to the result of the demonstration was material, and would have been favorable to plaintiffs, and would have been in rebuttal of evidence received on behalf of respondent. Where a question to which an objection is sustained indicates that the answer to it will be favorable to the party seeking to introduce the testimony and where the question is a material one, it is not necessary to make an offer of proof.

See *Sumida v. Pacific Auto. Ins. Co.*, 51 Cal.App.2d 472, 478, 125 P.2d 87; and *Stroud v. Hansen*, 48 Cal.App.2d 556, 560, 120 P.2d 102.

By reason of the above conclusions, it is not necessary to determine the other contentions of appellants.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.



103 Cal.App.2d 621

McCAFFREY v. WILEY.

Civ. 4096.

District Court of Appeal, Fourth District,
California.

April 19, 1951.

Action by P. R. McCaffrey against Harry R. Wiley for damages for withholding possession of land. The Superior Court of Kern County, R. B. Lambert, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Bernard, P. J., held that an action for ejectment and for damages for wrongful withholding of possession constituted single cause of action, and that prior judgment in ejectment was bar to action for wrongful withholding of possession.

Judgment affirmed.

1. Action ⇨53(1)

Judgment ⇨592

A single cause of action, being a violation of one fundamental right, may not be split and used as a basis for separate suits, and judgment on such cause of action is bar to subsequent suit thereon.

2. Action ⇨38(2)

The matter of ejectment and the matter of damages for withholding of possession are both based upon invasion of the same fundamental right of possession of real property and constitute but one single indivisible cause of action. Code Civ.Proc. §§ 427, 740.

3. Action ⇨53(2)

Where plaintiff had recovered possession of land from defendant in action of ejectment and had not raised issue as to right to damages for wrongful withholding of possession, plaintiff waived his right to damages and could not assert claim in subsequent action, since there was but one single indivisible cause of action involved. Code Civ.Proc. §§ 427, 740.

4. Judgment ⇨746

The defense that a cause of action has been split and that present suit is barred by a previous judgment in same cause is for benefit of defendant and may be waived by him.

5. Action ⇨53(1)

The prohibition against splitting of a cause of action does not apply if the particular issue upon which subsequent suit is brought was specifically withdrawn or reserved for future litigation in the prior action.

6. Judgment ⇨713(2)

Where plaintiff had recovered land from defendant in action of ejectment, subsequent action for damages for wrongful withholding of possession was barred even though issue as to right to damages for wrongful withholding of possession had not been raised in ejectment action and it was argued that extent of damages and amount of crop which would be grown on land withheld were not previously known, since plaintiff could have anticipated some damage from circumstances at time and had right to ask for damages in action of ejectment.

Schmidt & Catalano, Bakersfield, for appellant.

Musick, Burrell & Ingebretsen, Los Angeles, Kendall & Howell, and Mack & Bianco, all of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for the withholding of possession of 120 acres of land for the period from October 1, 1946, to October 14, 1947.

On July 25, 1945, J. B. Cutten, the owner of the land, leased it to the plaintiff for a

period of three years commencing on October 1, 1946. On April 11, 1946, Cutten, having overlooked the prior lease, executed an agreement giving the defendant the right to farm the same property for a period of five and one-half years. The defendant took possession on April 11, 1946, in good faith, and remained in possession until October 14, 1947.

On October 24, 1946, the plaintiff commenced an action in ejectment against Wiley to recover possession of the land. The only issue raised in that action was that of the right of possession, and no claim was asserted therein for rents or mesne profits. That action was tried on April 25, 1947, and a judgment for the plaintiff was entered October 14, 1947. No appeal was taken and that judgment became final. The defendant had planted barley on the land in October, 1946, but after October 24, and that crop was harvested about the first of June, 1947.

On March 19, 1948, the plaintiff brought this action to recover damages for the wrongful withholding of possession for the year preceding the entry of the prior judgment. The defendant filed a cross-complaint against the owner of the land, seeking to recover from Cutten any amount he might be required to pay in the event the plaintiff was given a judgment.

The court found that the mesne profits from the land here in question amounted to \$1312.77, and that Cutten was liable to Wiley for any loss suffered by him. However, the court found that Wiley had not suffered this loss of \$1312.77 since the plaintiff was not entitled to recover that amount from Wiley. In this connection, the court found that the plaintiff had had a single indivisible cause of action against Wiley for the right of possession and for damages for any withholding of possession; that the plaintiff had waived his right to recover damages for wrongfully withholding possession; that the bringing of the present action is an attempt to split a single indivisible cause of action which the plaintiff had prior to his commencing the prior action; and that the plaintiff is not entitled to recover anything from the defendant in this action by way of damages,

mesne profits, rentals or otherwise, having exhausted his remedy in the prior action. Judgment was entered that the plaintiff take nothing. While the judgment awarded Wiley certain amounts as against Cutten for his expenses in defending the suits, nothing was awarded him on his contingent claim since the plaintiff recovered nothing against him. The plaintiff has appealed from the judgment.

The appellant contends that section 427 (2) of the Code of Civil Procedure permits the joinder of an action for ejectment and an action for damages for withholding possession but does not require such joinder, and that certain decisions in this state have established the rule that a judgment in an ejectment action is not a bar to a subsequent action for damages for withholding or for rents and profits.

[1] Section 427 does not require the joinder of two causes of action which are entirely separate and distinct. *Lynch v. Kemp*, 4 Cal.2d 440, 49 P.2d 817, *Palpar, Inc., v. Thayer*, 83 Cal.App.2d 809, 189 P. 2d 752. A different rule may apply where two purported causes of action are in fact both based on the same invasion of the same right. It is well settled in this state that a party may not split a single cause of action, using the same obligation as the basis of separate suits, and that where this is done the judgment in the first action may be pleaded as a bar to a subsequent suit based on the same fundamental claim which could have been presented in the first action. *Wulfjen v. Dolton*, 24 Cal.2d 891, 151 P.2d 846, 849; *Panos v. Great Western Packing Co.*, 21 Cal.2d 636, 134 P.2d 242; *Slater v. Shell Oil Co.*, 58 Cal. App.2d 864, 137 P.2d 713. The reasons therefor are clearly set forth in *Wulfjen v. Dolton*. In that case the court said: "The violation of *one primary right* constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other."

[2,3] Section 740 of the Code of Civil Procedure provides that in an action for the recovery of property the plaintiff may also

recover any damages he has suffered for withholding the property. A specific right is given to sue for both elements in the same action. The matter of ejectment and the matter of damages for withholding possession are both based upon the same invasion of the same right. *Slater v. Shell Oil Co.*, 58 Cal.App.2d 864, 137 P.2d 713, 715. In that case, where the plaintiff sued for ejectment but in a prior action had sued for damages, the court said: "Some confusion is caused in the discussion of counsel from the failure to recognize the distinction between the 'cause of action' and the 'form of action'. In the application of the doctrines of *res judicata*, estoppel by judgment, and merger of judgments it is immaterial what form the proceedings take so long as they arise out of the same act or right. In the case here the right of the appellant which she asserts in both actions is the right to be free from the alleged trespass upon her land, and the occupation by the defendant. To assert this right she could sue for the trespass and recover damages, or in ejectment and have a judgment of ouster, and damages, or for an injunction to restrain the continued occupation."

The same principle was applied in *Van Horne v. Treadwell*, 164 Cal. 620, 130 P. 5, although that action was one to recover the possession of pledged stock instead of real estate. In that case, the court said: "The judgment there rendered was a conclusive adjudication of all matters, arising out of the withholding of the stock, which might have been presented to the court for determination. Whether we regard the first action as one in claim and delivery, or as a suit in equity for specific performance of the agreement to return pledged property on payment of the debt (in other words, a bill to redeem), there can be no question that in that action plaintiff was entitled to recover all damages sustained through the wrongful refusal of the defendants to redeliver the property. There was a total breach of a single and entire obligation, and the plaintiff could not split his demand for relief on account of such breach, so as to entitle him to recover a part of such relief in one action,

and the remainder in another. The rule thus stated is applicable, even if we assume, contrary to what we consider the fair construction of the pleading, that the complaint shows that the elements of damage now sought to be recovered were not known or ascertainable at the date of the former judgment."

In the instant case, the one primary right involved was the right of the appellant to possession of the land and there was but one violation of that duty on the part of the respondent. Both actions were based on the same invasion of the same right, and under the well established rules with respect to the splitting of actions which prevails in this state the appellant should have presented his claim for damages in the prior action, and by failing to do so he must be held to have waived it.

[4,5] The appellant cites the following cases in support of his contention that a judgment in an ejectment action does not bar a subsequent action for damages for withholding the property: *Nathan v. Dierssen*, 164 Cal. 607, 130 P. 12; *Johnston v. Fish*, 105 Cal. 420, 38 P. 979; *Coburn v. Goodall*, 72 Cal. 498, 14 P. 190; *Avery v. Superior Court*, 57 Cal. 247; *Haggin v. Clark*, 51 Cal. 112; *Yount v. Howell*, 14 Cal. 465; *Slater v. Shell Oil Co.*, 58 Cal.App.2d 864, 137 P.2d 713; *Clutter v. Superior Court*, 140 Cal.App. 135, 35 P.2d 152. We find nothing in any of those decisions which is controlling here. In *Johnston v. Fish*, 105 Cal. 420, 38 P. 979, 980, it was held that a plaintiff in ejectment is entitled to recover from the defendant only the value of the use and occupation of the premises, and is not entitled to the fruits of the land. Incidentally, the court remarked that the law gives to the plaintiff in ejectment the right to recover "either in the same action or in another, the value of the use and occupation of the land, which is termed 'damages for the withholding thereof'"; but went on to state that neither before nor after a determination as to the title of the land could the plaintiff recover the fruits of the land from one who had purchased them from an occupant who was in adverse possession. As to

other expressions in these cases, relied on by the appellant, some are dicta, and some are remarks in connection with the history of ejectment actions. In none of these cases was the question of splitting of actions raised or involved. It has been held that the defense of splitting a cause of action is for the benefit of the defendant and may be waived by him. *Cohn v. Cohn*, 7 Cal.2d 1, 59 P.2d 969; *Commercial Standard Ins. Co. v. Winfield*, 24 Cal.App.2d 477, 75 P.2d 525. It has also been held that the prohibition against the splitting of an action does not apply where the particular issue was specifically withdrawn or reserved for future litigation in the prior action. *Coburn v. Goodall*, 72 Cal. 498, 14 P. 190; *Panos v. Great Western Packing Co.*, 21 Cal.2d 636, 134 P.2d 242, 244.

[6] At the oral argument counsel for appellant made the further contention that the matter of damages could not have been presented in the prior action since it was not then known whether or not a crop would be raised on the land or, if so, how much of a crop would be produced. In *Panos v. Great Western Packing Co.*, it is said: "The authorities also establish that plaintiff cannot escape such bar by urging that during prosecution of the prior action he was unaware of the ground of negligence relied on here." A similar expression is contained in the opinion in *Van Horne v. Treadwell*, as above quoted. The appellant had a right to ask for damages in the prior action, he knew that some damage would naturally follow the withholding of possession, and he had actual knowledge that a crop was being grown on the premises long before that action was tried. Even if he considered the matter unimportant when he brought the action, he could without doubt have amended in that respect. It appears from the evidence that the appellant knew before the prior action was filed that the respondent intended to put in a crop on this land and to bring in water, which was not otherwise available, for that purpose. The appellant testified that he found out in October, 1946, that the respondent had already planted the land to

barley, that he saw the crop several times thereafter, and that he walked over the land and observed that this was a good crop. The crop was almost ready for harvest when the prior action was tried, and long before that time the appellant was fully aware of the circumstances upon which his claim for damages rests.

The question of damages for withholding the possession of land from another is closely and intimately connected with the question as to the right of possession of the land, and both rest upon the same invasion or violation of the same right. Logically, both claims should come under the well-established principles and rules prohibiting the splitting of what is, in essence and practical effect, a single cause of action. We find nothing in the authorities cited which requires a holding to the contrary.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



103 Cal.App.2d 749

**NISHKIAN et ux. v. CITY OF
LONG BEACH et al.**

Civil 17861.

District Court of Appeal, Second District,
Division 1, California.

April 25, 1951.

Proceeding for writ of mandate by Martin Nishkian, and wife, against the City of Long Beach, a municipal corporation, and others, commanding the city council to grant a permit to move a former army barracks from a certain location and put it on landowners' lots within the City of Long Beach. The Superior Court, Los Angeles County, Mildred L. Lillie, J., rendered judgment for plaintiffs and the defendants appealed. The District Court of Appeal, Drapeau, J., held that evidence sustained finding that moving the old army barracks into neighborhood

would disturb public welfare of Long Beach City.

Judgment reversed.

Doran, J., dissented.

1. Municipal corporations ⇨703(1)

Long Beach city council is a local administrative agency, clothed by city charter with discretionary power to grant or deny applications to move buildings over its city streets, and to place such buildings upon property within city. St. 1921, p. 2054.

2. Mandamus ⇨72

Courts will not compel public administrative agencies to act in a particular manner.

3. Administrative law and procedure ⇨791

A reviewing court is not to judge intrinsic value of evidence considered by an administrative agency, nor to weigh it, if record discloses substantial evidence to support decision, and inquiry is to be devoted only to question whether record shows an abuse of discretion.

4. Administrative law and procedure ⇨760

If reasonable minds may well be divided as to wisdom of an administrative board's action, a court will not substitute its judgment for that of administrative body.

5. Administrative law and procedure ⇨744,
754

Officers ⇨103

Whether decision be by a state-wide public board or public officer, or by local board or tribunal, scope of judicial review is limited to determine whether there has been an abuse of discretion, and courts have no power to try issues de novo.

6. Administrative law and procedure ⇨754
Officers ⇨103

The rule that state-wide administrative boards and officers are vested with a high discretion in working out their problems, and an abuse of that discretion must appear very clearly before courts will interfere is applicable to local administrative boards.

7. Administrative law and procedure ⇨475,
476

In quasi-judicial proceedings, witnesses should be sworn and examined, and a rec-

ord made, upon which reviewing courts may be enabled to determine whether substantial evidence was or was not considered by quasi-judicial body, and proceedings should be conducted in a quasi-judicial manner.

8. Mandamus ☞168(4)

In proceeding for writ of mandate by landowners commanding city council to grant permit to move former army barracks from certain location and put it on landowner's lots, evidence was sufficient to sustain finding that moving old army barracks into neighborhood would disturb public welfare of city. St. 1921, p. 2054.

Irving M. Smith, City Atty., Atlee S. Arnold, Deputy City Atty., Long Beach, for appellants.

Lane & Lane, Long Beach, for respondents.

DRAPEAU, Justice.

Martin Nishkian owned real property in the City of Long Beach. He desired to move a former army barracks from Costa Mesa and put it upon his Long Beach lots.

A city ordinance of the City of Long Beach provides that one desiring to move structures along the streets of the city must apply for a permit to do so; that the city building inspector must then post notices on the property to which it is proposed to move the house or building; and that persons owning property within a radius of three hundred feet of the proposed new location may protest to the city council; whereupon the city council must hold a hearing and decide whether or not to grant the permit.

Mr. Nishkian and the city building inspector proceeded in conformity with the ordinance; protests were filed; and after a hearing, the city council denied the application.

Mr. Nishkian then petitioned the Superior Court for a writ of mandate, commanding the city council to grant the permit. The written protests received by the city council and the minutes of the hearing are set forth in the Petition for Writ of

Mandate. Upon stipulation the ordinance was received in evidence.

The Superior Court granted the peremptory writ. From this judgment the City appeals.

The ordinance provides that the permit shall be denied if the city council finds that it will result in a violation of any city or county or state law, or greatly inconvenience any considerable number of persons, or will violate or disturb the public welfare, safety, or peace.

The City contends that the city council properly found that moving the house would disturb the public welfare, in that it would have adversely affected the area where it was proposed to locate the barracks.

Mr. Nishkian contends that the action of the city council in denying his application was arbitrary, capricious, and an abuse of discretion, in that there was no substantial evidence produced at the hearing to warrant denial of the permit.

[1] The City of Long Beach is a chartered city. Stats. 1921, p. 2054. Its city council is a local administrative agency, clothed by the city charter with discretionary power to grant or to deny applications to move buildings over its city streets, and to place such buildings upon property within the city. Greif v. Dullea, 66 Cal.App.2d 986, 153 P.2d 581; also see 2 Stanford L. Rev. 291.

[2] It is the general rule that courts will not compel public administrative agencies to act in a particular manner. Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 144 P.2d 4.

[3] A reviewing court is not to judge the intrinsic value of evidence considered by an administrative agency, nor to weigh it, if the record discloses substantial evidence to support the decision. The inquiry is to be devoted only to the question whether the record shows an abuse of discretion. Cantrell v. Board of Supervisors, 87 Cal. App.2d 471, 197 P.2d 218.

[4] If reasonable minds may well be divided as to the wisdom of an administrative board's action, a court will not sub-

stitute its judgment for that of the administrative body. *Rible v. Hughes*, 24 Cal.2d 437, 150 P.2d 455, 154 A.L.R. 137.

[5,6] Whether the decision be by a state-wide public board or public officer, or by a local board or tribunal, the scope of judicial review is limited to determine whether there has been an abuse of discretion, and the courts have no power to try the issues *de novo*. *McDonough v. Garrison*, 68 Cal.App.2d 318, 156 P.2d 983. The rule that state-wide administrative boards and officers are vested with a high discretion in working out their problems, and that an abuse of discretion must appear very clearly before the courts will interfere, *Nelson v. Dean*, 27 Cal.2d 873, 168 P.2d 16, 168 A.L.R. 467, is applicable to local administrative boards.

The case comes down then to a consideration of the controlling question: Was there substantial evidence to support the action of the city council?

A number of citizens and owners of property adjacent to the Nishkian lots presented written protests, and appeared before the city council. The minutes of the proceedings before the council are far from satisfactory. All that the minutes show is that some of the protestants made speeches before the council; that other persons made speeches for Mr. Nishkian; and that photographs of the building proposed to be moved and of the locality involved were presented to the council.

[7] In proceedings of this kind, quasi-judicial in nature, witnesses should be sworn and examined, and a record made, upon which reviewing courts may be enabled to determine whether substantial evidence was or was not considered by the quasi-judicial body. The proceedings should be conducted in a quasi-judicial manner at least.

In *Walker v. City of San Gabriel*, 20 Cal. 2d 879, 129 P.2d 349, 142 A.L.R. 1383, a business license was revoked. There was no evidence before the city council except a letter from the chief of police enumerating certain charges against the licensee. This was held by our Supreme Court to be

hearsay, and insufficient to sustain the action of the council.

The following excerpts from the minutes of the Long Beach city council illustrate the unsatisfactory condition of the record now under consideration:

"Approximately 15 people were present to protest.

"Mr. Jewell, 1956 Harbor, addressed the City Council, protesting, stating that the west side has been getting some bad deals on old houses being moved in and not being improved; that this building does not meet with the approval of the Building Department.

"Mrs. R. H. Craig, 1918 Caspian, addressed the City Council, protesting, stating that several building(s) have been moved in and have been rented to people with large families; that it is a small area and they feel there are too many families to the neighborhood.

"Mrs. Verne Muehlstedt addressed the City Council, protesting, stating that a lot of the owners of old buildings which were moved in stated they would improve them and did not do so; that it would cost a great deal of money to improve this building as Mr. Nishkian states he plans to do.

* * * * *

"Mr. C. T. Putnam addressed the City Council, stating that he lives directly across from this proposed location; that there is considerable vacant property around there and if one old barracks building is moved in, they will have more come in.

* * * * *

"Mrs. Verne Muehlstedt addressed the City Council, again protesting the granting of the permit, stating that Mr. Nishkian stated that he does not plan to do anything to the inside of the building; that the inside is just like cardboard and it is nothing but a fire trap; that they do not want any fire traps built around their neighborhood."

Such substantial evidence as may be included within the minutes may be stated as follows: That if one old barracks building is moved into the area more will come in, and that the inside of the barracks proposed to be moved "is just like cardboard" and "is nothing but a fire trap."

[8] Applying the rules set forth in this opinion, this Court is of the opinion, that attenuated and unsatisfactory as the record may be, the evidence is sufficient to support a finding that moving this old barracks into the neighborhood would violate and disturb the public welfare of the City of Long Beach.

The judgment is reversed.

WHITE, P. J., concurs.

DORAN, J., dissents.



103 Cal.App.2d 697

LEE v. HENSLEY et al.

Civ. 4093.

District Court of Appeal, Fourth District,
California.

April 23, 1951.

Rehearing Denied May 15, 1951.

Hearing Denied June 18, 1951.

John F. Lee, also known as Floyd L. Hensley, brought action against William J. Hensley, etc., and others for an accounting. The Superior Court of Kern County, W. L. Bradshaw, J., rendered a judgment for the defendants, and the plaintiff appealed. The District Court of Appeal, Griffin, J., held that since the Superior Court properly ruled that alleged cause of action set forth in original complaint was barred by statute of limitations, no error resulted in a similar ruling as to second amended complaint from which plaintiff, without explanation, omitted allegations which showed that cause of action was barred by statute of limitations.

Judgment affirmed.

1. Limitation of actions $\Rightarrow$ 100(13)

Statute of limitations commences to run after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry. Civ.Code, § 19.

2. Limitation of actions $\Rightarrow$ 100(11)

In cases involving a fiduciary relationship between parties at time of alleged

fraud, facts which would ordinarily require investigation may not excite suspicion, and same degree of diligence is not required in order to prevent running of statute of limitations. Civ.Code, § 19.

3. Pleadings $\Rightarrow$ 214(2)

A demurrer admits the truth of all allegations which are well pleaded, however improbable the facts alleged may be.

4. Limitation of actions $\Rightarrow$ 100(7)

In action against guardian by Indian many years after reaching his majority, for an accounting and to have certain property restored to Indian, allegations of original complaint that guardian was guilty of fraud, not in concealment of property of Indian, but rather in misrepresenting guardian's financial inability to make good on known obligations to Indian, did not allege facts which would toll statute of limitations. Civ.Code, § 19; Code Civ. Proc. §§ 319, 328, 336, 337, subd. 2, 338, subd. 4, 343.

5. Limitation of actions $\Rightarrow$ 100(7)

In action against guardian by Indian many years after reaching his majority, for an accounting and to have certain property restored to Indian, claim of Indian for alleged earnings which he claimed were turned over to guardian many years before was barred by limitations. Civ. Code, § 19; Code Civ.Proc. §§ 319, 328, 336, 337, subd. 2, 338, subd. 4, 343.

6. Guardian and ward $\Rightarrow$ 163

In action against guardian by Indian many years after reaching his majority, for an accounting and to have certain property restored to Indian, collateral attack could not be made by Indian on foreign guardianship proceedings which occurred many years before in foreign state.

7. Pleading $\Rightarrow$ 252(1)

A defect in a verified complaint, by reason of an allegation which renders it vulnerable, cannot be cured merely by omitting the allegation without explanation in later pleading.

8. Pleading $\Rightarrow$ 252(1)

Facts once alleged in pleading cannot be withdrawn from consideration by merely

filing an amended pleading omitting them without explanation.

9. Limitation of actions — 180(1)

In action against guardian by Indian many years after reaching his majority, for an accounting and to have certain property restored to Indian, court was justified in examining and considering original complaint to determine whether cause of action was barred by limitations, where second amended complaint merely omitted allegations showing that claim was barred by limitations without explanation. Civ. Code, § 19; Code Civ.Proc. §§ 319, 328, 336, 337, subd. 2, 338, subd. 4, 343.

10. Limitation of actions — 185½

Where trial court properly ruled that alleged cause of action set forth in original complaint was barred by limitations, and second amended complaint merely omitted allegations which showed that cause of action was barred by limitations, without explanation, no error resulted in ruling that cause of action set forth in second amended complaint was barred by statute of limitations. Civ.Code, § 19; Code Civ. Proc. §§ 319, 328, 336, 337, subd. 2, 338, subd. 4, 343.

Victor E. Cappa, San Francisco, Fred Rosser, Tulare, Burum, Young & Woolbridge, Bakersfield, for appellant. Victor E. Cappa, San Francisco, of counsel.

Siemon & Siemon, Bakersfield, for respondents.

GRIFFIN, Justice.

This appeal comes to us on the judgment roll alone, consisting of a second amended complaint, a general and special demurrer thereto, and a judgment of dismissal predicated upon an order sustaining the demurrer without leave to amend.

The main question is the sufficiency of the complaint, as amended, to constitute a cause of action. It alleges generally that plaintiff is an Indian member of the Cherokee Indian Nation; that William J. Hensley, hereinafter referred to as defendant, a white man, married plaintiff's mother, Daisy Lee Hensley; that plaintiff lived

with them but was not adopted by defendant; that in 1906, when plaintiff was six years of age, the Government allotted and conveyed to plaintiff three parcels of land in Oklahoma; that defendant applied for and was appointed guardian of the person and estate of plaintiff, and in the petition for guardianship represented himself to the court as the father of the plaintiff. (Defendant and his wife Daisy were divorced in 1918.) Defendants H. J. Hensley, brother of defendant, Rosa Hensley, his brother's wife, Hannah Hensley, who married defendant in 1920, and who subsequently divorced defendant, and Winifred Barton Hensley, defendant's fourth wife, are each named as defendants herein.

The amended complaint specifically alleges that at the time of defendant's appointment as guardian, he fraudulently conceived and planned and schemed to and did thereafter defraud plaintiff of his property and of its fruits. Then follows over 114 pages of clerk's transcript containing a statement of the alleged acts and conduct of defendant in relation to the claimed mishandling and misappropriation by defendant of plaintiff's guardianship property and its subsequent investment in other properties, which statements may be summarized as follows: That defendant, after being appointed guardian, moved to California and brought plaintiff and defendant's wife with him so that plaintiff would know nothing of the allotment and of the guardianship proceedings, or of the rents from the property; that defendant filed an inventory and appraisal in the guardianship proceedings purporting to be a true and full inventory of the ward's property but which did not in fact set forth all of the property or its proceeds; that from 1906 to 1910 defendant filed no accounting with the court; that in 1910 he filed a false account and did not include therein rents and profits from the land from 1906 to 1910, which totaled \$1,150; that defendant failed to account for \$1,710 alleged to have been paid to him as guardian by plaintiff's mother, from her separate property, and for the use and benefit of the ward; that he failed to account for \$500 paid by the ward to the guardian, which was money

earned by the ward and turned over to the guardian for safe-keeping. It is then alleged that defendant did intentionally omit the aforementioned receipts from the said account for the purpose of fraudulently concealing the true facts as to said monies paid and received as aforesaid, from the said court and plaintiff, and for the purpose of fraudulently diverting the whole thereof to his own use and benefit; that these monies were invested by the defendant in his own business enterprises and in the purchase of real property and other valuable properties, i. e., a meat market in Bakersfield, California, etc.; that defendant had no separate property or monies of his own and that at that time neither he nor plaintiff's mother had any community property; that defendant operated the business purchased with plaintiff's monies from 1909 to 1910 at a monthly profit of about \$500; that about that time defendant heard from his sister in Oklahoma that there was a current boom in close proximity to plaintiff's lands; that thereupon defendant sold the meat business for the sum of \$4,000, went to Oklahoma, and in pursuance of his corrupt plan, performed an additional series of fraudulent acts as hereinafter set forth; that in 1911 defendant, in pursuance of his unlawful plans, filed a document in the court consisting of a verified petition for authority to sell all of plaintiff's real property; that he fraudulently alleged therein that defendant's property was only of a value of \$500 when in truth and in fact it had a fair market value in excess of \$10,000; that in a petition for sale of the property defendant made false representation as to the necessity for the sale and that at all times defendant intended only to convert the property and the proceeds thereof to his own use, and did in fact do so in the manner set forth, i. e., that defendant fraudulently conspired with certain individuals, including his relatives in Oklahoma, to defraud plaintiff of his three parcels of land, in that he agreed with them that as guardian of the plaintiff he would purport to sell to them all three of the aforesaid parcels of land but in fact would sell them only parcel three at a figure less than one-

half of its then actual fair market value and that he would secure a confirmation of the purported sale of all three parcels and that the other parties orally agreed with him that in consideration of his selling them the said parcel at said figure, each would pose as a bona fide purchaser of all three parcels but after the confirmation of the sale they would divide the parcels among themselves so that they would keep parcel three and parcels one and two would be reconveyed to defendant without paying them anything for said reconveyance; that thereafter a decree was entered authorizing the sale; that an additional bond was required and that the co-conspirators furnished such bond; that this bond was at all times worthless and known by defendant to be worthless; that thereafter defendant filed a return of sale and falsely recited that he had sold the property to the relatives indicated for \$1,160, but that on June 12, 1937, certain purchasers executed quitclaim deeds to defendant in the names of W. J. Hensley to two parcels of the land formerly owned by the ward and without consideration; that defendant, with intent to avoid suspicion, did not record the quitclaim deeds issued to him until about one year thereafter; that defendant has never accounted to the court nor to the plaintiff for the fair market value of parcels one and two, and that the defendant sold the same and converted the proceeds to his own use and benefit; that in 1910 defendant, out of the monies of the plaintiff unaccounted for and converted by him for his own use, gave his brother H. J. Hensley \$2,000 and told him to hold it for him for defendant's use and benefit; that H. J. Hensley knew that the said money belonged to plaintiff and that it had been embezzled and converted by defendant, as aforesaid.

It is then alleged that defendant guardian fraudulently omitted from his account filed in 1911, \$150 paid to him as rents for the property for the year 1906, and the sum of \$920.33 rentals for said property paid to 1911, and the further sum of \$1,710 claimed to have been given to defendant by plaintiff's mother for the use and benefit of plaintiff as aforesaid; that he fraud-

ulently omitted from said account approximately \$500 of plaintiff's earnings claimed to have been given to defendant for the use and benefit of the plaintiff as aforesaid; that he omitted from said account the profits and proceeds from the operation and sale of the Bakersfield meat market; that he omitted to account for the money received from the sale and conversion of the two parcels of real estate valued in excess of \$10,000; that defendant intentionally omitted these receipts from the account for the purpose of fraudulently concealing the true facts as to said monies paid and received as aforesaid from the said court and plaintiff, and for the purpose of fraudulently diverting the whole thereof to his own use and benefit. It is then set forth that in 1913 the court served defendant guardian with a citation commanding him to file reports in that court. A purported account was filed which omitted the items aforementioned. It is then alleged that there was paid to defendant, during that period, the sum of \$133.19, which he received from the Bureau of Indian Affairs, which was plaintiff's Immigrant Cherokee pay; that defendant failed to account for this item; that the court discovered certain false and fraudulent charges against the estate, disallowed them, and not knowing about the facts here related, ordered the account settled and found that a balance of \$937.30 was due to the ward. Then follows an allegation that in November, 1913, the court served defendant with a citation ordering him to file a new bond, which he failed and refused to do; that in 1914 the guardian filed an account which purported to be an account of all his acts and doings as guardian and of the receipts and disbursements of money for and on account of his ward; that this account did not show the \$937.50 balance charged the defendant in his previous account; that said account was otherwise false because of the fact that it did not correctly set forth the other items above mentioned which plaintiff believed to be in excess of \$17,343.19. Objections are made to other items contained in this account. Then follows the allegation that in November, 1914, the court made an or-

der disapproving said account, revoked defendant's letters of guardianship, and ordered defendant to file a final account within 20 days and turn over to the new guardian the proceeds of the minor's estate; that defendant refused to obey the order or account for said sums; that defendant has never been discharged by the court as guardian of plaintiff's property nor exonerated from liability to account; that in 1911 defendant purchased with the funds of plaintiff a certain business, a butcher shop in Bakersfield, which was operated by defendant and his brother, H. J. Hensley, from 1911 to 1931, at a considerable profit; that it was sold for a considerable sum sufficient, together with other monies converted by the defendant, to enable defendants William J. Hensley and H. J. Hensley to buy certain valuable parcels of real property in Bakersfield, more particularly described in the complaint. It is alleged that this property was held by H. J. Hensley and his wife for the use and benefit of defendant since 1911. (It developed that some of this property so purchased was discovered to be oil-bearing land and became quite valuable.) It is then alleged that at all times defendants and each of them were familiar with the facts alleged and that these funds and properties rightfully belonged to the plaintiff; that in 1920 defendant gave to his then wife, Hannah Hensley, an interest in the meat market business which was purchased out of plaintiff's funds as aforesaid, and that at that time she well knew that defendant had purchased said business with the funds of plaintiff.

Then follows the general allegation that plaintiff never had an opportunity to be present at any of the hearings or proceedings in the guardianship matter, all of which occurred during the period when he was six years of age and up to the age of 15 years, and that on June 27, 1947 he first learned that he had been a ward of the defendant as guardian, and that he then first learned that the defendant was not his natural father. The complaint then sets out a set of facts which he claims prevented the running of the statute of limitations alleged in defendant's demurrer.

to the amended complaint, i. e., that the action was barred by secs. 338, subd. 4, 319, 328, 336, 337, subd. 2, and 343, C.C.P., i. e., that because of a quarrel between the defendant and his brother, on June 27, 1947, some of the facts hereinbefore set forth came to light for the first time; that the plaintiff, for the first time, became suspicious of his guardian and began an investigation which disclosed the true facts alleged. The circumstances surrounding the quarrel are fully alleged. Plaintiff then charged that defendant, at all times mentioned, dominated the plaintiff, gave him false information, and told him nothing of his property or the rights he had acquired through the Government; that he turned him against his mother so he would not obtain information from her; that he led him into believing he should be confined in Preston School of Industry under the guise that it was a good school for the training of boys; that he was then committed to Ione until he was 18 years of age. Several paragraphs contained a long dissertation of claimed additional reasons why plaintiff was prevented by defendant from making an investigation of any kind or from tracing any of the funds converted by the defendant into the reinvestments made by him as aforesaid; that since 1910 these defendants wilfully, fraudulently and wickedly agreed and conspired with each other to cheat and defraud plaintiff of his property and monies as aforesaid. Then follow certain facts upon which the conclusion is reached that plaintiff did not discover these facts until June 27, 1947. It is then alleged that the defendants and each of them hold, as involuntary trustees for the use and benefit of the plaintiff, all the properties above set forth, together with all the income, rents, dividends, oil royalties and substitutions therefor. Plaintiff seeks an accounting and an order that said property be restored to plaintiff.

Several exhibits are attached to the complaint in support of its allegations.

In addition to the claim that the cause of action is barred by the statute of limitations, it is also defendant's argument that the allegations of the complaint are not sufficient to suspend the running of

the statute, citing such cases as *Thomas v. Murray*, 174 Okl. 36, 49 P.2d 1080, 104 A.L.R. 209; 54 C.J.S., Limitations of Actions, p. 249, § 215; *Scafidi v. Western Loan & Building Co.*, 72 Cal.App.2d 550, 555, 165 P.2d 260; *Bogart v. George K. Porter Co.*, 193 Cal. 197, 201, 223 P.2d 959, 31 A.L.R. 1045; and *Lady Washington C. Co. v. Wood*, 113 Cal. 482, 45 P. 809.

Defendant concedes in his brief that if a cause of action is stated, the statute did not commence to run until plaintiff reached the age of majority and until he obtained knowledge of the fraud.

The true rule is prescribed in sec. 19, Civil Code: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

[1,2] The statute commences to run after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry. *Scafidi v. Western Loan & Building Co.*, supra, citing *Hobart v. Hobart Estate Co.*, 26 Cal.2d 412, 159 P.2d 958. However, in cases involving a fiduciary relationship between the parties at the time of the alleged fraud, facts which would ordinarily require investigation may not excite suspicion, and the same degree of diligence is not required. *Hobart v. Hobart Estate Co.*, supra.

[3] We are immediately confronted with the rule that a demurrer admits the truth of all allegations which are well pleaded, however improbable the facts may be. *Woodroof v. Howes*, 88 Cal. 184, 26 P. 111; *Hitson v. Dwyer*, 61 Cal.App.2d 803, 143 P.2d 952.

Assuming, as we must, the truth of the allegations pleaded in reference to the concealment of facts and the time of discovery of the fraud, it appears to us that such allegations are sufficient to toll the running of the statute of limitations as to certain items. Whether, on a trial, plaintiff can establish these facts is not the

question before us. *Miller v. Ash*, 156 Cal. 544, 105 P. 600; *Daniel v. Tolon*, 53 Okl. 666, 157 P. 756, 4 A.L.R. 704; *Tilley v. Brady*, 323 Mich. 547, 36 N.W.2d 140; *Lataillade v. Orena*, 91 Cal. 565, 27 P. 924; *Gillette v. Wiley*, 126 Ill. 310, 19 N.E. 287; *Gaver v. Early*, 58 Cal.App. 725, 209 P. 390; *Mortimer v. Loynes*, 74 Cal. App.2d 160, 168 P.2d 481; *Bowman v. McPheeters*, 77 Cal.App.2d 795, 176 P.2d 745; 39 C.J.S., *Guardian and Ward*, § 153(b) p. 256, and cases cited; *Cook v. Ceas*, 143 Cal. 221, 77 P. 65; *Sears v. Rule*, 27 Cal.2d 131, 163 P.2d 443.

Defendants seek to avoid the effect of the allegations of plaintiff's second amended complaint in respect to the claim that plaintiff had no knowledge of the facts of fraud until 1947, because of the claimed fact that in plaintiff's original complaint, drawn by another attorney, he made certain statements inconsistent with his present allegations and accordingly this court, as well as the trial court, was not bound to accept as true allegations contrary to admissions in former pleadings in the same case, citing *Tieman v. Red Top Cab Co.*, 117 Cal.App. 40, 45, 3 P.2d 381; *Wennerholm v. Stanford University School of Medicine*, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358; *Zakaessian v. Zakaessian*, 70 Cal.App.2d 721, 161 P.2d 677; and *Traeger v. Friedman*, 79 Cal.App.2d 151, 172, 179 P.2d 387.

The only record on appeal requested by the plaintiff and which is before this court, is the second amended complaint, the demurrer thereto, and the judgment of dismissal. Defendant, in his brief, refers to the original complaint and some of its allegations and argues that those allegations are inconsistent with the allegations of the second amended complaint.

Defendant insists that the trial court, in ruling on the sufficiency of the second amended complaint, had the right to take into consideration admissions made in the former pleadings and accordingly, on this appeal, he moved, over objections, that the original complaint, the first amended complaint, and the demurrers thereto, together with the rulings thereon, be made a part of the record on appeal. This mo-

tion was submitted in connection with the appeal on its merits and was granted.

We have carefully examined these documents. In the second amended complaint the plaintiff claims he was ignorant until 1947, of (a) his parentage and racial connections; (b) his acquisition of Indian lands; (c) receipts by defendant from plaintiff's estate; (d) existence of guardianship; (e) investment of plaintiff's money in California property; and (f) that plaintiff owned any interest in the Kern County lands.

The original complaint, verified by plaintiff, alleged generally that in 1910, prior to leaving the State of Oklahoma, "defendant guardian falsely represented to plaintiff and his mother that there existed in the State of Oklahoma, several parcels of land which really belonged rightfully to defendant guardian, as he had put up the purchase price therefor but which were actually in the name of plaintiff's mother, in trust for the children, Floyd L. Hensley, Ethel L. Hensley, and William J. Hensley, Jr. * * * that said lands were valuable oil lands" and the "taxes were 'eating them up'"; that if defendant guardian did not do something about it the property would be "lost to defendant guardian and his family, including the plaintiff herein"; that defendant told plaintiff "that he had had a lot of correspondence with important people in Oklahoma and knew that the only way anything could be done was for himself, defendant guardian, to go direct to Oklahoma and start a Court action to 'probate' said lands"; that in 1917, "defendant guardian falsely represented to this plaintiff * * * that said Daisy Lee Hensley had fraudulently used and expended for her own purposes, all the rents and profits from this plaintiff's Indian Lands which had been in her name" but that the defendant guardian "had 'raised some money' on plaintiff's Indian Lands in Oklahoma and had purchased for this plaintiff certain property then known as 'the slaughter house property', more fully described as * * * All of Lot 8 * * *" and "that he, defendant guardian, would protect said property for this plaintiff, from plaintiff's mother, and

turn it over to this plaintiff when plaintiff reached the age of 21 years and that plaintiff should never tell anyone he, the plaintiff, owned said Lot 8 or that defendant guardian was holding said Lot 8 in trust for said plaintiff * * *; that in truth and in fact said W. J. Hensley, defendant guardian herein, did purchase said Lot 8 by using funds and monies he held in trust for plaintiff, but put the title in the names of W. J. Hensley and H. J. Hensley, defendants herein, and had no intention of ever turning said property over to plaintiff, as defendant guardian then well knew; that all of defendant guardian's representations (*made in December, 1917*) as aforesaid were false and untrue as defendant guardian then well knew."

It is then alleged that in *September, 1919*, within a few days after plaintiff attained the age of majority, he did, in *February, 1920*, "write a letter to defendant guardian in Bakersfield, * * * requesting assistance of defendant guardian, whom he still believed to be his natural father, and further making respectful inquiry regarding whether or not defendant guardian was able to return to him, plaintiff herein, or to deliver to plaintiff herein, any of the monies or properties hereinbefore mentioned in accordance with the promises of defendant guardian, as aforesaid; said written letter being made by plaintiff as an informal request for information and not as a formal or legal demand, as plaintiff herein still had the utmost respect for and confidence in defendant guardian;" that in *March, 1920*, defendant guardian called on plaintiff in Fresno and presented plaintiff with what purported to be an account of plaintiff's earnings from wages and purporting to show a balance due to plaintiff herein of approximately \$50. It is then alleged that at that same time (1920) defendant guardian told plaintiff that Daisy Lee Harris was trying to "get everything that Hannah Hensley, wife of defendant guardian then owned, and everything that H. J. Hensley, brother of defendant guardian owned, and was also trying to get this plaintiff's Lot

8; that plaintiff's Indian Lands didn't matter much anyway, as, 'the best of them went into Lot 8 anyway' and that plaintiff and defendant guardian said W. J. Hensley, had better forget the balance of the Indian Lands as, 'they're not worth monkeying with or fretting about'; that defendant told plaintiff (in 1920) to take no action in reference thereto but to assist defendant in defending the litigation then pending against defendant, brought by his wife, see *Harris v. Hensley*, 83 Cal. App. 283, 256 P. 832; and *Harris v. Hensley*, 214 Cal. 420, 6 P.2d 253; that defendant guardian at that time (1920) promised to show plaintiff the results of an investigation made in Oklahoma in reference thereto as soon as his attorneys had completed investigation, and that defendant thereafter falsely produced and exhibited to plaintiff papers and documentary proof that plaintiff's mother had fraudulently dealt with the plaintiff's before-mentioned Indian lands and was probably guilty of the crime of forgery. It is then alleged that in the year 1932 defendant guardian showed plaintiff what purported to be a full and true account of defendant guardian's dealings throughout the preceding period of twenty odd years between defendant guardian and defendant guardian's brother and his wife, and further showed, by said purported account and other documents and deeds then of record in Kern County that defendant H. J. Hensley and Rosa Hensley were the sole owners of said Lot 8, and that no property stood of record in the name of defendant guardian.

Notwithstanding his allegation in the second amended complaint that he had no knowledge of these transactions until 1947, it appears in plaintiff's original complaint, as verified by him, that he did have knowledge of the Oklahoma property and of defendant's dealings with it since 1910, and at various times thereafter he discussed the matter with defendant. It further appears that in 1917 defendant told him that he had invested the proceeds in Lot 8 and would turn it over to plaintiff when he reached 21 years of age. It also

appears that plaintiff made *demand* on his *guardian* in 1920 for a report. No action was thereafter taken for over 12 years when, in 1932, it is alleged that defendant presented plaintiff with what purported to be a full and true account of the guardian's dealings over a period of 20 years. It is apparent that he had knowledge at that time that his claimed money had gone into Lot 8.

[4] Plaintiff's excuse for his inaction, reiterated many times in his complaint, is that he believed defendant to be absolutely "penniless" and utterly incapable of being compelled to respond in legal form. In other words, the general fraud alleged and relied upon in the first complaint is not the concealment of property, but rather the misrepresentation of the guardian as to his, the guardian's financial inability to make good on the known obligation. The representation as to such a matter is not such a representation as would toll the statute of limitations. 54 C.J.S., Limitations of Actions, p. 249, § 215; *Thomas v. Murray*, *supra*. Furthermore, the allegations of the complaint, in effect, admit that in 1917 defendant acknowledged the trust and promised to convey the proceeds to plaintiff upon his reaching majority, and that in February, 1920, plaintiff did make a demand for an accounting, although he alleged that it was "not a formal or legal demand". No action was taken thereafter in reference to this accounting until 1949.

The pleadings set forth in the second amended complaint may be considered as dealing with the alleged misappropriation of two general funds: (1) the funds derived from the Oklahoma guardianship and which are alleged to have been acquired by conversion of money defendant is alleged to have received in Oklahoma; and (2) monies which defendant is alleged to have received from plaintiff and plaintiff's mother after the family came to California.

[5] As to the alleged earnings of plaintiff which he claims were turned over to defendant, it cannot be said that plain-

tiff did not have knowledge of this fact at the time. This occurred many years ago and it cannot be said, under the pleadings, that the statute of limitations has not run on this alleged claim.

[6] In relation to the items which amount to a collateral attack upon the guardianship proceedings in Oklahoma, plaintiff may not disturb the judgment or order of that court in this proceeding. *Fealey v. Fealey*, 104 Cal. 354, 38 P. 49; *La Salle v. Peterson*, 220 Cal. 739, 32 P.2d 612; *O. A. Graybeal Co. v. Cook*, 16 Cal. App.2d 231, 60 P.2d 525.

In effect, plaintiff, in his first complaint, made allegations that were sufficient to show that plaintiff had knowledge of sufficient facts prior to 1947 which would bar a recovery under the statute of limitations. The demurrer to the first complaint was sustained on that ground. To avoid these previous allegations, which would bar a recovery, plaintiff, by the second amended complaint, reverses his position, omits many of the facts and dates set out in his first verified complaint which would preclude a recovery, and alleges that he had no knowledge of the surrounding facts until 1947.

[7-9] The rule is that a defect in a verified complaint, by reason of an allegation which renders it vulnerable, cannot be cured simply by omitting the allegation without explanation in a later pleading. *Wennerholm v. Stanford University School of Medicine*, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358. See, also, *Williamson v. Joyce*, 137 Cal. 151, 69 P. 980; *Neet v. Holmes*, 25 Cal.2d 447, 154 P.2d 854. Facts once alleged cannot be withdrawn from consideration by merely filing an amended pleading omitting them without explanation. Accordingly, the court was fully justified in examining and considering the original complaint. *Neal v. Bank of America*, 93 Cal.App.2d 678, 682, 209 P.2d 825.

In *Slavin v. City of Glendale*, 97 Cal. App.2d 407, 411, 217 P.2d 984, 987, the court adopted the language: "* * * 'appellant should not be allowed to breathe

life into a complaint by omitting facts, previously alleged in a verified pleading, which made it fatally defective.'"

[10] Considering the allegations of the original complaint as to when plaintiff acquired knowledge of certain alleged facts, which allegations are omitted from the second amended complaint, we must conclude that the purpose of the amendment was to avoid the effect of the allegations of the original complaint. Since the trial court properly ruled that the alleged cause of action set forth in the original complaint was barred by the stat-

ute of limitations, no error resulted in a similar ruling as to the second amended complaint.

Defendant William J. Hensley died shortly before this appeal was perfected. An order has been made substituting his administratrix with the will annexed, Margaret K. Hersey, as defendant and respondent on this appeal.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.

37 Cal.2d 24

LANDRUM et al. v. SEVERIN.

L. A. 21829.

Supreme Court of California, in Bank.

April 27, 1951.

George W. Landrum and another sued Charlie Miller Severin for the recovery of damages assertedly sustained at the time of the collision of two automobiles. The Superior Court, Los Angeles County, Paul Vallée, J., rendered judgment for defendant, and plaintiffs appealed. The Supreme Court, Edmonds, J., held that the evidence was sufficient to support the implied finding of a violation by plaintiffs of the following-too-closely statute.

Affirmed.

Prior opinion 224 P.2d 30.

1. Automobiles ⇨245(80)

In damage suit arising out of automobile collision occurring when defendant's automobile approaching from opposite direction made left turn in front of plaintiff's automobile at intersection, jury question was presented as to whether at time of accident, considering circumstances revealed by evidence, plaintiff had been driving his automobile at less than reasonable and prudent distance behind one preceding him. Vehicle Code, § 531(a).

2. Automobiles ⇨244(43)

In damage suit arising out of automobile collision occurring when defendant's automobile approaching from opposite direction made left turn in front of plaintiff's automobile at intersection, evidence sustained implied finding that plaintiff had violated the following-too-closely statute by not keeping proper distance between his automobile and one preceding him into intersection at which collision occurred. Vehicle Code, § 531(a).

3. Appeal and error ⇨1064(1)

Where, as part of its charge in case arising out of automobile collision, trial court fully instructed jury upon meaning of proximate cause and requirement that negligence must proximately contribute to injury, failure of trial court to repeat statement of rule as to proximate cause in its instruction on following-too-closely stat-

ute was not prejudicial error. Vehicle Code, § 531(a).

4. Appeal and error ⇨981**New trial ⇨104(1)**

Order denying new trial will not be disturbed if record shows any basis upon which it may be upheld, and where motion is based upon ground of newly discovered evidence, it must appear that evidence is not cumulative.

Samuel Maidman and David H. Paltun, Los Angeles, for appellants.

Chase, Rotchford, Downen & Drukker and Richard T. Drukker, all of Los Angeles, for respondent.

EDMONDS, Justice.

The appeal from a judgment in favor of Charlie M. Severin in an action for the recovery of damages assertedly sustained at the time of the collision of two automobiles, principally concerns the applicability of section 531(a) of the Vehicle Code. That statute fixes a rule of conduct for a driver following another automobile. The car driven by George W. Landrum collided with the one operated by Severin, who was making a left turn in front of it. Landrum contends that it was prejudicial error for the court, at the request of Severin, to instruct the jury in the terms of the statute.

The record shows that Landrum was traveling north in the inside lane of San Fernando Road. Severin approached the intersection of Roxford Street from the opposite direction. When approximately 100 feet from the intersection, he gave a hand signal for a left turn onto Roxford Street. He had then slowed his car to a speed of 15 or 18 miles per hour.

According to the evidence, in approaching Roxford Street, Landrum was following another automobile at a distance of 15 to 17 feet. The speed of his automobile was 20 to 35 miles per hour. The car ahead of his proceeded through the intersection, passing behind the Severin automobile which was then struck by Landrum's car.

As requested by Severin, the jury was instructed that, as provided by the California Vehicle Code, "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon, and the condition of, the roadway." Landrum takes the position that this instruction was prejudicially erroneous because: (1) There is no evidence showing a violation of the section by him; (2) There was no showing that violation of the section proximately contributed to the collision; and (3) The instruction was not conditioned by one respecting proximate cause. It is also argued that the trial court abused its discretion in denying the motion for a new trial made upon the ground of newly discovered evidence.

Landrum asserts that the only evidence concerning his car with relation to the vehicle preceding it related to a time prior to reaching the intersection. According to him, he was then driving at a speed of 25 to 30 miles per hour and a much greater distance behind the vehicle preceding him than one car length. As he reached the intersection of Roxford Street, the automobile in front of him slowed down a little. He immediately lessened the speed of his car, he said, so that the gap between them decreased to a car length when he reached the intersection.

This version of what occurred is not supported by the record. At the trial, Landrum testified, "* * * as I approached the intersection of Roxford, the car just ahead of me at that particular moment was just about the length of a car". He also told the jury that he was then traveling at a speed of from 20 to 35 miles per hour.

[1] In addition to the testimony concerning the distance between the two vehicles and the speed of the Landrum automobile, there was evidence relating to the existing traffic conditions and the nature of the roadway. It was for the jury to determine whether, considering all of these circumstances, Landrum was driving his car at a distance behind the one ahead of him which was less than was reasonable

and prudent. The space between vehicles may be such that, as a matter of law, there was or was not a violation of the statute. But the present case does not come within that category.

In *Lewis v. Western Truck Line*, 44 Cal. App.2d 455, 112 P.2d 747, some witnesses estimated the distance between the two vehicles as being between 100 and 200 feet, and their speed at 28 or 30 miles per hour. The collision occurred upon a highway, not a city street. An instruction in the words of the statute was held proper. The record in *Rodriguez v. Savage Transportation Co.*, 77 Cal.App.2d 162, 175 P.2d 37, shows testimony that the distance between the second and third truck was 60 feet and the speed of the third truck 40 miles per hour. The fourth truck, traveling at 45 miles per hour, was following at a distance of 50 feet.

[2] By the instruction challenged in the present case, the question as to Landrum's conduct was properly left to the jury and, in view of all of the circumstances, it cannot be said that there is insufficient evidence to support the implied finding of a violation of the quoted statute.

Concerning the causal connection between the violation of section 531(a) and the collision, the record shows that as Landrum approached the intersection, the lead vehicle "slowed down rather rapidly". Landrum said that he then decreased his speed and tried to see what was ahead of the car preceding him. He was unable to do so either by looking to the left of it or through its rear window and windshield. He also testified that he thought the automobile was slowing down to allow some other vehicle "to make some movement" or "him making a turn". It is undisputed that the lead vehicle then traveled through the intersection and safely passed to the rear of the Severin automobile, which had crossed the inside lane for northbound traffic after completing a left turn. At this point, Landrum saw the Severin car for the first time. "Just as I saw * * * [it] in front of me in my lane there", Landrum testified, "then I put on * * * [the brakes with] full force * * *. It skid me right into it".

The record does not clearly indicate the events which transpired just prior to the collision. Counsel for Severin argue that, as the lead vehicle decreased its speed, Landrum was required to turn sharply to the right to avoid a rear-end collision. In doing so the Landrum automobile passed into the outside lane where it collided with the one driven by Severin.

There is no direct evidence that the accident occurred in this way. It is clear from the record that the point of impact was in the outside lane, near the easterly curb of San Fernando Road, and that the Severin automobile was struck on the right front portion. Landrum offered no explanation of how his automobile came to be in the outside lane, but testified that he did not attempt to "go to the right" of the automobile preceding him. However, his automobile moved from the inside to the outside lane.

The evidence also clearly shows that Landrum was unable to see the Severin automobile until the car which he was following had passed into the intersection. A reasonable inference from this evidence is that had Landrum been following at a reasonable and prudent distance, he would have seen the Severin automobile in time to avert a collision. This record affords a substantial basis for a conclusion that his conduct in following another vehicle so closely as not to have a sufficient view of the roadway ahead to proceed safely was a direct and proximate cause of the accident.

[3] Landrum argues that the giving of the instruction on section 531(a) of the Vehicle Code was error because it did not include any statement of the rule as to proximate cause. However, as a part of its charge, the court fully instructed the jury upon the meaning of proximate cause and the requirement that negligence must proximately contribute to the injury. Under such circumstances, the failure to repeat the statement in a particular instruction concerning the duty of a party was not prejudicial error. *Everts v. Rosenberg*, 4 Cal.App.2d 500, 41 P.2d 166; *Wallner v. Pickwick Stages System*, 130 Cal.App. 472, 20 P.2d 90.

[4] The Landrums finally contend that the trial court abused its discretion in denying their motion for a new trial based upon newly discovered evidence. The motion was supported by the affidavits of three persons, strangers to the action, to the effect that Severin made an abrupt left turn without stopping and drove directly into the path of the Landrum automobile, which was being operated in a careful and cautious manner. This evidence would support Landrum's testimony and contradict the evidence offered by Severin. But an order denying a new trial will not be disturbed if the record shows any basis upon which it may be upheld, and where the motion is based upon the ground of newly discovered evidence it must appear that the evidence is not cumulative. *Smith v. Royer*, 181 Cal. 165, 183 P. 660; *Scott v. Flanagan*, 14 Cal.App.2d 105, 57 P.2d 1382.

The judgment is affirmed. The purported appeal from the order denying a new trial is dismissed.

GIBSON, C. J. and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



37 Cal.2d 65

FOWLER v. KEY SYSTEM TRANSIT LINES.

S. F. 18282.

Supreme Court of California, in Bank.

May 1, 1951.

Rehearing Denied May 28, 1951.

Action by Jessie Fowler against the Key System Transit Lines, a corporation, for damages for personal injuries sustained when plaintiff fell after alighting from defendant's bus. The Superior Court in and for the County of Alameda, A. J., Woolsey, J., entered a verdict in favor of defendant, and plaintiff appealed. The Supreme Court, Schauer, J., held that the trial court had committed reversible error in rejecting evidence relating to a custom whereby defendant's bus usually stopped at the intersection

in question on the cross-walk so that the passengers would not have to step into a gutter upon alighting.

Reversed and remanded for new trial.

Prior opinion, 222 P.2d 287.

1. Negligence ☞124(3)

Evidence of custom is ordinarily admissible in negligence cases.

2. Appeal and error ☞1056(1)

Carriers ☞345

In action for injuries sustained when passenger on defendant's bus stepped off bus and into gutter while alighting on dark night at intersection, where contributory negligence of passenger was made issue in case, trial court committed prejudicial error in rejecting evidence relating to custom whereby bus usually stopped at cross-walk at intersection in question in order that passengers alighting from bus would not have to step into gutter, notwithstanding fact that such evidence would also have tended to establish violation of statute preventing bus from stopping at cross-walks. Vehicle Code, § 586; Civ. Code, § 3517.

3. Carriers ☞343

In action to recover for injuries sustained by bus passenger in alighting from bus at intersection, evidence as to bus driver's custom of stopping at cross-walk at particular intersection was admissible to refute charge that passenger had been contributorily negligent, regardless of whether plaintiff had pleaded the alleged custom. Vehicle Code, § 586; Civ. Code, § 3517.

4. Appeal and error ☞110

Order of trial court denying new trial is not appealable.

James G. Quinn, Jr., Emeryville, William H. Quinn, Oakland, for appellant.

Donahue, Richards, Rowell & Gallagher and Bryant M. Bennett, Oakland, for respondent.

SCHAUER, Justice.

Plaintiff appeals from an adverse judgment, rendered against her on a jury

verdict, in her action to recover for personal injuries. At the trial in the superior court issue was joined both on the question of defendant's negligence and plaintiff's contributory negligence. A hearing was granted by this court, after decision by the District Court of Appeal, First Appellate District, Division Two, for the purpose of giving further study to the problems presented. After such study we have concluded that the opinion of the District Court of Appeal, prepared by Mr. Justice Goodell, correctly treats and disposes of the issues involved, and it is therefore, with certain further discussion pertinent to contentions urged before us, adopted as and for the opinion of this court. Such opinion (with appropriate deletions and additions as indicated) is as follows:

"[* * *] On Sunday evening, July 7, 1946, about 8:30, appellant, a woman of 70, was a passenger on a Key System bus traveling easterly on San Jose Avenue in Alameda. She signalled for a stop at Paru Street and the bus stopped at the southwest corner of the two streets with its front door a short distance westerly of the north-and-south crosswalk. The night was dark and the intersection was but dimly lighted. As appellant left the bus by its front door she stepped into the gutter, which was about 8 inches deep, its bottom paved with cobblestones; it was rough and uneven and contained debris, rocks and pebbles. She lost her balance and fell against the curb before getting a foothold on the sidewalk, and fractured her left hip. When the bus stopped it was inclined toward the sidewalk, on an angle, which left the appellant very little room, and put her in fear of being struck by it when it started up. Appellant was found lying where she fell, by a police officer, who had to use the spotlight on his car to make sure a human being was lying there.

"Appellant's principal contention is that the court erred in excluding the testimony of two witnesses as to the customary stopping place of the busses.

"At San Jose Avenue and Paru Street the crosswalk is flush with the sidewalk

so that a pedestrian crossing the avenue would not have to step up or down at a curb and over a gutter, but would keep walking along on the same plane as the sidewalk, which situation appears clearly in three photographs in evidence. The gutter into which appellant stepped was at the opening of the culvert which runs under the crosswalk.

"The two witnesses testified that the customary bus stops were within the area of the crosswalk, which the witnesses marked on the photographs. It is evident that had the bus stopped at any of the accustomed places within the flat area as they portrayed them, appellant would have stepped onto the crosswalk and not into the gutter as she did.

"The testimony of both witnesses was stricken out on defendant's motion, which left the record as if it had been rejected in the first place. Appellant's counsel in urging its retention assured the court that Mrs. Fowler would testify 'that it was the place where the bus always stopped to permit her to alight in the past,'¹ and that he had 'under subpoena several witnesses to testify in addition to the two already, that use that bus regularly, that that is the regular place * * *.'

"Appellant does not contend that the failure to stop at the accustomed place on this occasion was negligence *per se*, but she does contend that 'The custom of the bus in stopping regularly at a particular place on the route, the place at which the plaintiff expected to alight and at which she thought she was alighting was brought into the trial as one of the elements necessary to show the defendant's negligence in this particular case.' She contends further that she 'was entitled to show the custom of this respondent as establishing a standard of safety in this case and this case only, and here reliance upon that standard so adopted by respondent itself.'

"In *Ross v. San Francisco etc. Railways Co.* [1920], 47 Cal.App. 753, 766, 191 P. 703, the court said 'The settled practice of stopping a street-car at a particular

place becomes a rule of conduct upon which the public has a right to rely to a reasonable extent, and a departure from such rule is a vitally important element in determining the question of negligence, for it constitutes a departure from the standard of safety which the defendant has itself adopted. [Citations.]'

[1] "There can be no doubt that evidence of custom is ordinarily admissible in negligence cases. Cases so holding are *Hennessey v. Bingham* [1899], 125 Cal. 627, 635-636, 58 P. 200; *Adamson v. City & County of San Francisco* [1924], 66 Cal. App. 256, 260, 225 P. 875; *Thomas v. Southern Pacific Co.* [1931], 116 Cal.App. 126, 131-132, 2 P.2d 544; *Mace v. Watanabe* [1939], 31 Cal.App.2d 321, 323, 87 P.2d 893; *Burke v. John E. Marshall, Inc.* [1940], 42 Cal.App.2d 195, 203-204, 108 P. 2d 738; *Scott v. Gallot* [1943], 59 Cal.App. 2d 421, 425-426, 138 P.2d 685.

"The evidence rejected in this case was not that of a general custom, but of respondent's own custom and practice, such as that spoken of in *Ross v. San Francisco etc. Railways Co.*, *supra*.

"In *Adamson v. City & County of San Francisco* [1924], 66 Cal.App. 256, 260, 225 P. 875, this court said: 'Where * * * a usual practice or custom has obtained, and * * * the claim is made that one of the parties has, to the discomfiture of the other, without notice, departed from the usual custom or practice, the courts have by an unbroken line of decisions held that the *question of negligence on the part of the defendant, and the question of contributory negligence on the part of the plaintiff*, are both questions for the jury to determine in the light of all of the facts, *including the evidence tending to establish the alleged custom or practice and the alleged deviation therefrom.* [Citations.]' (Emphasis added.) This was cited approvingly in *Polk v. City of Los Angeles* [1945], 26 Cal.2d 519, 531-532, 159 P.2d 931, where it was said 'Whether negligence or contributory negligence may be predicated upon departure from custom is a question for the jury.' The *Adamson* opinion contains

1. Thus showing plaintiff-appellant's knowledge of the custom she sought to prove.

a pertinent quotation from *Carter v. Sioux City Service Co.* [1913], 160 Iowa 78, 89, 141 N.W. 26, 30, on the subject of departure from custom.

"From these and other authorities it is settled law that evidence of custom is admissible for its bearing on either negligence or contributory negligence.

"Respondents pleaded that plaintiff failed to 'exercise ordinary care and caution in conducting herself so as to avoid the alleged accident' and that it was 'directly and proximately caused by the contributory negligence of said plaintiff.' Contributory negligence thus became an important issue in the case, and if the evidence of custom bore on that issue it should have been admitted for that reason if for no other.

"In *Scott v. Gallot* [1943], supra, 59 Cal. App.2d 421, 138 P.2d 685, the trial court granted a new trial because it had stricken out certain evidence of custom, relevant under the affirmative issue of contributory negligence. The order granting the new trial was affirmed.

"In *Muir v. Cheney Bros.* [1944], 64 Cal. App.2d 55, 63, 148 P.2d 138, the court in discussing plaintiff's testimony, respecting the *customary course of traffic*, said: 'From the reported decisions it is apparent that the evidence was not admissible for the purpose of excusing the plaintiff for the violation of any provisions of the law. However, it was admissible as a part of the *res gestæ for the purpose of giving to the jury full knowledge of all the facts and circumstances which existed at the time and place of the accident, which were known to the parties*, so as to permit the jury to pass upon the question of whether plaintiff conducted himself as an ordinary and reasonable person would have conducted himself in the light of all of the circumstances. [Citations.]' (Emphasis added.) *Carter v. Sioux City Service Co.*, quoted in the *Adamson* case, supra, is substantially the same.

"Respondents attempt to justify the court's ruling by invoking the familiar rule that 'Custom cannot overcome unequivocal statutory provisions.' The basis for this is the provision of section 586, Vehicle

Code, that 'No person shall stop * * * any vehicle * * * on a crosswalk.' Of the five California cases they cite on this point only one is a negligence case. None of them is in point since appellant had no such purpose as those cases disclose. In *Hurtel v. Albert Cohn, Inc.* [1936], 5 Cal.2d 145, 52 P.2d 922, the plaintiff sought to excuse her own violation of an ordinance dealing with stop-and-go signals by showing that everybody violated it. In *Kohn v. Sacramento, etc., Co.* [1914], 168 Cal. 1, 7, 141 P. 626, it was contended that non-negotiable bonds should be treated as negotiable instruments because for years everybody had so treated them, and the courts should 'make the letter of the statutes bend' to the custom. Respondents' cases are not to be criticized for they all enforce the rule stated above, but they simply do not touch this case.

"The excluded evidence was not offered for the purpose of opposing custom to statute law. Appellant had not disobeyed any law and was not seeking to excuse any violation by invoking custom.

"The evidence might have shown repeated violations of section 586 but they were not appellant's violations. If respondent railway habitually stops its busses in the crosswalk, that is a matter between it and the law enforcement authorities, and appellant is concerned therein only insofar as such stops tend to establish the bus line's own standard of safety for its passengers, and insofar as such stops had afforded appellant a safe place to alight.

"Appellant is no more affected or concerned with the violations of section 586 than was the passenger-plaintiff in *Clarkson v. United Railroads of San Francisco* [1924], 67 Cal.App. 372, 227 P. 710, concerned with the written contract between the United Railroads and the Western Pacific. There the custom, which departed from the contract, of handling trains was put before the jury and an instruction on the subject was given. With respect to the attack on the instruction this court said [67 Cal.App. at page 376, 227 P. 710]: '* * * this is an action based on the alleged negligence of the parties to the alleged written agreement, and the action

is being maintained by one who was not a party to that written agreement. As to each of the defendants the issue in this case was negligence or no negligence.' The court then restated what it said in *Adamson v. City & County of San Francisco*, supra, and concluded [67 Cal.App. at page 377, 227 P. 710]: 'As between the two defendants in this case we think it is clear that the same rule should apply. The question was not what each of the defendants had agreed to do, but the question distinctly was what custom or practice theretofore had obtained.'

"By relying on section 586 respondents in effect say to appellant: 'In giving you in the past a safe place to alight we violated § 586, but you are now foreclosed from proving our custom for the very reason that we were transgressors.' Respondents are thus taking advantage of their own violations of law (Civ.Code, § 3517; *Hedlund v. Sutter Medical Service Co.* [1942], 51 Cal.App.2d 327, 333-334, 124 P.2d 878) to keep from the record evidence which otherwise would be clearly admissible.

"The precise question is, whether evidence of a custom which violates positive law is to be rejected for that reason alone, or whether it is nevertheless admissible if it bears on negligence or contributory negligence. Neither side has produced any California authority on precisely this problem. There are, however, cases in other jurisdictions directly in point, the leading one of which seems to be *Langner v. Caviness* (1947), 238 Iowa 774, 28 N.W.2d 421, 172 A.L.R. 1135. Therein it appears that the law of Iowa requires persons in vehicles meeting each other on the highway to give half the traveled way by turning to the right, and a violation is prima facie evidence of negligence. However, a well established custom existed between truckers when working upon public works that the driver of an empty truck would yield the right of way to the driver of a loaded truck when about to meet in a narrow or defective place in the highway. Defendants in a negligence case arising out of a collision between trucks filed a counterclaim, where-

in they pleaded the existence of such custom. On plaintiff's motion, that part of the answer was stricken out on the ground that it stated 'no defense or excuse for failure to exercise the statutory care required of defendants in the operation of their truck.' A verdict was returned for plaintiff and defendants appealed, contending that the stricken allegations properly bore on the issue of plaintiff's freedom from contributory negligence. The appeal was 'presented by both sides largely as if the trial court had ruled directly against the admissibility of evidence in support of the pleaded custom' (28 N.W. 2d 423) which is the way the problem arose here. The court in reversing held that the custom was properly pleaded and that the allegations should not have been stricken out. It said (at 28 N.W.2d 423): 'It is generally held * * * that a custom which conflicts with a statutory provision will not be enforced. Where there is such conflict, the statute must control [citations] * * * However, there are decisions that evidence of custom is admissible even for the purpose of excusing noncompliance with a state or municipal regulation. *Dugan v. Fry* [1929], 3 Cir., 34 F.2d 723, 724, 725; *Pollock v. Hamm* [1928], 177 Ark. 348, 6 S.W.2d 541; *Tobin v. Goodwin* [1930], 157 Wash. 658, 290 P. 215. See, also, *Hensen v. Connecticut Co.* [1922], 98 Conn. 71, 118 A. 464, 467. As stated, defendants do not contend the custom upon which they rely could excuse the negligence charged against Woolums but argue only it may be considered on the issue of plaintiff's freedom from contributory negligence * * * We think the custom pleaded here cannot be invoked to supersede or nullify the above statute. But it does not follow that such custom cannot be considered in determining whether plaintiff was free from contributory negligence.'

"The court then cites inter alia *Mann v. Standard Oil Co.* [1935], 129 Neb. 226, 261 N.W. 168, and then reaches into California for further authority, citing *Muir v. Cheney Bros.*, supra, and saying: '*Muir v. Cheney Bros.* [1944], 64 Cal.App.2d 55, 148 P.2d 138, 141, involves the question of right of way at an intersection and holds

evidence of the customary course of traffic at the intersection was properly received, not to excuse plaintiff's failure to yield the right of way, but *to give the jury full knowledge of the circumstances at the time and place of the collision, which were known to the parties*, so as to permit the jury to decide whether plaintiff acted as an ordinarily prudent person in the light of such circumstances.' (Emphasis added.)

"Langner v. Caviness cites authorities from several other states, and at 28 N.W.2d 424 summarizes the Mann case as follows: 'Our conclusion is amply supported by authority. In Mann v. Standard Oil Co. [1935], 129 Neb. 226, 261 N.W. 168, defendant offered evidence of a recognized custom to signal a left turn by opening the left door and that its truck driver gave such signal. The statute required an arm signal. The court holds the custom could not supersede the statute but the evidence was admissible upon the issue of plaintiff's contributory negligence.'

"Respondents cite Glaum v. Cummings, decided by the Illinois Appellate Court, and have supplied the full text of the opinion. It is unreported but the syllabi are found in 317 Ill.App. 655, 47 N.E.2d 359. Judgment was entered on a directed verdict for the defendants, which was affirmed. Glaum was injured while alighting from a streetcar and his claim of negligence was based on the failure to furnish him with a reasonably safe place to alight, and in failing to stop at the regular stopping place. His attempt to prove that it was the railway's custom to stop at a place other than that where he was injured, was met by the railway's showing that the law prohibited it. The court rejected the offer of proof and in affirming the judgment the appellate court said: 'It has been consistently held that a custom cannot be invoked to avoid a settled rule of law or to prevail against or overcome a statute, and such an alleged custom is therefore not binding. [Citations.]'

"The case, while similar, is not in point since Glaum's contributory negligence was so flagrant that the court took the case away from the jury. Hence the rule just discussed was not brought into play, and

probably not even considered. What the court said respecting custom is no different from what our California courts have said, and none of the three cases cited in the Glaum opinion is a tort case.

"[* * *]"

[2] Here it is true, as suggested by defendant, that the evidence in question tended to show repeated violations of the law by defendant, and that none of those violations contributed directly to plaintiff's injury. But, as appears from the foregoing discussion, the evidence was material not because it tended to show violations of the law but because it tended to show a custom established by defendant and a right of plaintiff, who was familiar with the custom, to rely upon its continuance. Such evidence does not become inadmissible because it also tends to show violations of the law. It is self-evident that it would be helpful for the triers of fact in determining whether defendant was negligent and whether plaintiff was contributively negligent to consider the facts (if so found) that defendant had established a custom of stopping at the crosswalk, that plaintiff as a regular passenger had become familiar with the custom, that defendant by its conduct had encouraged plaintiff to rely upon the custom, that plaintiff did rely upon it and that on a dark night, without warning to plaintiff, defendant departed from such custom. Upon the record the rejection of the evidence in question was prejudicial error.

[3] Defendant urges, in reliance upon *Tharp v. San Joaquin Cotton Oil Co.* (1938), 27 Cal.App.2d 554, 561, 81 P.2d 443, 82 P.2d 21, that because plaintiff failed to plead the alleged custom she was precluded from introducing evidence thereof. Regardless of the merit or lack of merit of defendant's contention otherwise, the point is not decisive where, as here, the custom is relied upon to refute the charge that plaintiff was contributively negligent. (See *Scott v. Gallot* (1943), *supra*, 59 Cal.App.2d 421, 427, 138 P.2d 685.)

The question of the admissibility of such evidence to prove negligence of the defendant without pleading the custom

need not arise, and other claimed errors need not occur, on a new trial and therefore need not be considered here.

[4] Plaintiff has also attempted to appeal from an order denying her motion for a new trial. Such order is not appealable, and the attempted appeal therefrom will be dismissed. (See *Reeves v. Reeves* (1949), 34 Cal.2d 355, 357, 209 P.2d 937.)

The judgment is reversed and the cause remanded for a new trial; the attempted appeal from the order denying a new trial is dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.



37 Cal.2d 52

PEOPLE v. ODLE.

Cr. 5156.

Supreme Court of California, in Bank.

April 27, 1951.

John Calvin Odle was convicted in the Superior Court, Orange County, Robert Gardner, J., for first degree murder and a judgment imposing the death sentence was entered, and the defendant automatically appealed. The Supreme Court, Traynor, J., held that, where the trial court was vested with discretion to determine punishment of defendant convicted for first degree murder and there was no error, Supreme Court had no power to substitute its judgment for that of trial court and could not reduce the penalty to life imprisonment.

Judgment affirmed.

Schauer, J., dissented in part.

1. Homicide 253(3)

Evidence warranted conviction for first-degree murder in that defendant committed a willful, deliberate, and premeditated murder. Pen.Code, § 189.

2. Criminal law 1183

Under statute providing that appellate court may reverse, affirm, or modify a

judgment or order appealed from, or reduce degree of offense or punishment imposed, and may set aside, affirm, or modify proceedings subsequent to or dependent on such order or judgment, and may order a new trial if proper, appellate court can reduce the punishment in lieu of ordering new trial when there is error relating to punishment imposed, but cannot modify judgment in absence of error in the proceedings. Pen.Code, §§ 1181, 1260; Const. art. 3 § 1; art. 6, § 4½; art. 7, § 1.

3. Homicide 347

Where trial court was vested with discretion to determine punishment of defendant convicted for first-degree murder and there was no error, Supreme Court had no power to substitute its judgment for that of trial court and could not reduce the penalty to life imprisonment. Pen. Code, §§ 189, 190, 1181, 1260.

Z. B. West, Santa Ana and Morris Lavine, Los Angeles, for appellant.

Fred N. Howser and Edmund G. Brown, Attys. Gen. and Frank Richards, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

This appeal is from a judgment imposing the death penalty following the conviction of defendant of first-degree murder.

Defendant and deceased were married in Huntington Park, California, on April 6, 1947. They lived together in Santa Ana, California, where defendant was employed. Shortly before Christmas, 1948, deceased became a saleslady and department manager for Davis Stationers on East Fourth Street in Santa Ana. Early in March, 1950, deceased left defendant and instituted divorce proceedings that resulted in the entry of an interlocutory decree of divorce in her favor on April 25, 1950. Defendant repeatedly importuned deceased to return to him, both before and after the entry of the decree. On April 10, 1950, he quit his employment, presumably because of his depression over the separation. Thereafter not only did he frequently visit his

wife at Davis Stationers to persuade her to return to him, but during a great part of her working hours he stationed himself at the corner of Fourth and Main, where Davis Stationers was located, or across the street at points where he could observe his wife and she could see him. These activities were apparently designed to convince her of his grief and the genuineness of his requests that she return to him.

During this period, defendant enlisted the aid of several of their friends to persuade her to return to him. These efforts were unavailing. About the time he quit his employment, defendant informed a friend that he intended to buy a gun and kill his wife unless she returned to him. On April 13, 1950, he purchased the pistol with which he later killed his wife. After the purchase he repeated to several friends that he would kill his wife if she did not return to him. They informed defendant's wife of his threats, but she apparently did not take them seriously.

On May 1, 1950, five days before the homicide, defendant encountered a friend on the street across from Davis Stationers. After some conversation about defendant's marital difficulties and his grief at the separation, defendant stated "Be sure and watch the newspapers for the next week or ten days." The friend asked "Oh, is that so, John?" Defendant replied "Yes, it is too bad, but that is just what it has to be."

On the morning of May 6, 1950, the day of the homicide, defendant took some laundry to a cleaning and laundry agency that had done work for him for more than two years. He asked the proprietress to deliver the laundry to the Y.M.C.A., where he was then living, "because I don't believe I will be free to call for it." About 1:30 p. m. that day, defendant entered Woolworth's on Main Street, across the street from Davis Stationers. He talked with the girl in charge of the candy counter and informed her that he was going across the street to see his wife, who had better not forget that he had a gun.

Immediately thereafter, defendant crossed the street, entered the Davis Sta-

tioners store and stood by the counter where his wife was working. Shortly after 2 p. m., defendant asked his wife and Mr. Davis, her employer, to accompany him to the stockroom in the rear of the store so that they might converse quietly. As they entered the stockroom, defendant repeated his plea for a reconciliation. She refused, and he then took the pistol from his pocket and shot her. As she fell forward he fired two more shots into her body and head. Mr. Davis ran out the back door just as defendant fired a shot at him that lodged in the door behind him. In the ensuing excitement, defendant escaped out the back door. He went immediately to the Santa Ana police station and surrendered. He told the desk officer in charge "I have just shot my wife. She is at the Davis Stationery Store. I have just shot my wife. Here, take this gun." After questioning by several police officers, defendant signed a full confession that he had killed his wife with the gun, which he had purchased for that purpose.

Defendant pleaded not guilty and not guilty by reason of insanity and waived a trial by jury. It was stipulated that the evidence given in the trial on the plea of not guilty could be considered by the trial judge in the trial on the plea of not guilty by reason of insanity. Following testimony establishing the foregoing facts, defendant introduced without objection the testimony of a psychiatrist, Dr. Victor Parkin, to establish that defendant was mentally ill and therefore not capable of forming a clear intention to kill. Dr. Parkin conceded that defendant's mental illness did not meet the tests of legal insanity, but stated that it precluded his formation of an intention to kill "with the clarity of thought that would make him entirely guilty of an act of murder. Homicide, yes." The trial court found defendant guilty of murder in the first degree, but reserved its decision fixing the penalty until after the trial on the plea of not guilty by reason of insanity.

In that trial Dr. Robert Wyers, a psychiatrist called by the court, testified that in his opinion defendant was legally sane;

that he knew the nature and consequences of the act of killing his wife; that although he was in need of psychiatric treatment, he was not psychotic but was in fact classifiable as mentally normal; and that he was capable of planning the murder of his wife and executing his plan with full knowledge of what he was doing. The opinion of Dr. Wyers was corroborated by Dr. William Musfelt, another psychiatrist called by the court, and by Dr. Hyman Tucker, a psychiatrist called by the prosecution. Defendant called no witnesses. The trial court thereupon found defendant sane and sentenced him to be executed.

[1] The foregoing evidence is clearly sufficient to support the trial court's determination that defendant committed a wilful, deliberate, and premeditated murder and is therefore guilty of murder of the first degree. Penal Code, § 189. Defendant contends, however, that the trial court abused its discretion by imposing the penalty of death rather than life imprisonment, and that this court has power under the 1949 amendment to Penal Code section 1260 to reduce the penalty to life imprisonment.

That section provides: "The court may reverse, affirm, or modify a judgment or order appealed from, *or reduce the degree of the offense or the punishment imposed*, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial." (Italicized provisions added by Stats.1949, ch. 1309, § 1.)

Before the amendment of section 1260 it was settled that this court had no power to review the exercise of the jury's or trial court's discretion in fixing the penalty for first degree murder. *People v. Danielly*, 33 Cal.2d 362, 383, 202 P.2d 18; *People v. Tuthill*, 32 Cal.2d 819, 827, 198 P.2d 505. Similarly, it could not reweigh the evidence in determining whether the trier of fact had correctly decided the degree of the offense, but could only order a reduction in the degree if the evidence was legally inadequate to support the finding of the higher degree. Penal Code, §

1181(6); *People v. Thomas*, 25 Cal.2d 880, 905, 156 P.2d 7; *People v. Bender*, 27 Cal.2d 164, 186, 163 P.2d 8; *People v. Valentine*, 28 Cal.2d 121, 144, 169 P.2d 1. It is necessary to determine, therefore, whether the amendment to section 1260 was intended to broaden the scope of appellate review over the determination of the degree of the offense and the punishment therefor.

In the light of the legislative history of sections 1260 and 1181 of the Penal Code, we have concluded that the 1949 amendment was not intended to broaden the scope of appellate review. Before 1927 if it was determined on appeal that the evidence was insufficient to support a verdict of guilty of a higher degree of an offense but sufficient to support a verdict of a lower degree, the appellate court had no power to order a modification of the judgment but was required to reverse the judgment and order a new trial. *People v. Nagy*, 199 Cal. 235, 239, 248 P. 906. At that time subdivision 6 of section 1181 of the Penal Code provided that the trial court could grant a new trial when the verdict was contrary to law or evidence. To obviate the necessity of a new trial, when the insufficiency of the evidence went only to the degree of the crime, the Legislature in 1927 amended section 1181 to provide for modification of the judgment either by the trial or appellate court when "the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein". Penal Code, § 1181(6); see, *People v. Kelley*, 208 Cal. 387, 391-392, 281 P. 609.

In 1949 the Special Crime Study Commission on Criminal Law and Procedure in its second progress report recommended a further amendment to Penal Code section 1181 to obviate the necessity of granting new trials when the punishment fixed by the jury or trial court was not supported by the law or evidence. The commission stated, "At the present time a trial judge on the hearing of a motion for a new trial is authorized in a proper case, in lieu of granting said motion, to modify the verdict so as to reduce the degree of the offense of which the defendant stands convicted

but has no authority to change or modify the punishment in those cases in which the fixing of the punishment is part of the verdict. If such authority were vested in the trial court it is believed that in certain circumstances a new trial of the entire cause might be avoided." Second Progress Report of the Special Crime Study Commission on Criminal Law and Procedure [March 7, 1949] Proposal XXVIII, p. 20. The proposed amendment provided that this power, like that given in subdivision 6 of section 1181, should extend to any court to which the case might be appealed. To bring section 1260 in accord with subdivision 6 and the proposed new subdivision, the commission recommended the amendment to section 1260 providing that the appellate court might reduce the degree of the offense or the punishment imposed. Proposal XXIX, p. 21.

Although the Legislature failed to pass the proposed amendment to section 1181 but did enact the amendment to section 1260, it is nevertheless clear from the legislative history that the amendment was designed, not to increase the scope of appellate review over the fixing of the degree or punishment of crime, but to bring section 1260 in accord with section 1181 with regard to the reduction of the degree of crime and to make clear that the appellate court can reduce the punishment rather than grant a new trial when the evidence does not support the punishment imposed.

In view of the holding before the 1927 amendment to section 1181 that the court could not modify a judgment to correct the degree of the crime fixed by a jury, *People v. Nagy*, supra, 199 Cal. 235, 239, 248 P. 906, the Legislature may have been fearful that the same rule would apply when the evidence was insufficient to support the punishment imposed. For example, section 209 of the Penal Code provides for different punishments depending on whether or not the victim of a kidnapping suffers bodily harm. Under the rule of the *Nagy* case, assuming its applicability, an appellate court could not modify the punishment in lieu of ordering a new trial when the jury specified the greater punishment and there was no evidence that the victim

suffered bodily harm. A comparable situation might have arisen under sections 192 and 193 of the Penal Code, which make the punishment for manslaughter in the driving of a vehicle depend on whether or not there was gross negligence.

Section 1260 now makes clear that the court can reduce the punishment in lieu of ordering a new trial, when the only error relates to the punishment imposed. It does not, however, vest power in the court to modify a judgment in the absence of error in the proceedings. It lists the various actions that an appellate court may take after reviewing an order or judgment. Thus, the court may "reverse, affirm, or modify" as well as "reduce the degree of the offense or the punishment imposed". The section does not purport to set forth any test for determining which of the various possible actions the court should take. It has never been seriously contended that this section vests the court with power to reverse a judgment, when the evidence supports it and there has been no error in the proceedings, nor has it been contended that it vests the court with power to affirm a judgment even though there is no evidence to support it or there has been other prejudicial error. Whatever action the court has taken with respect to a judgment or order has always depended on whether or not there was error in the proceedings and if so whether the error was prejudicial. Cal.Const. Art. VI, § 4½. The 1949 amendment adding the words, "or reduce the degree of the offense or the punishment imposed" sets forth no different test for determining what action the court should take and vests the court with no more power to reduce the degree of the offense or the punishment imposed than it has to "reverse, affirm, or modify a judgment or order appealed from". To construe the section otherwise would give the court clemency powers similar to those vested in the Governor, Cal.Const. Art. VII, § 1, and raise serious constitutional questions relating to the separation of powers. Cal.Const. Art. III, § 1; see, *In re McGee*, 36 Cal.2d 592, 226 P.2d 1, and cases cited in 24 C.J.S., Criminal Law, § 1946, p. 1091, note 26.

[2, 3] It cannot reasonably be concluded that by adding "or reduce the degree of the offense or the punishment imposed" to the various actions an appellate court may take after reviewing a judgment or order, the Legislature intended radically to alter the scope of appellate review and permit the court in every case, regardless of error, to substitute its judgment for that of the trial court or jury. We hold, therefore, that the amendment did no more than bring section 1260 into accord with section 1181 (6) with respect to reduction of the degree of an offense and make clear that the court may reduce the punishment in lieu of ordering a new trial, when there is error relating to the punishment imposed. The test for determining what action should be taken remains the same: was there prejudicial error in the proceedings? When, as in this case, the trial court is vested with discretion to determine the punishment, Penal Code § 190, and there has been no error, this court has no power to substitute its judgment for that of the trial court. *People v. Danielly*, supra, 33 Cal. 2d 362, 383, 202 P.2d 18; *People v. Tuthill*, supra, 32 Cal.2d 819, 827, 198 P.2d 505.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, and SPENCE, JJ., concur.

SHENK, Justice.

I concur in the judgment but I do not agree with the definite implication in the majority opinion that this court has the power to reduce the punishment and thus commute the sentence from death to life imprisonment even in the presence of error. The power of commutation of sentence and pardon is vested exclusively in the Governor by section 1 of article VII of the constitution and even that power is circumscribed by the provision in the same section that the chief executive may not extend executive clemency by granting a commutation of sentence or a pardon to a person twice convicted of a felony without the "written recommendation of a majority of the Judges of the Supreme Court." The provisions of the constitution are "mandatory and prohibitory". Section 22, Article I.

Cal.Rep. 229-230 P.2d-37

When power is vested by the constitution in one branch of the state government it is incompetent for another branch to exercise it. The latest expression of this court on the subject is found in *In re McGee*, 36 Cal.2d 592, 226 P.2d 1, where it was held that when a power has been expressly vested in the legislature (in that case to determine the qualifications of one of its members) the courts are without authority to assume jurisdiction over the controversy. It was there stated, 226 P.2d at page 3: "The powers of the government of the state are divided into the legislative, executive and judicial, and neither shall exercise the powers of the other 'except as in this Constitution expressly directed or permitted.' Cal.Const., Art. III, § 1." Here the power of commutation of sentence is expressly vested in the Governor and it is beyond the power of the legislature to transfer that function to the courts as was attempted by an amendment of section 1260 of the Penal Code in 1949. There is no other provision of the constitution, express or otherwise, directing or permitting the courts to exercise the power thus vested in the Chief Executive. Section 43½, article VI, adopted in 1926, authorizing the legislature to grant to the courts of appellate jurisdiction the power to make findings contrary to or in addition to those made by the trial court does not by any manner of means confer upon the legislature the right to authorize this court to exercise the power of commutation of sentence and thus reduce the punishment from death to life imprisonment. Section 956a of the Code of Civil Procedure (added in 1927) is the enactment designed to carry into effect the constitutional amendment of 1926. That amendment was first construed and applied in *Tupman v. Haberkern*, 1929, 208 Cal. 256, 280 P. 970. The power thus conferred on the courts applies only to cases where "trial by jury is not a matter of right or where trial by jury has been waived". This power has never been exercised in criminal cases for the obvious reason that trial by jury in such cases is a matter of right and following a waiver of a jury trial the court is not authorized to make findings of fact as contemplated by sections 632 and 956a of

the Code of Civil Procedure. In *People v. Willison*, 1932, 122 Cal.App. 760, at pages 762 and 763, 10 P.2d 766, at page 767, it was rightly said, with reference to the power to be exercised pursuant to section 4¾ of the constitution, that "It was not intended that the Court of Appeal or the Supreme Court should be permitted to make findings of fact and thereby change verdicts rendered in jury trials." See also *People v. Myers*, 122 Cal.App. 675, 10 P.2d 498.

Section 1181(6) of the Penal Code was amended in 1927 to authorize on appeal the reduction in the degree of the crime. There was and is no constitutional inhibition foreclosing the legislature from conferring that power. This court recognized that fact and first exercised the power in *People v. Kelley*, 1929, 208 Cal. 387, 281 P. 609. There is a vast difference between a change in the degree of the crime under the law and the evidence and a change in the punishment. The former involves the application of the law to the facts and is the function of the court. The latter is a matter of executive clemency, a power exercisable exclusively by the Governor under the constitution and without restraint so far as the law and the facts are concerned, except, as stated, in the case of a recidivist.

It is conceded by the majority that if there is no error in the record the court, under the authorities, may not reduce the punishment and thus commute the sentence from death to life imprisonment. When there is error it is a function of the court to determine whether that error, in view of the entire record, has resulted in a miscarriage of justice and is therefore pre-

judicial. If prejudicial error does not appear the judgment should be affirmed. If prejudicial error is determined to be present, it is the function and duty of the court to reverse the judgment or, in a proper case, to reduce the degree. There is no power in the Chief Executive to reduce the degree. It is his function to commute the sentence from death to life imprisonment or to some lesser period of confinement or to execute a pardon pursuant to the constitutional section. The punishment is fixed in the first instance by the jury under proper instructions as to the law or by the court where a jury has been waived. Any change in the punishment thereafter either by commutation from death to life imprisonment or to a shorter period, is just as much the exclusive constitutional function of the Chief Executive as the granting of a pardon, and I assume that no one would even intimate that by an amendment of the code the legislature could transfer the pardoning power from the Governor to the Supreme Court.

SCHAUER, Justice (concurring and dissenting).

I concur in the judgment.

I do not agree with any implications in the majority opinion that within constitutional limitations the Legislature cannot, or that it has not, empowered this court to reduce punishment "in the interest of justice" in any case in which it may appear necessary or proper so to do.

The source of the legislative power is section 4¾ of article VI of the California Constitution.¹ The pertinent act of the Legislature is section 1260 of the Penal Code.²

1. Section 4¾: "In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the legislature may grant to any court of appellate jurisdiction the power, in its discretion, to make findings of fact contrary to, or in addition to, those made by the trial court. The legislature may provide that such findings may be based on the evidence adduced before the trial court, either with or without the taking of additional evidence by the court of appellate jurisdiction. The legislature may also

grant to any court of appellate jurisdiction the power, in its discretion, for the purpose of making such findings or for any other purpose in the interest of justice, to take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and to give or direct the entry of any judgment or order and to make such further or other orders as the case may require."

2. Section 1260: "The court may reverse, affirm, or modify a judgment or order ap-

37 Cal.2d 74

PEOPLE v. THOMAS.
Cr. 5201.

Supreme Court of California, in Bank.
May 1, 1951.

Henry Thomas was convicted in the Superior Court, Siskiyou County, James M. Allen, J., of murder of the first degree and the death penalty was imposed and the defendant automatically appealed. The Supreme Court, Carter, J., held that Supreme Court could not reduce the penalty to life imprisonment.

Judgment affirmed.

1. Homicide Ⓒ18(5)

Murder committed while defendant was attempting to commit a robbery was murder of the first degree. Pen.Code, §§ 187, 189.

2. Criminal law Ⓒ980(2)

In determining degree of an offense and punishment to be imposed after a plea of guilty, trial court must consider matters in aggravation as well as in mitigation of offense.

3. Criminal law Ⓒ980(2)

A hearing for determination of degree of an offense and punishment therefor is not a "trial" in technical sense, and is not governed by the same strict rules of procedure as a trial, but is simply a statutory hearing by which court examines witnesses to determine whether any facts exist to aggravate or mitigate punishment.

See publication Words and Phrases, for other judicial constructions and definitions of "Trial".

4. Criminal law Ⓒ980(2)

Where defendant who pleaded guilty to murder charge remained silent at hearing to determine degree of offense when trial court and district attorneys stated that evidence other than evidence already given was unnecessary, defendant could not complain on appeal that defendant sat silent.

pealed from, or reduce the degree of the offense or the punishment imposed, and may set aside, affirm, or modify any or

5. Criminal law Ⓒ1147
Homicide Ⓒ347

Where trial court was vested with discretion to determine punishment of defendant convicted for first degree murder and there was no error, Supreme Court could not substitute its judgment for judgment of trial court and could not reduce penalty from death to life imprisonment.

Mark M. Brawman and George A. Tebbe, Yreka, under appointment by the Supreme Court, for appellant.

Edmund G. Brown, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Defendant, Henry Thomas, having pleaded guilty to murder, Pen.Code, § 187, the court found the murder to be of the first degree, and imposed the death penalty. The appeal is here by operation of law. Charged with defendant, was William McCain, who pleaded not guilty. McCain was tried, found guilty, and a sentence of life imprisonment was imposed. Also charged with the same crime, and ordered held to answer at the preliminary examination was Joe Cooper, but what disposition has been made of the charge against him, if any, does not appear.

According to the evidence taken when the degree and punishment were fixed, and at the preliminary hearing, Mr. and Mrs. Ainsworth were managing a grocery store near Hatfield, Siskiyou County, California, on October 20, 1950. About 5:30 in the afternoon, while the Ainsworths were present in the store, defendant and McCain entered it, McCain in the lead. Defendant ordered soft drinks. McCain drew a pistol and stated it was a holdup. Defendant also drew a pistol. Ainsworth grasped the barrel of the pistol held by McCain and in the ensuing struggle it was discharged, a bullet striking and wounding Mr. Merrill, who

all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial."

entered the store at that time. After McCain's gun discharged, defendant fired several shots from his pistol, two of which struck Mrs. Ainsworth, causing her death. McCain and defendant fled and were finally apprehended in Bakersfield.

Defendant urges two grounds for reversal: (1) The court erred in failing to take evidence to ascertain the penalty to be imposed. (2) The penalty should be reduced to life imprisonment under § 1260 of the Penal Code, as amended in 1949. Stats. 1949, ch. 1309, § 1.

Defendant was held to answer following a preliminary examination and an information was filed against him. On December 4, 1950, he was arraigned and not having means to employ counsel, one was appointed for him—Mr. Mark M. Brawman. Time to plead was set for December 6, 1950, at his counsel's request. At that time, after a brief appearance in court, counsel for defendant and McCain's counsel, and the district attorney retired to the judge's chambers where the judge said that Mr. Brawman had spoken to him in regard to the possibility of defendant avoiding the death penalty by making a "certain" plea. The judge remarked that he had read the transcript of the preliminary hearing and that he was "inclined" to give the "extreme" penalty whether he pleaded guilty or not guilty. On returning to court, defendant pleaded guilty and December 11, 1950, was fixed as the time for "pronouncing judgment," later continued to December 14, 1950, when the court announced it would hear evidence on the degree of the offense. The district attorney called decedent's husband, Ainsworth, to the stand and he testified to the facts relating to the killing. Defendant's counsel was asked by the court if he wished to cross-examine and declined. The court then remarked: "Step down (addressing the witness). I don't think we will need any further." The district attorney then made the same remark, to which the court replied "All right." Defendant's counsel remained silent. The court then stated that it was murder of the first degree. Thereafter when asked by the court whether he had any legal cause to show why sentence

should not be pronounced, defendant stood mute. The death penalty was imposed.

[1-4] There is no question that the evidence is ample to establish murder of the first degree, for it was committed while attempting to commit robbery. Pen.Code, § 189. Defendant's excuse for not offering any evidence on the question of penalty is that the court's remark heretofore quoted foreclosed such offer. That remark may not necessarily be so construed, and the court, as seen, did not only take the evidence on the subject consisting of Ainsworth's testimony, but also the evidence given at the preliminary hearing which went into the details of the crime from the planning of it to the flight. Moreover, defendant stood mute when asked if he had any legal cause to show why sentence should not be pronounced and it was not until then that the death sentence was "pronounced." The rule is stated: "In determining the degree of an offense and the punishment to be imposed, after a plea of guilty, it is the duty of the trial court to consider matters in aggravation as well as in mitigation of the offense. The legal significance of established facts may well constitute an element of which cognizance is taken in the exercise of judicial discretion. A hearing for the determination of the degree of an offense and the punishment therefor is not a trial in the full technical sense, and is not governed by the same strict rules of procedure as a trial. As stated in *People v. Williams*, 14 Cal.2d 532, 536, 95 P.2d 456, 458 (quoting from *People v. Popescue*, 345 Ill. 142, 153, 158, 177 N.E. 739, 77 A.L.R. 1199) it is 'simply a statutory hearing, by which the court examined witnesses to determine whether any facts existed to aggravate or mitigate the punishment,' and 'in considering evidence in aggravation or mitigation of the offense the court may consider many matters "*not admissible on the issue of guilt or innocence*" * * *.' *People v. Gilbert*, 22 Cal.2d 522, 528, 140 P.2d 9, 12. And as said by this court in *People v. Forbes*, 219 Cal. 363, 372, 26 P.2d 466, 470: "He [defendant] cannot now complain that he sat mute with his attorneys at his side while evidence of his wicked crime was given by the several witnesses. That he

offered no evidence, if any there was, which was not included in the ample statements and confessions made by himself and Mrs. Nelson, was a matter wholly within the control of his attorneys, who might have examined each witness at length and, no doubt, could have obtained a continuance, upon the asking, for the production of evidence tending to mitigate the offense, if such existed." And also what was said in *People v. Jackson*, 36 Cal.2d 281, 288, 223 P.2d 236, 241, is applicable: "Finally, there is defendant's argument that the trial court abused its discretion in imposing the death penalty upon him. The contention seems pointless. Admittedly the homicide here involved was committed in the perpetration of a robbery, and as such constituted murder of the first degree. Pen.Code, sec. 189; *People v. Bautista*, 22 Cal.2d 867, 869, 141 P.2d 417; also *People v. Lindley*, 26 Cal.2d 780, 791, 161 P.2d 227; *People v. Isby*, 30 Cal.2d 879, 888, 186 P.2d 405. While defendant urges that the killing was 'accidental * * * precipitated by the unfortunate attempt of the deceased to wrestle the gun from defendant,' and that the 'Probation Officer reported * * * a recommendation of life imprisonment,' these same matters were fully argued at the hearing to determine the degree of murder and the sentence to be imposed therefor. Their evaluation in the light of the entire record was for the trial court's consideration, and it unquestionably appears that the trial court, acting within its discretion and upon a consideration of all the circumstances, fixed the sentence in accordance with the statutory authority vested in it."

[5] Authority was not granted to the court by the amendment to § 1260 of the Penal Code to reduce the penalty from death to life imprisonment in this case for the "amendment [to § 1260] did no more than bring section 1260 into accord with section 1181(6) with respect to reduction of the degree of an offense and make clear that the court may reduce the punishment in lieu of ordering a new trial, when there is error relating to the punishment imposed. The test for determining what action should be taken remains the same: was there prejudicial error in the proceedings? When, as

in this case, the trial court is vested with discretion to determine the punishment, Penal Code § 190, and there has been no error, this court has no power to substitute its judgment for that of the trial court." *People v. Odle*, Cal.Sup., 230 P.2d 345. There was no error in the proceedings in this case.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

SHENK, Justice.

I concur in the judgment but I do not agree with the very definite suggestion in the majority opinion that this court has the power under section 1181(6) or section 1260 of the Penal Code, even in the presence of error, to reduce the punishment and thus commute the sentence from death to life imprisonment or any lesser period. That power is exclusively vested in the Governor of the state by section 1 of article VII of our constitution. My views are more fully expressed in my concurring opinion in *People v. Odle*, Cal.Sup., 230 P.2d 345.



37 Cal.2d 62

PEOPLE v. PERKINS et al.

Cr. 5205.

Supreme Court of California, in Bank.

April 27, 1951.

Charles Davis Perkins, R. C. Carrigan and Elmer Junior Tucker were charged with first degree robbery and defendant Perkins was convicted thereof in the Superior Court, Los Angeles County, Harry J. Bordé, J., and he appealed. The Supreme Court, Schauer, J., held that the legislature, in amending the statute prohibiting probation of one convicted of robbery while armed with a deadly weapon by inserting word "himself" before "armed," is presumed to have known of previous judicial construction of statute as forbidding probation of one acting with a com-

panion armed with deadly weapon in commission of robbery, though not personally armed with such a weapon, and to have intended to change law so as to forbid probation only of one convicted of robbery while himself armed with deadly weapon.

Judgment reversed and cause remanded with direction.

Prior opinion 226 P.2d 64.

1. Criminal law ☞982

The legislature, in amending statute prohibiting probation of one convicted of robbery while armed with deadly weapon by inserting word "himself" before "armed," is presumed to have known of previous judicial construction of statute as forbidding probation of one acting with companion armed with deadly weapon in commission of robbery, though not personally armed with such a weapon, and to have intended to change law so as to forbid probation only of one convicted of robbery while himself armed with deadly weapon. Pen. Code, § 1203.

2. Statutes ☞212.5

The very fact that statute is amended demonstrates intent to change pre-existing law, and presumption must be that legislature intended to change statute in all particulars touching which language thereof was materially changed.

3. Robbery ☞15

The fact that one of three persons charged with robbery while armed with deadly weapon was not himself armed with such a weapon did not make him any the less guilty of first degree robbery. Pen. Code, § 211a.

4. Robbery ☞15

One aiding and abetting others in commission of first degree robbery is guilty thereof, regardless of precise acts committed by him personally. Pen. Code, §§ 31, 211a.

SCHAUER, Justice.

On this appeal from a judgment of conviction of first degree robbery defendant attacks the holding of the trial court that a 1949 amendment of a provision of section 1203 of the Penal Code did not change the meaning of that section. Prior to such amendment the applicable portion of the section required that "probation shall not be granted to any defendant who shall have been convicted of robbery * * * and who at the time of the perpetration of said crime * * * was armed with a deadly weapon * * *" It was settled case law that the section forbade the granting of probation to one who, although not personally armed with a deadly weapon, acted with a companion who was so armed. (*People v. Gillstarr* (1933), 132 Cal.App. 267, 22 P.2d 549; *People v. Lewis* (1934), 140 Cal.App. 475, 477, 35 P.2d 561; see *People v. Stevens* (1939), 32 Cal.App.2d 666, 669, 90 P.2d 595.) The material portion of the 1949 amendment added the word "himself" to the above quoted portion of section 1203, so that it now forbids probation to one convicted of robbery who "was himself armed with a deadly weapon." We have concluded that this amendment was intended to and did change the rule of the above cited cases.

Defendant Perkins and two others were charged with robbery; the information further charged that "at the time of the commission of said offense said defendants were armed with a deadly weapon, to wit, a pistol." Each defendant pleaded guilty, denied being armed, waived jury trial on the issue of being armed, asked for and was granted leave to apply for probation, and stipulated that the court could base its determination of the question whether defendants were armed upon the probation officer's report. This report showed that Perkins did not "himself" have possession of a deadly weapon at the time of the commission of the offense, but that his two co-defendants used a Luger pistol which was passed from one to the other of them. Because of the fact that Perkins' co-defendants used the gun in committing the robbery the trial court found that Perkins

Richard L. Rykoff, Los Angeles, for appellant.

Fred N. Howser and Edmund G. Brown, Attys. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

was guilty of robbery of the first degree and held that he was not eligible to probation.

[1,2] It is presumed that the Legislature knew of the judicial construction of its statute and that by amending the portion of the statute construed it intended to change the law. (Anderson v. I. M. Jameson Corp. (1936), 7 Cal.2d 60, 67, 59 P.2d 962; Prager v. Isreal (1940), 15 Cal.2d 89, 94, 98 P.2d 729; In re Halcomb (1942), 21 Cal.2d 126, 129, 130 P.2d 384; McFadden v. Jordan (1948), 32 Cal.2d 330, 334, 196 P.2d 787; Lundquist v. Lundstrom (1928), 94 Cal.App. 109, 112, 270 P. 696; see also 1 Sutherland Statutory Construction (3d ed.), § 1930.) Ordinarily (and there is nothing to suggest that this is not an ordinary case) the Legislature uses words for some reason and intends them to have some meaning. "The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act." (United States v. Bashaw (8 Cir., 1892), 50 F. 749, 754, quoted with approval in People v. Weitzel (1927) 201 Cal. 116, 118, 255 P. 792, 52 A.L.R. 811, and in Loew's Inc. v. Byram (1938), 11 Cal.2d 746, 750, 82 P.2d 1; see also People v. Valentine (1946), 28 Cal.2d 121, 142, 169 P.2d 1; 23 Cal.Jur., Statutes, §§ 157, 158; 2 Sutherland, op. cit., §§ 4510, 4705.)

Our conclusion is strengthened by reference to the origin and legislative history of the 1949 amendment of section 1203 of the Penal Code. (See 23 Cal.Jur., Statutes, § 148; See also 2 Sutherland, op. cit. §§ 5003, 5010.) The amendment was recommended by a minority of the Special Crime Study Commission. Such minority opposed the majority recommendation that *all* restrictions on probation be abolished, and reported that "The fact that a defendant

knows that he will be sent to a State prison, if he commits one of the more serious crimes and is *personally armed with a deadly weapon at the time*, * * * has a deterrent effect on those who deliberately plan and commit the most serious felonies, *and who are armed and would not hesitate to use a weapon should the occasion demand.*" (Final Report of the Special Crime Study Commission (1949), p. 120; italics defendant's.)

[3,4] It should be noted that, as correctly held by the trial court, the fact that defendant Perkins was not "himself" armed with a "dangerous or deadly weapon" does not make him any the less, in a legal sense, guilty of robbery of the first degree, which is defined by section 211a¹ of the Penal Code. Perkins is guilty of first degree robbery, regardless of the precise acts which he committed personally, because he aided and abetted in its commission (Pen. Code, § 31²). Indeed it was by analogy to this rule, which makes all willful participants in a crime guilty as principals, that it was originally held that a defendant in the situation of Perkins could not have probation (People v. Gillstarr (1923), supra, 132 Cal.App. 267, 269, 22 P.2d 549; People v. Lewis (1934), supra, 140 Cal.App. 475, 477, 35 P.2d 561) and was subject to the minimum sentence required of those armed with a deadly weapon (People v. Stevens (1939), supra, 32 Cal.App.2d 666, 669, 90 P.2d 595).

For the reasons above stated the judgment is reversed and the cause remanded to the trial court for further proceedings not inconsistent with the foregoing opinion and with the specific direction that it consider Perkins' application for probation on its merits.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

1. Penal Code, § 211a: "All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree."

2. Penal Code, § 31: "All persons concerned in the commission of a crime * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, * * * are principals in any crime so committed."

37 Cal.2d 29

GERING v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 21843.

Supreme Court of California, in Bank.
April 27, 1951.

Edward Gering filed a petition against the Superior Court of the State of California in and for the County of Los Angeles, Carl S. Jameson, and others, for writ of mandate to set petitioner's case for trial and render judgment. The Supreme Court, Edmonds, J., held that writ of mandate would issue, since order removing cause from calendar was nonappealable.

Writ issued.

Prior opinion, 224 P.2d 83.

1. Mandamus ⇨4(3)

Where referee in bankruptcy determined that bankrupt's cause of action for conspiracy had not passed to the trustee in bankruptcy, but trial court ordered cause of action removed from calendar until substitution of trustee as plaintiff, writ of mandate requiring trial court to set cause for trial would issue, since order was nonappealable and bankrupt could not prosecute his action to judgment. Bankr. Act, 11 U.S.C.A. § 1 et seq.; Code Civ. Proc., §§ 632, 668, 963.

2. Courts ⇨28

A court has the basic duty to consider and determine on the merits all causes of action properly before it and of which it has jurisdiction.

3. Mandamus ⇨4(1)

Where a proceeding is disposed of by nonappealable order, the court may be compelled by mandate to perform its basic duty to consider and determine the cause of action on its merits.

4. Bankruptcy ⇨280

A debtor cannot object to allowance of a claim prosecuted by a trustee in bankruptcy pursuant to an order of the bankruptcy court.

5. Bankruptcy ⇨390

Where referee in bankruptcy determined that bankrupt's cause of action for conspiracy was not an asset of bankrupt's

estate and that it did not pass to trustee in bankruptcy, defendants in conspiracy action could not demand that trustee in bankruptcy be substituted as plaintiff, since referee's determination was res judicata and defendants could have no reasonable fear of double liability. Bankr. Act, 11 U.S.C.A. § 1 et seq.

Macbeth & Ford, Norman Macbeth and Patrick H. Ford all of Los Angeles, for petitioner.

Zagon, Aaron and Sandler and Marvin Manuel, all of Los Angeles, for respondents.

EDMONDS, Justice.

The superior court has refused to hear and decide a suit brought by Edward Gering to recover damages upon the ground that the cause of action, if any, is an asset which belongs to his creditors. The federal court which adjudicated him bankrupt and administered his estate decided to the contrary. The present proceeding has been brought to require the superior court to set the case for trial and render a judgment.

According to the allegations of the complaint, Gering is entitled to damages as the result of a conspiracy occasioned by the loss of his partnership interest in a business. He asserts that his former partners and their landlord accomplished this by a conspiracy which they successfully carried out.

Shortly after he commenced the action, he was adjudicated a bankrupt. In the bankruptcy proceeding, a referee held that Gering's right of action against his former partners and landlord did not pass to the trustee in bankruptcy and was not an asset of the estate. The basis of this determination was that the complaint stated "a cause of action for damages to an advantageous business relationship and not to an existing property interest which the bankrupt could have disposed of to his advantage. In other words, the alleged wrongful conduct of the defendants * * interfered with the future earning capacity or power of the bankrupt. Such earning capacity or power is not 'property' until it has created earnings or brought them

into existence". The order of the referee became final.

After Gering was discharged and the bankruptcy estate closed, Gering's action came on for trial. The defendants filed a supplementary answer in which they pleaded that he has been adjudicated a bankrupt. They then moved the court to stay all proceedings upon the ground that the asset and cause of action automatically passed to the trustee under the Bankruptcy Act, 11 U.S.C.A. § 1 et seq. Upon the hearing of that motion, the court held, contrary to the order of the federal court, that the asset had passed to the trustee and the cause cannot be heard until the trustee is substituted as plaintiff. All proceedings were stayed and the cause was ordered off calendar.

Thereafter, Gering moved the court to vacate the prior orders and to restore the cause to the calendar. This motion was denied upon the ground that the proper remedy would be by writ of mandate or by action of the federal court.

In support of the petition for a writ of mandate, Gering contends: (1) Mandamus is the proper remedy, and is the only method available to obtain a review of the order of the trial court; no legal remedy is adequate. (2) Because of the exclusive jurisdiction of the federal courts in bankruptcy matters, the decisions and order concerning the present action are binding upon the defendants and the state court and cannot be attacked collaterally. (3) The order of the superior court stays the proceedings upon a condition which cannot be met, namely, the substitution of a trustee in bankruptcy whom the federal court has already decided has no interest in the litigation. (4) Unless it appears that the federal court has directed the trustee to intervene in an action pending in a state court, the defendant may not object to the plaintiff-bankrupt proceeding with the litigation in his own name and upon his own behalf.

Gering presents several reasons in support of his conclusion that mandamus is not only the proper remedy but the only remedy available to review the order of

of the trial court. He points out that the challenged order is not appealable under the provisions of section 963 of the Code of Civil Procedure. He also asserts that the order of the superior court was in no sense a final judgment. It was not entered in the judgment book. Code Civ. Proc. § 668. It does not rest upon findings of fact and conclusions of law, and they were not waived. Code Civ. Proc. § 632. As a final reason, he says that the order does not purport to settle the disputed questions of fact.

The real parties in interest contend that an appeal from the judgment is an adequate remedy. In that appeal, they argue, Gering may seek a review of all "nonappealable intermediate orders such as the one in question".

[1] The superior court has placed Gering in a position in which he cannot prosecute his action, and he has no remedy unless he can obtain relief by way of writ of mandate. In an application to the federal court to reopen the bankruptcy estate for the purpose of administering upon his alleged cause of action against his partners, he would be met by the determination, long since final, that his creditors have no interest in it. Until he complies with this impossible condition, his action will not be set for trial.

[2,3] The respondents argue that the order of the superior court was a proper exercise of its judicial discretion which, however erroneous, may not be reviewed or corrected by mandamus. This statement ignores the basic duty of a court to consider and determine on the merits, all causes of action properly before it and of which it has jurisdiction. The performance of that duty, this court very recently held, "is compellable by mandate. Any other rule would be unjust where the order disposing of the proceeding is nonappealable, because the aggrieved party would have no way of correcting the trial court's error and obtaining a decision on the merits". *Robinson v. Superior Court*, 35 Cal.2d 379, 386, 218 P.2d 10, 18. General statements, such as the respondents' argument that Gering "* * * seeks to

convert his application for this extraordinary writ into a writ of error * * *", were expressly disapproved as being "too broad" and "long ago characterized as inaccurate and misleading". Ibid.

The respondents make no claim that the subject matter of the alleged cause of action is not within the jurisdiction of the superior court. They contend that because of the asserted defect in the party plaintiff, the action is not properly before the court. In a mandate proceeding, it is argued, the court has no authority to determine the ownership of any right to damages against Gering's partners and to measure the correctness of the challenged order by that determination. Upon that reasoning, Gering has no adequate means of obtaining a decision upon the merits of his case. Such a position clearly is contrary to the views expressed in the Robinson case.

Obviously, the defendants' only legitimate interest in the identity of the prosecutor of the action is to make certain that the claim against them is not enforced by Gering and later by the trustee or Gering's creditors. If the defendants are beyond any reasonable danger of double liability, they may not attack the order of the bankruptcy court declaring that the cause of action in question did not pass to the trustee and is not a part of the bankrupt's estate.

[4] In speaking of actions prosecuted by a trustee in bankruptcy, pursuant to an order of the bankruptcy court, it has been said that a debtor has no standing to object to the allowance of the claim. "A man who owes money cannot object to the debt being assigned. All he has a right to ask is that proper proof of the assignment be shown him before he is asked to pay; the rest is none of his business. That being so, the debtor cannot object to a general transfer of all his creditors' assets, although the assignment may include the particular claim on which he happens to be liable. It is not his affair whether the person to whom he owes the money made the assignment voluntarily or by operation of a

statute. It is enough for him that the assignment was made, and that the trustee who acts under the assignment now demands payment." Glen on Liquidation [1935], § 291, pp. 423, 424.

Conversely, it is enough for the defendants in the present case that by a final order the cause of action against them was not assigned but determined to be the property of the bankrupt. In *Rand v. Iowa Central R. Co.*, 186 N.Y. 58, 61, 78 N.E. 574, 575, it was argued that "* * * the defendant by payment of a judgment herein to the plaintiff would not be protected if it should thereafter be sued upon the same cause of action by any trustee of the bankrupt estate who might hereafter be appointed." Rejecting this contention, the court replied: "It may very well be that any sum recovered by the plaintiff in the present action will be held by him as trustee for his creditors; but this is a matter which does not concern the defendant so long as the plaintiff holds the legal title to the claim and the defendant is secured against any possibility of being compelled to pay it twice." See also *Johnson v. Collier*, 222 U.S. 538, 540, 32 S.Ct. 104, 56 L.Ed. 306; *Southern Express Co. v. Connor*, 49 Ga. 415, 417.

[5] In the present case, assurance that the defendants are being requested to pay the judgment, if one be rendered, to the proper party is found in the order of the bankruptcy court. The determination that legal title to the cause of action in question is the property of Gering and did not pass to the bankruptcy estate is a final determination which is admittedly *res judicata* as to Gering, the trustee, and the creditors. Under these circumstances, the defendants can have no reasonable fear of double liability, and they have no legal standing to demand that the trustee in bankruptcy be substituted as plaintiff in the present action.

Let the writ issue as prayed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.

PEOPLE v. RYAN.

Cr. 749.

District Court of Appeal, Fourth District,
California.

April 30, 1951.

Rehearing Denied May 11, 1951.

Hearing Denied May 28, 1951.

James O. Ryan was convicted in the Superior Court, San Diego County, Dean Sherry, J., of attempted grand theft and he appealed. The District Court of Appeal, Barnard, P. J., held that evidence was sufficient to sustain finding that representations made by defendant relating to medical properties of a salve that defendant used to treat a cancer patient were false, known by defendant to be false, and were wilfully made by defendant for purpose of obtaining money from patient.

Affirmed.

1. False pretenses ☞49(4)

In prosecution for attempted grand theft, evidence was sufficient to support finding that defendant made representations relating to medical properties of a salve, which defendant used in treatment of cancer patient, for purpose of defrauding, with knowledge of falsity of representations or under circumstances making him chargeable with such knowledge.

2. False pretenses ☞49(2)

In prosecution for attempted grand theft, evidence was sufficient to support implied finding that misrepresentations made by defendant respecting healing qualities and properties of salve to be used to treat internal cancer, were wilfully made for purpose of obtaining money from cancer victim.

3. Criminal law ☞739(1)

Defense of entrapment is one to be presented as question of fact.

4. Criminal law ☞569

Evidence that nurse, pursuant to arrangement with agents of state board of health and district attorney's office, called defendant on phone and asked him to come and see her father who was suffering from cancer, that after defendant appeared, he was introduced to a patient posing as

nurse's father and to an inspector for food and drug bureau posing as her brother-in-law and neither man was in fact related to nurse, and that following defendant's contracting to treat patient and acceptance of down payment, defendant was arrested, and charged with attempted grand theft, was insufficient to establish an entrapment.

5. Criminal law ☞1028

Where defense of entrapment was not raised in trial court, nor argued to jury, nor presented in arguing for new trial, such defense could not be raised on appeal.

Henry W. Hache, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with attempted grand theft, and found guilty by a jury. His application for probation was granted but he appeals from an order denying his motion for a new trial.

The defendant is a chiropractor, and also a graduate laboratory technician. Pursuant to an arrangement with agents of the State Board of Health and the district attorney's office, a nurse called the defendant on the phone and asked him to come to see her father who was suffering from a cancer and who had been told that he had only five or six months to live. The defendant asked where the cancer was located and was told it was in the stomach. The next day the defendant came to the home of a Mr. Read, who had the cancer, and was introduced to Mr. Read as the nurse's father and to an inspector for the Food and Drug Bureau as her brother-in-law. Neither man was, in fact, related to the nurse. An investigator for the district attorney's office, who was also in the house, took down the conversations in shorthand and on a wire recorder.

The defendant examined Mr. Read's eyes, using an instrument connected to an

electric outlet, but made no other examination. He announced that Mr. Read had a cancer in the stomach which had spread into the kidneys or liver, and that he knew this because he saw it in the patient's eyes. He repeatedly and positively stated that he could cure this cancer. He told them that his treatment consisted of a salve to be applied externally; that the treatment was not recognized by the American Medical Association; that this salve brought internal cancer to the surface; that the salve would be applied over the patient's abdomen and applied daily for a period of several months; that within a few days the salve would produce a running sore and would cause great pain; that the patient could either bear the pain or obtain opiates, if he was able to do so; that the running sore would create a foul odor, which was the cancer coming out; that Mr. Read would have 40 or 50 small holes in his stomach, through which the cancer would exude; that the exudation would gradually lessen; and that the salve should be applied as long as there was "one tiny hole". He told them that the salve for internal cancer was different from the one he used for external cancer. He showed them a jar of the salve he proposed to use and told them he made it from a secret formula which had been handed down to him by his grandfather, who had been a doctor in Texas; that the salve contained herbs, olive oil, wax and oil of croton; that it was impossible to analyze it chemically; that it contained three elements which were very necessary, and the best chemist in the world could not tell what they were; that the ingredients were very expensive; and that if the salve was applied as he had described the cancer would be drawn out and the patient would be cured. He told them that he had successfully treated internal cancers on other patients, and claimed successes in treating both external and internal cancers. He left a small jar of the salve which he said was enough for a week's treatment.

The question of his fee was discussed. The defendant said that if he made daily visits to change dressings the cost for the

entire treatment would be \$1000, but if someone else changed the dressings and he was required to come out but once a week the cost would be \$500. The defendant at first suggested \$200 down but, after a discussion, it was agreed that \$300 would be paid down and the balance in sixty days. The \$300 was paid, for which the defendant signed a receipt. It was arranged that the treatments were to start a couple of days later.

The defendant was arrested shortly after he left the house. A jar of this salve was taken from his bag. This jar and the small jar which the defendant had left at the house were analyzed by a chemist for the State Department of Public Health, who found that the substance consisted of lead oleate, rosin, sodium carbonate and some skin irritant or blistering substance. No evidence of any herb material was found. The defendant told the officers that this salve contained croton oil but refused to divulge its formula. He also said that he made the salve himself and put herbs into it; that the salve killed cancer regardless of whether it was internal or external cancer; that he inherited the formula from his grandfather who had practiced medicine in Texas; that the salve caused an eruption of the skin, which was part of the cure; and that in treating his previous patients he accepted without question the diagnosis of cancer which someone else had made.

Three licensed physicians and surgeons testified. An eye doctor testified that the presence of a cancerous growth in the liver, stomach or intestines could not be detected by any examination of the patient's eyes. The doctors testified that the salve, containing lead oleate and croton oil, could not penetrate through and reach an internal cancer; that croton oil is a severe irritant which will break the skin where it is applied; that lead oleate, if frequently applied, would cause lead poisoning; that this salve would have no beneficial effect in the treatment of cancer; and that before it could possibly reach the cancerous area it would destroy the live tissues in its path. In brief, the doctors testified that

the use of this salve could have no beneficial effects in the treatment of an internal cancer, and that its continued use would result in very great harm to the patient.

The defendant testified that he made this salve by taking "Griswold's Salve" and adding croton oil and "Soap Lake Salts"; that among the larger portions contained in the salve was croton oil with "a greater proportion of oleate of lead"; that he had never had the salve analyzed; that the first time he used the salve he did not know what was in it, "but after I knew what it was"; that he first heard about the salve from one Galloway and talked with Mr. Barkus, a friend of Galloway's; that he had a knowledge of cancer and had studied forms of diagnosis; and that he had successfully treated twelve or fifteen patients for cancer. There was evidence that he had treated no patient for internal cancer. He brought in several patients whom he said he had successfully treated. Portions of the tissue that had come from some of these patients, whom he had treated for external cancer, were brought into court. An analysis of these tissues was made and it was found that they contained no cancer cells, but only fat cells and pus cells resulting from an infection.

Evidence was received, without objection, concerning a patient who was suffering from an internal cancer and who was treated with this same salve six months before the defendant was arrested. The patient died shortly after the treatment and there was evidence that the salve caused her great injury and hastened her death. This salve had been obtained from Mr. Barkus, Mr. Galloway's friend, and the defendant had talked to them both about this cancer cure. The defendant testified that he had told people that he inherited the formula for this salve from his grandfather; that this was not true; and that he told this story because, in obtaining the formula from Galloway, he had agreed not to reveal what was in it.

The only point raised is that the court erred in denying defendant's motion for a new trial since the evidence is insufficient

to prove that he made any false representations, for the purpose of defrauding, with knowledge of their falsity or under circumstances making him chargeable with such knowledge. It is argued that he honestly told these people that his method of treatment would not be approved by medical doctors; that there is no proof that he would have failed to cure Mr. Read had he been permitted to try; and that there is no evidence indicating that he had any reason to believe that his treatment would not cure such an internal cancer.

[1] There is ample and compelling evidence that a number of the representations admittedly made by the defendant were false. Among these are the representations that his salve was composed of herbs; that his salve could not be analyzed chemically; that he inherited the formula for the salve from his grandfather who had been a medical doctor; that by looking at Mr. Read's eyes he could and did determine that Mr. Read had cancer of the stomach and intestines; that he had treated patients suffering from internal cancers; that he could cure internal cancer by applying his salve to the skin surface of the abdomen; and that the salve, so placed, would bring internal cancer to the surface.

The defendant contends that there is no evidence to indicate that he knew these representations were false because medical doctors admit that they know very little about cancer. It positively appears from the evidence that he did know that at least three of these representations were false. The evidence, with the reasonable inferences therefrom, is amply sufficient to show that he should have known that the rest of them were false. The representations that this salve was composed of herbs, that it could not be analyzed chemically, and that he inherited the formula from his grandfather who had been a medical doctor, were well designed to create the belief in the average layman that his salve was an ancient, secret and wonder remedy, and were apparently used for that purpose since no other reasonable purpose appears.

The appellant was not only a licensed chiropractor but was a laboratory technician as well. He admittedly knew the ingredients of the salve he used, and he either knew or should have known their action and effect if frequently applied to the human body. He testified that he never questioned a diagnosis made by someone else, and that if a patient had been given up as incurable by the medical profession he had no hesitancy in prescribing his treatment. He argues that he was actuated solely by a desire to aid suffering humanity, in cases where medical doctors were unable to cure the patient. This is hardly consistent with the fee charged or with the collection of a large part of the fee in advance, when treatments were admittedly expected to extend over many months.

[2] Proof of knowledge on the part of the defendant that some of the representations he made were false must necessarily rest on evidence with respect to the surrounding circumstances. The evidence here is sufficient to show that the defendant should have known that these representations were false, and to indicate that he either knew them to be false or made them with a reckless disregard for their truth or falsity. The evidence supports the implied finding that the misrepresentations were wilfully made for the purpose of obtaining money from an unwary victim who would naturally be in a state of desperation.

[3,4] In his opening brief the defendant, in setting forth a statement of the background of the case, makes the statement: "The story of Dr. Ryan's involvement and entrapment in this case is comparable only to those related by the victims of the Russian Secret Police." The matter of entrapment is not amplified and no reference is made to anything in the record showing that the point was raised in the trial court. The record does show that it was not argued to the jury, and that it was not presented in arguing for a new trial. The defense of entrapment is one to be presented as a question of fact. *People v. Bradford*, 84 Cal.App.

707, 258 P. 660; *People v. Lee*, 9 Cal.App. 2d 99, 48 P.2d 1003; *People v. Grossman*, 28 Cal.App.2d 193, 82 P.2d 76. Some of the elements of entrapment, under the authorities, appear to be absent here. On the record before us it cannot be said, as a matter of law, that an entrapment here appears. *People v. Lagomarsino*, 97 Cal. App.2d 92, 217 P.2d 124. Under the circumstances here appearing this point cannot be raised on appeal for the first time.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



103 Cal.App.2d 892

DEAN v. SUPERIOR COURT et al.

Civ. 14810.

District Court of Appeal, First District,
Division 2, California.

April 30, 1951.

Jane Dean filed a petition against the Superior Court in and for the City and County of San Francisco, California, and Clarence D. Wrye and Sonia Wrye, real parties in interest in an action brought by petitioner for injuries allegedly resulting when petitioner was struck by an automobile driven by Clarence D. Wrye, for writ of mandamus directing the respondent court to set aside an order discharging an order to show cause. The District Court of Appeal, Dooling, J., held that the statutory privilege of Clarence D. Wrye not to have his wife testify against him did not entitle him to have plaintiff precluded from asking his wife by deposition whether she was a defendant in the action, and whether she was served with summons and complaint, and what her name was and where she resided, and whether she owned the automobile which allegedly struck plaintiff.

Order in accordance with opinion.

1. Depositions ~~6~~59

In action for injuries allegedly resulting from being struck by automobile driven

by defendant, privilege of defendant not to have defendant's wife testify against defendant did not entitle defendant to have plaintiff precluded from asking defendant's wife by deposition whether she was a defendant in the action, whether she was served with summons and complaint, what her name was and where she resided, and whether she owned automobile which allegedly struck plaintiff, since defendant's liability depended on whether defendant's negligence proximately caused injury to plaintiff, and whether defendant's wife owned the automobile had no relation to defendant's liability. Code Civ.Proc. § 1881, subd. 1.

2. Mandamus ⇨40

Where superior court on certification from notary erroneously held in effect that defendant in action for injuries resulting from being struck by automobile driven by defendant was entitled to preclude plaintiff from asking defendant's wife specified questions on deposition, in view of privilege of defendant not to have his wife testify against him, mandamus was proper remedy to enforce right to have such questions answered on deposition. Vehicle Code, § 402; Code Civ.Proc. § 1881, subd. 1.

Delany, Jarvis, Fishgold & Werchick,
San Francisco, for petitioner.

Healy & Walcom, San Francisco, for
Real Parties in Interest.

DOOLING, Justice.

Petitioner commenced an action for personal injuries alleged to have been sustained when struck by an automobile driven by one Clarence Wrye. Clarence Wrye's wife, Sonia, was joined and served as First Doe. The liability alleged against First Doe was the derivative one under Vehicle Code, section 402: that she was the owner of the vehicle and that Clarence Wrye was driving it with her permission. Petitioner sought to take the deposition of Sonia Wrye and her counsel, who also represents her husband, objected on the ground that she could not testify against

her husband without his consent. Code Civ.Proc. sec. 1881, subd. 1. The specific questions asked her were: Are you one of the defendants in this action? Were you served with summons and complaint? What is your full name? Where do you live? Are you the owner of an automobile (describing it)? Objection was made to all of these questions on the ground stated and on instruction of her counsel Mrs. Wrye refused to answer them.

The matter was certified to the Superior Court by the notary and on December 9, 1950, the Superior Court made an order "discharging said order to show cause to Sonia Wrye re-answering questions at the taking of her deposition." Petitioner seeks relief from us by mandamus.

[1] It is clear that answers to none of the specific questions asked of the wife would be evidence against her husband. The husband's liability depends on whether or not his negligence proximately caused injury to petitioner. The wife's ownership of the car has no relation to the husband's liability in any respect. The privilege of the husband not to have his wife "be examined * * * for or against her husband" was simply not involved.

[2] Mandamus is the proper remedy to enforce the right to have these questions answered on deposition. McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 159 P.2d 944.

Counsel attempt to present a broader question, whether under the circumstances the privilege has been waived. Since no question affecting in any way the husband's liability was asked, and therefore none in which the privilege may properly be said to be involved, no foundation for presenting this question was laid.

Let the peremptory writ of mandamus issue directing the respondent court to set aside its order of December 9, 1950 and to make the necessary orders to compel Sonia Wrye to answer the specific questions asked her as certified to the court by the notary.

NOURSE, P. J., and GOODELL, J.,
concur.

108 Cal.App.2d 840

**PARGA v. PACIFIC ELECTRIC
RY. CO. et al.
Civ. 17844.**

District Court of Appeal, Second District,
Division 3, California.

April 27, 1951.

Hearing Denied June 25, 1951.

Action by Charles Parga, as administrator of the estate of Hilarion Parga, deceased, against Pacific Electric Railway Company, a corporation, and Jose Camarena, under Federal Employers' Liability Act for damages to adult children of decedent. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., directed a verdict for defendants, and plaintiff appealed. The District Court of Appeal, Bartlett, Justice pro tem., held that in absence of evidence indicating life expectancy of decedent and that children had reasonable expectation of any pecuniary benefit as result of continuation of such life, there was no basis in evidence for award of damages to adult children of decedent.

Judgment affirmed.

1. Master and servant ☞85, 228(1)

The Federal Employers' Liability Act is not compensation statute but requires proof that defendant was negligent before liability will attach for injury to or death of employee and where negligence of employee is sole proximate cause of accident resulting in death, there is no liability on part of employer. 45 U.S.C.A. § 51 et seq.

2. Appeal and error ☞927(7)

On appeal from judgment entered on directed verdict for defendant, court in considering record will resolve every conflict in favor of plaintiff, consider every inference which can reasonably be drawn and every presumption which can fairly be deemed to arise in support of plaintiff and accept as true all evidence adduced, direct and indirect, which tends to support plaintiff's case.

3. Master and servant ☞265(14)

Where administrator of estate of employee killed when struck by train while working as section hand on defendant's railroad sought to recover, under Federal Employers' Liability Act damages sustained

by adult children of decedent, although there were eye witnesses to accident there was a presumption, which was species of evidence, that deceased was using ordinary care for his safety at time and place of the accident. 45 U.S.C.A. § 51 et seq.

4. Master and servant ☞284(4), 286(43)

In action under Federal Employers' Liability Act by administrator of estate of employee killed when struck by train while working as section hand on defendant's railroad for damages to adult children of decedent, wherein there was evidence that foreman of section crew had warned decedent of approach of train, whether defendant's foreman had used reasonable care in warning deceased of approaching train under circumstances and whether evidence was sufficient to overcome presumption that decedent was using ordinary care for his own safety at time and place of accident were questions for jury. 45 U.S.C.A. § 51 et seq.

5. Death ☞64

In action under Federal Employers' Liability Act by administrator of estate of employee killed while working as section hand on defendant's railroad for damages to adult children of decedent, evidence as to expenses of funeral of decedent was properly excluded. 45 U.S.C.A. § 51 et seq.

6. Death ☞103(4)

Where administrator of estate of employee killed when hit by train while he was working as section hand on defendant's railroad sought damages under Federal Employers' Liability Act on behalf of adult children of decedent, and there was no evidence of life expectancy of decedent nor evidence indicating that children had reasonable expectation of any pecuniary benefit as result of continuation of such life, directed verdict for defendant was proper, since there was no basis in evidence for computation of damages other than speculation and surmise. 45 U.S.C.A. § 51 et seq.

Head, Wellington & Jacobs and Winthrop O. Gordon, all of Santa Ana, for appellants.

C. W. Cornell, O. O. Collins, and John R. Allport, all of Los Angeles, for respondents.

BARTLETT, Justice pro tem.

Charles Parga, as administrator of the estate of Hilarion Parga, deceased, brought this action against the respondent under the provisions of The Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., to recover damages sustained by the children of Hilarion Parga by reason of an accident alleged to have been caused by the negligence of the respondent, as a result of which Hilarion Parga died. At the time he received the injuries in this accident, he was an employee of respondent and engaged in work for it. At the conclusion of the case, the court directed a verdict for the respondent, Pacific Electric Railway Company.

Appellant contends that the case should be reversed for two reasons: (1) that there was evidence from which the jury could have held that there was negligence on the part of the respondent which was the proximate cause of injuries from which Hilarion Parga died, and (2) that there was sufficient proof of damages to his children because of his death to entitle appellant to have the question of the amount of damage submitted to the jury.

Hilarion Parga went to work for the Pacific Electric Railway Company on February 14, 1944. On August 1, 1944, the day of the accident, he was working as a section hand on the tracks of the company between 75th Street and Florence Avenue in Los Angeles County. At the place where he was working there were four parallel sets of tracks. Facing toward Long Beach, the two sets of tracks to the right carried trains out-bound or toward Long Beach and the two to the left in-bound or toward Los Angeles. The tracks and the distance between them were all of standard width. Immediately prior to the accident the track crew was working on the inside pair of the out-bound tracks and deceased and Andreas Salgado, who was working with him, were standing just east of the easterly rail, putting dirt and gravel underneath the ties. The foreman in charge of the job, Jose

Camarena, was charged with the duty, among other things, of watching for trains and warning the men working under him of their approach. These men were to keep on working until such warning was received and follow the orders of Mr. Camarena. At the time of this accident two trains were operating on the out-bound tracks and one on the in-bound tracks, which was the train that struck the deceased. Mr. Camarena testified he saw two trains traveling on the out-bound tracks almost abreast of each other. Later on in answer to the question " * * * when you first saw the two cars coming, they were right on top of you?" He answered: "That is right, about 3 to 400 feet away." The first thing that had attracted his attention to these two cars coming on the out-bound tracks was when someone hollered. At this time Hilarion Parga was 150 feet away from Mr. Camarena and when Mr. Camarena saw the two cars he whistled and shouted "Watch out for the car." 5 or 10 seconds later he saw the in-bound train. He testified: "When I motioned for them to get away from the out-bound trains that was going at the same time, then glanced back and saw the other train coming, I motioned to Hilarion to get away from that track and get in the middle of the two tracks.

"Q. Get in the middle of the four tracks? A. Three tracks, between two out-bound and in-bound.

"Q. You just motioned him? A. That is right.

"Q. You were about 150 feet from him at that time? A. That is right.

"Q. Then what did you see him do? A. At that time when I motioned him to get over, instead of taking my warning, he kind of seemed to get excited and stepped backwards and at the time the car was coming and he got hit."

[1] We quite agree with respondent that the Federal Employers' Liability Act is not a compensation statute but requires proof that defendant was negligent before liability will attach for injury to or the death of an employee; also that where the negligence of the deceased is the sole prox-

mate cause of the accident causing his death, then there is no liability on the part of the employer. Respondent claims that is the situation here.

[2] Respondent concedes that the following statement of law which appears in appellant's brief is correct: "Because this is an appeal from a judgment entered upon the court's order directing a verdict in favor of the defendant and against the plaintiff, in considering this record the court will resolve every conflict in favor of plaintiff, consider every inference which can reasonably be drawn and every presumption which can fairly be deemed to arise in support of plaintiff and accept as true all evidence adduced, direct and indirect, which tends to support plaintiff's case. *Lashley v. Koerver* [*Koerber*], 26 Cal.2d 83 [156 P.2d 441]; *Anthony v. Hobbie*, 25 Cal.2d 814, page 817 [155 P.2d 826]."

[3, 4] Although there were eye witnesses to the accident it is presumed that deceased used ordinary care for his safety at the time and place of the accident and this presumption was in itself a species of evidence. *Broun v. Blair*, 26 Cal.App.2d 613, 80 P.2d 95. We have not attempted to recite all of the evidence in the record but that which we have related is sufficient to show that it would be for the jury to determine whether the evidence was sufficient to overcome this presumption and also whether or not the defendant used reasonable care in warning deceased of approaching trains under the circumstances which we have related. This brings us to appellant's next contention that there was sufficient proof of damages to have the question of the amount of damage submitted to the jury. The trial judge in granting the motion for a directed verdict stated, in effect, that he would be inclined to deny the motion if it were not for the state of the evidence concerning damages.

[5] The allegation of the complaint concerning damages was " * * * there was incurred on account of the said deceased's funeral expenses in the amount of Six Hundred Twenty-five Dollars (\$625.00); and as a further direct and proximate

result of the said negligence of said defendants, plaintiff and said heirs at law of the deceased have been damaged in the sum of the amount of said funeral expenses and the further sum of Twenty-five Thousand Dollars (\$25,000.00)." The appellant offered evidence as to the funeral expenses of the deceased. An objection to the introduction of this evidence was correctly sustained. *Heffner v. Pennsylvania R. Co.*, 2 Cir., 81 F.2d 28.

The children, in whose behalf this action was brought, were six in number. The eldest was Ynez P. Lopez. She was 52 years old and had been supported by her husband for many years. Marguerita Edquevel was 49 years old, married and supported by her husband. The sons, four in number, range in age from Louis, 44 years of age, to Charles, the youngest, who was 35. Each of these sons is married and had supported himself and family for years. Hilarion Parga owned a piece of land at Santa Ana on which were three buildings. Henry Parga, as he had the largest family, lived in the largest house. In fact, he bought the house from the estate after his father's death. Appellant, in his brief, states that Henry paid no rent for this house but there was no such evidence in the record or any testimony from which such a state of affairs could be inferred. Henry was not even called as a witness and appellant, who did testify, gave no such evidence. Back of this house were two houses in one of which resided Jose Cortez and in the other Hilarion Parga and his son Louis. Louis, when asked if he paid his father any rent, replied, "Indirectly". That answer was elaborated on later by testimony that he and his father shared all of their household expenses but he did not testify that he profited in any way by these arrangements nor did he give any testimony from which any such inference could be drawn. Charles Parga testified that before Hilarion, his father, went to work for the Pacific Electric Railway Company, they worked together on a farm the witness was operating and that his father said that after he got through working for the Pacific Electric he would return to the farm work. There

was no testimony as to any benefit the witness received from this arrangement or that his father had any idea of quitting his work for the defendant company. There was no definite testimony that the deceased gave any money at any time throughout the years to any of his children. The nearest to it was the testimony of Charles Parga, that while his father never gave him any money he, Charles, did borrow some money from his father on one occasion in 1942 but had not paid it back. There is no testimony as to how old Hilarion Parga was and consequently none as to his life expectancy. He worked for the Pacific Electric Railway Company from February 14th to August 1st, a period of 5½ months but gave none of his earnings to any of his children nor is there any evidence as to how much he earned then or as to what he had earned at any period of his life.

[6] The foregoing constitutes all of the evidence before the court at the time it refused to submit the question of damages to the jury. The appellant states: "There are many cases on comparable facts where awards of substantial amounts were sustained and a few of those cases are cited herein below * * *." We have examined those cases with care. The first one referred to is *In re Barker's Estate*, 134 Misc. 833, 237 N.Y.S. 212, which was a decision of the Surrogate Court of New York approving a settlement of a claim on which no action had been brought and all the court was concerned with in that case was as to how the money should be divided among the various heirs. In *Lundeen v. Great Northern Ry. Co.*, 128 Minn. 332, 150 N.W. 1088, the testimony before the court disclosed that the young man who had died was 23 years of age; that his parents were in need; that for the past 4 years he had given aid to his parents and an award of \$2,000 damages was upheld. The case of *Dow v. Carnegie-Illinois Steel Corporation*, 3 Cir., 165 F.2d 777, is of no aid whatever as that was a case wherein the judgment was in favor of the defendant and the court reversed the case because of the admission of certain improper evidence. The questions before us in this appeal were

not even discussed. *Sabine Towing Co. v. Brennan*, 5 Cir., 85 F.2d 478, was an appeal in admiralty from a judgment awarding damages for the death of members of the crew of a tug which had foundered in the Gulf of Mexico. In each of the claims which were made in that case the evidence was complete, direct and certain as to the age of the member of the crew, as to what the member of the crew had earned and as to the actual money which each month he had turned over to his beneficiaries. There is a complete lack of this type of evidence in the case before us. *Director General of Railroads v. Chapman's Adm'x.*, 195 Ky. 364, 242 S.W. 365, was an action brought by the administratrix on behalf of the widow and 5 minor children aged from 2 to 11. The age of the deceased was in evidence, the amount that he earned and the fact that his 5 children were entirely dependent upon him for support. *Haidacker v. Central R. Co. of New Jersey*, 52 F. Supp. 713, which was the last case appellant cites and from which he quotes, was a decision of the United States District Court on a petition for approval of a compromise settlement offered by the defendants in an action brought under the Federal Employers' Liability Act. The court had before it the wages of the deceased at the time of his death, the fact that his life expectancy was 27.45 years and also that a minor child would have an expectancy of support up until the time he attained his majority. The other child was an adult. The adult waived any claim. In commenting on this the court said, 52 F.Supp. at pages 715: "There are situations where a child who has attained the age of twenty-one years would be entitled to damages if he had in fact suffered a pecuniary loss. Such an instance would be the case of one who was not employed and who was living at home and supported by the deceased, or who was living away from home and was ill or crippled and receiving support from the deceased * * *." It will be seen from this brief statement regarding this case that the facts are in no way comparable to those we have here and no case has been called to our attention where damages in any amount at all have been allowed

in situations like this one. In cases of the type we are considering the rule is that no damages should be allowed. In *Williams v. Southern Pac. Co.*, 54 Cal.App. 571, 202 P. 356, the father of one, Mrs. Peabody, died. In that case, as in the one we have here, there was no allegation either that Mrs. Peabody was dependent upon the deceased or that she had any grounds for expecting any pecuniary benefits from a continuance of her father's life. She was an only child but was 21 years of age and married at the time of her father's death and there was no evidence that after she was married she received any assistance from her father. The court said 54 Cal.App. at pages 581, 582, 202 P. at page 360: "Appellant contends that under the facts shown the case of *Gulf, C. & St. F. R. Co. v. McGinnis*, 228 U.S. 173, 33 S.Ct. 426, 57 L.Ed. 785, [see also, *Rose's U. S. Notes*], is conclusive against a recovery in behalf of Mrs. Peabody. In that case the administratrix sued under the federal act for the benefit of herself and four children, one of whom was an adult married daughter. Judgment was given for the sum of \$15,000, one-half of which was apportioned equally to the four children. The Court of Civil Appeals affirmed the judgment. [*Gulf, C. & S. F. Ry. Co. v. McGinnis*, *Tex.Civ.App.*] 147 S.W. 1188. The Supreme Court of the United States reversed the judgment on the sole ground that, under the pleadings and proofs, the married daughter was not entitled to recover. The court said:

"There was neither allegation nor evidence that Mrs. Saunders was in any way dependent upon the decedent, nor that she had any reasonable expectation of any pecuniary benefit as a result of a continuance of his life. * * * In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employee for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given."

"See, also, *Garrett v. Louisville etc. R. Co.*, 235 U.S. [308] 312, 35 S.Ct. 32, 59 L.Ed. 242. [See, also, *Rose's U. S. Notes*].

"There is no distinction in principle between the *McGinnis* Case and this. In neither case was there any evidence from which to infer that pecuniary benefits would have been received except the bare fact of the relationship of father and daughter. In the *McGinnis* Case it was held that the issue raised was a federal question and that case is controlling here where the identical question is presented." In addition to the cited case and the United States Supreme Court decisions referred to therein, other cases definitely holding that no adult child can recover damages in the absence of evidence showing either dependency or reasonable grounds for expecting some pecuniary benefit from the continuance of the decedent's life are *Thompson v. Camp*, 6 Cir., 163 F.2d 396; *Nashville, C. & St. L. Ry. v. Hines*, 20 Tenn.App. 1, 94 S.W.2d 397; *Hines v. Walker*, *Tex.Civ. App.*, 225 S.W. 837. In *Gulf, C. & St. F. R. Co. v. McGinnis*, 228 U.S. 173, 33 S.Ct. 426, 57 L.Ed. 785, the fact that the trial court refused to instruct the jury that they could not find any damage for an adult married daughter was held to be grounds for reversal. In the case before us we are asked to reverse the trial court in a situation where if there had been a verdict for the plaintiff, there would have been no basis in the evidence whatever for the amount of damage which would necessarily have been based purely upon guess, speculation and surmise. There was no evidence before the court of dependency or of any reasonable expectation of pecuniary benefit to any of these children from a continuance of the life of Hilarion Parga or, viewing the testimony in its most favorable light, any testimony from which any reasonable inference could be drawn of such an expectancy.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

BROCKMAN v. LANE et ux.

Civ. 17866.

District Court of Appeal, Second District,
Division 3, California.

April 26, 1951.

Rehearing Denied May 15, 1951.

Hearing Denied June 18, 1951.

Stewart L. (Les) Brockman sued E. C. Lane and wife for breach of an alleged oral partnership agreement, fraud in inducing plaintiff to render services for defendants, accounting, and a declaration of plaintiff's rights. Defendants filed a cross-complaint against plaintiff and another for conspiracy to defraud. From a judgment of the Superior Court of Los Angeles County, Ben Rosenthal, Judge Assigned, for defendants, plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the oral agreement did not create a partnership, but constituted an employment of plaintiff to render personal services and was invalid under the statute of frauds, though partly performed.

Judgment affirmed.

1. Master and servant ☞1**Partnership ☞20**

An oral agreement, terms of which were substantially stated in unsigned writing providing for employment of one of parties by other parties to supervise cultivation of their land and equal division of net profits between landowners and employed party, did not create partnership, but constituted employment to render personal services.

2. Frauds, statute of ☞44(3)

An oral agreement for employment of one of parties for at least five years to supervise cultivation of other parties' land in Arizona was invalid under statute of frauds, whether made in California or Arizona, and part performance thereof did not cure its invalidity. Civ.Code, § 1624, subd. 1; A.C.A.1939, § 58-101, subd. 5.

3. Trial ☞387(1)

The Superior Court was under no duty to consider or decide issues not tendered for decision by parties to action.

Clyde Thomas, Los Angeles, for appellant.

J. M. Jessen and Reynolds, Painter & Cherniss, all of Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiff Stewart L. (Les) Brockman appeals from an adverse judgment in this action against E. C. Lane and wife for damages for a breach of an alleged oral agreement of partnership. It was alleged in the complaint that defendants entered into a partnership with plaintiff which was to continue for at least five years; defendants were to furnish capital to acquire, develop and farm certain unspecified land in Arizona; plaintiff would manage the development and farming of the land, would be allowed a drawing account of \$300 per month, all capital advanced by defendants would be repaid to them from earnings and the remaining profits would be equally divided between plaintiff and defendants, plaintiff being charged with the amount of his withdrawals; full and complete terms of the contract were agreed upon; it was determined to put the agreement in writing; plaintiff prepared and submitted an agreement providing that defendants would advance up to \$102,000; defendants suggested that the agreement be changed so as to obligate them to advance only the sums needed as the operations progressed; defendants agreed to have the contract rewritten, which they failed to do and the agreement was not signed. Plaintiff performed his obligations under the agreement for more than one year; crops of great value were grown on the land, resulting in a large profit, but when harvest time came plaintiff was ejected from the land, defendants entered into possession, harvested the crops, retained the proceeds and denied and still deny that plaintiff has any interest in the property or profits of the alleged partnership. In a second cause of action it was alleged that defendants fraudulently induced plaintiff to render his services and had no intention of entering into a written agreement or allowing plaintiff to receive any profits or gains from his activities, all to his damage in the sum of \$250,000.

The complaint prayed for an accounting, damages, a declaration of plaintiff's rights and incidental relief. By their answer defendants denied the existence of the alleged partnership and alleged that they had employed plaintiff as manager of their farming operation under an oral agreement which was to run for five years, was subject to be and was terminated by them for cause. They also alleged that the oral agreement was not to be performed within a year and was invalid under sections 1973(1) of the Code of Civil Procedure and 1624(1) of the Civil Code of California, and under chapter 58, section 58-101, subsection 5 of the Arizona Code Annotated. Defendants filed a cross-complaint for damages resulting from an alleged conspiracy to defraud, bringing in Stewart L. Brockman, Sr. as a defendant to the cross-complaint. Plaintiff, Stewart L. Brockman, Jr. answered; apparently Brockman, Sr. was not served with the cross-complaint.

When the action came on for trial the court on motion of defendants ruled that the trial would proceed first on the issue of the alleged invalidity of the oral agreement. Defendants presented this defense. By deposition of an attorney in Arizona they proved the terms of the proposed written agreement which Brockman, Jr. had caused to be prepared. In this writing, defendants were named party of the first part and Stewart L. Brockman, Jr. and Paula C. Brockman, his wife, party of the second part. No reason was shown for including Mrs. Brockman as a contracting party. The oral agreement was with Les Brockman. The writing provided that Lane and wife were to furnish approximately 900 acres of land for farming and at least \$100,000 in capital; that "first party agrees to employ second party for a period of at least five (5) years to supervise the cultivation of the land in a farmer-like manner and according to the usual course of farming practiced in the neighborhood." It specified the duties of Brockman, provided for the return to defendants of the cost of clearing the land, purchasing equipment, construction of wells and "all

of the permanent construction," and for the equal division of the net profits between the Lanes and Brockman. It read in part "second party agrees that all costs will be maintained within 5% of the estimates heretofore furnished, and if said costs exceed said 5% of the estimates furnished, then this contract may be cancelled immediately"; also "and that in the event that second party neglects the crops or fails to farm same in a good and farmer-like manner, or fails to perform all of the necessary farming operations, then the party of the first part shall have the right to take over the crops and finish the farming operations. Second party agrees to furnish all of his time and effort to the supervision of said farming for a period of five (5) years." In addition to the foregoing writing, defendants introduced in evidence a claim of mechanics lien verified by Stewart L. Brockman, Jr., November 14, 1947, stating that he was claiming the sum of \$60,000 for labor and equipment furnished in work on the land under an oral agreement entered into between Brockman and defendants on or about October 20, 1946, that Brockman "was to work in the preparation for and cultivation of crops to be planted and grown on the above described land * * * that the said contract has been duly performed by him, and the improvement, preparation and cultivation was completed on the 10th day of November, 1947, and ten (10) days have not elapsed since that date." \$60,000 was claimed as one-half the estimated net profits "on crops and permanent improvements on the above described land." No other evidence was introduced by either party. The contentions of the parties were presented in extensive arguments.

[1] Plaintiff contended that the unsigned writing stated the terms of the oral agreement and that the effect of it was to create a partnership for a period of five years. Defendants, while conceding that the writing stated substantially the terms of their oral agreement with Brockman, contended that the contract was one of employment for a period of five years,

that it did not create a partnership relation and, not being in writing, was invalid. The question submitted to the court was whether the relationship created was one of employer and employee or of partners. The court concluded that the oral agreement constituted an employment of plaintiff to render personal services. This was a correct decision. The writing so states, and there was no evidence of an oral agreement at variance with the terms of the writing. Defendants retained ownership of the land and improvements. They ran all the risk of loss. Plaintiff was to be paid a monthly salary and a share of the profits, if any, but this was only as compensation for his services. A finding that the parties were partners would have had no support in the evidence.

[2] It was not shown whether the oral agreement was made in California or Arizona, but in either state an oral agreement of employment for a period of five years is invalid. Civ.Code of California, sec. 1624 (1); Arizona Code, Ann. sec. 58-101; *Standing v. Morosco*, 43 Cal.App. 244, 184 P. 954; *Waddell v. White*, 51 Ariz. 526, 78 P.2d 490. Part performance did not cure the invalidity. *Long v. Long*, 162 Cal. 427, 122 P. 1077.

The case was tried on the theory that the court was to determine a single issue. Plaintiff's counsel stated, "we asked for a partnership and if it is not a partnership, it is out of court. We do ask for an accounting, and ask for an injunction that has never been brought on for hearing." The court stated, "my present inclination would be to make a determination of this issue here now" and the parties acquiesced in that procedure.

[3] There were other issues which were not tried or submitted. These were, (1) whether under the employment contract plaintiff would be entitled to an accounting, (2) the issue of fraud as set out in plaintiff's second cause of action, and (3) the issues tendered by the cross-complaint. Although it was argued by defendants that plaintiff could not prevail under a complaint alleging he was a partner of defendants when the proof showed

that he was an employee, he did not abandon his claim that he was a partner nor seek to amend his complaint. He did not offer any evidence nor request an opportunity to offer evidence upon the issue that was tried, nor evidence which might tend to support a claim that all the terms of an agreement to employ him for five years were agreed upon and that the agreement should be held valid notwithstanding the refusal of defendants to execute a written agreement as promised, nor any other ground of estoppel of defendants to rely on the statute of frauds. The court was under no duty to consider or decide issues that were not tendered for decision.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.



103 Cal.App.2d 744

DOUGLAS v. FOSTER.

Civ. 18116.

District Court of Appeal, Second District,
Division 2, California.

April 24, 1951.

Rehearing Denied May 9, 1951.

Hearing Denied June 18, 1951.

Action by Frank T. Douglas against Samuel P. Foster to recover moneys alleged to have been paid for defendant's benefit and for services performed. Defendant filed a counterclaim for money had and received. The Superior Court of Los Angeles County, Walter S. Gates, J., entered judgment for defendant on his counterclaim, and plaintiff appealed. The District Court of Appeal, Wilson, J., held that evidence sustained finding that money paid by plaintiff on accounts owed by restaurant had been paid from cash receipts of business and not from his personal funds as he had alleged.

Judgment affirmed.

1. Appeal and error ☞994(3), 1009(4)

In suit by lessor of restaurant premises against lessee for money allegedly paid

by lessor for benefit of lessee, wherein it appeared that lessor did buying and paid bills and handled cash receipts for such restaurant business, and only evidence that lessor had paid bills for merchandise delivered to restaurant from his own personal funds and not out of cash receipts was his own personal testimony, weight and credibility to be given to such testimony was for trial court.

2. Money paid ⇨9

In suit by lessor of restaurant premises against lessee for money allegedly paid by lessor for benefit of lessee, wherein it appeared that lessor did buying, paid bills and handled cash receipts of such business, evidence sustained finding that money utilized by lessor for payment of bills for merchandise was from cash receipts of business and not from his personal funds.

3. Landlord and tenant ⇨161(3)

Where lessee of restaurant premises sought to recover from lessor for articles purchased by lessee for premises on theory that articles were additions, and lease provided that alterations and repairs should be paid for by lessee and become property of lessor at end of lease, finding of court that lessor was indebted to lessee on claim was implied finding that articles were additions and not alterations and repairs.

4. Appeal and error ⇨1009(3)

Where lessor of restaurant premises sought to recover from lessee for money paid out for bills on theory that business had lost money and lessor had paid bills from his personal funds and lessee filed counterclaim for articles purchased as addition to premises and evidence was conflicting, appellate court was bound by determination of trial court as to interpretation of such evidence.

1. Appellant's brief fails in two particulars to conform with Rule 15(a) of Rules on Appeal, in force when brief was filed, 22 Cal.2d 12: (1) There are no headings descriptive of the subject matter covered in the argument. Headings "Point I" etc., do not fulfill the requirements of the

5. Landlord and tenant ⇨161(3)

Where lessee of restaurant was granted judgment against lessor for articles purchased by lessee for premises as additions, lessor would not be given credit on amount of judgment for share of tax on liquor license paid by him and which allegedly had been refunded to lessee, in absence of evidence as to amount of tax, amount of refund, or that there was refund.

James M. Gammon, C. V. Eberhard, Los Angeles, for appellant.

Hobart & Hobart, Los Angeles, for respondent.

WILSON, Justice.

This is an action to recover moneys alleged to have been paid by plaintiff for defendant's benefit and for services performed. By his answer defendant denies he is indebted to plaintiff and counterclaims for money had and received. From a judgment in favor of defendant in the amount of \$444.38, plaintiff appeals.¹

The only question raised upon appeal is whether the findings are supported by the evidence.

In 1942, defendant leased from one Jacob Christen a furnished cafe and adjacent cottage in the vicinity of San Dimas, California. At the same time defendant employed plaintiff to manage the cafe. It was agreed between the parties that in addition to board and lodging plaintiff was to be paid \$5 a day in cash, his wife was to receive \$2 a day and plaintiff was also to receive 40 percent of the net profits of the business. Some time later plaintiff's pay was increased to \$7 a day and that of his wife to \$3 a day.

About May, 1944, plaintiff bought the property upon which the restaurant was

rule and are of no assistance to the court.

(2) The statement of facts does not contain any reference whatever to the record. In the new rules which became effective January 1, 1951, Rule 15(a), 36 Cal.2d 15, has not been changed.

located and the equipment from Christen. On September 1, 1944, defendant entered into a lease with plaintiff, the lease providing that alterations and repairs were to be made at the expense of the lessee and to become the property of the lessor at the termination of the lease; lessee was to maintain the equipment and motors in good working condition and to pay for any repairs which might be required due to ordinary wear and tear.

The business was operated in the following manner: Plaintiff purchased the liquor, food and supplies and hired and paid the employees. He paid all the bills except the rent, social security, unemployment insurance and withholding taxes which were paid by defendant. Some of the bills were paid by plaintiff in cash when the goods were delivered or purchased and others were paid by check. All wages were paid by cash. Plaintiff deposited the receipts in the bank in the same account in which he kept his personal funds. At the end of each month he took the cash register tapes representing the receipts of the cafe, subtracted the total expenses paid by him and drew a check for the credit balance, if any, which he deposited in another account upon which only defendant drew checks. Plaintiff sent the cash register tapes and the bills he had paid to defendant shortly after the first of each month. He made no other accounting to defendant, who kept the books and computed the net profit or loss for each year.

Plaintiff testified that when necessary he would advance his personal funds to pay current bills and reimburse himself from the receipts of the business; that beginning in the latter part of 1947 business began to fall off; that in May or April and again in June or July he told defendant there were a number of unpaid bills.

It is plaintiff's contention that since the evidence is undisputed that he expended \$3,348.15 for merchandise and services delivered to defendant's place of business and there is no evidence of repayment, the finding that defendant is not indebted to him is not supported by the evidence.

All the receipts of the cafe were under the sole and absolute control of plaintiff. Some of these he kept in cash for the purpose of paying bills and the balance he deposited in his personal account without segregating them in any way from his personal funds. He paid employees' salaries in cash, taking no receipt therefor. Receipts from the sale of cigarettes and from the slot machines were not rung up on the cash register. The customers' food checks were kept in plaintiff's possession. Credit was extended to a friend of plaintiff, one Tom Johnson, running as high as \$100 a month. Plaintiff testified he would ring the charge on the cash register, put his own money in the till and keep the cash register tickets until Johnson repaid him. The bartender testified the sales to Johnson were not rung up on the cash register but that he kept a slip on the shelf of the register upon which he marked down the amounts charged.

Expert witnesses testified that the cost of liquor should not exceed 40 percent of the gross sales of liquor and in most establishments it would be about 35 percent; the cost of food should not be more than 55 percent of gross food sales and it was generally between 45 and 50 percent. In the cafe operated by plaintiff the cost of liquor amounted to 53.4 percent of the sales for the period January 1, 1948, to September, 1948, and the cost of food for the same period amounted to 76.4 percent. These percentages were based on the food and liquor sales reported by plaintiff and included in the cost were all bills which he claimed to have paid out of his personal funds. Both experts testified such percentages were unreasonably high. One witness testified that if the highest reasonable percentage, that is, 40 percent for liquor costs and 55 percent for food costs, were applied to the bar sales of \$12,917.60 and food sales of \$10,224.17 for that period the gross profit of the cafe should have been \$12,738.02. However, the gross profit for this period was only \$8,915.08, a difference of \$3,824.94. The percentages for the years 1946 and 1947 were normal and plaintiff's explanation of the increase was that there was a decline in sales with

no corresponding decline in overhead. Both expert witnesses testified that would have no effect upon the percentage of cost to gross sales.

Defendant testified he knew the business was losing some money but he thought it was only a matter of two or three hundred dollars. In April he noticed that plaintiff was including among his paid bills some that were incurred three months previously. On April 10, 1948, he wrote plaintiff as follows: "I have paid out \$450.00 rent—152.00 S. S. Taxes and Employees Contribution—34.76 Insurance, and 325.00 License since the 1st of Jan. 1948. I have received 64.86 in those 3 months and you report a loss of 206.70 in Mar. and 146.58 in Jan.

"I cannot keep this up. From your last 4 or 5 months you have been putting in bills that were enacted 3 months previous. So you must also be behind in payment of bills.

"Something must be done and quick, so I will be waiting a report from you first as to what you think.

"Let me know at end of each month hereafter just what bills you are holding and amounts."

To this communication plaintiff replied: "I know its been tough and I will see you in the next few days. I am trying to work out a plan for more income with no more overhead. Business is just bad and I'll have to do something to increase it."

Plaintiff did not thereafter advise defendant as to the bills he was holding and it was not until September, 1948, that he told defendant he had advanced \$3,348.65 and that there were \$3,084.00 in unpaid bills for the months of May, June and July. Plaintiff testified he did not advise defendant earlier because defendant was out of town for nine weeks prior to September. Defendant testified he was out of town only two weeks.

The bills which plaintiff allegedly paid with his personal funds as shown by his bill of particulars were incurred and paid by him between April 6 and September 21, 1948. He testified the funds which he advanced were taken from his safe

deposit box; that he had about \$4,000 which represented money he had saved over a period of years from his salary, his bonus, profits from the slot machines and an undetermined amount he made from operating a "book."

[1,2] Plaintiff admitted his conviction of two felonies, embezzlement and grand theft. The only evidence that he had used his personal funds to pay the cafe bills is his testimony and his credibility was for the determination of the trial court. It is obvious that the court did not believe plaintiff's testimony that he advanced the money for the payment of the bills but concluded that they were paid from the receipts of the business. Such a conclusion is supported by the evidence.

[3,4] There is a conflict in the evidence with respect to the articles purchased by defendant and upon which the court found plaintiff was indebted to defendant in the sum of \$444.38. There is no dispute over the fact that the articles were purchased nor the fact that they were paid for out of the profits of the business. Plaintiff contends that the items purchased constituted "alterations and repairs" and since the lease provides that the lessee shall make and pay for any alterations and repairs which shall become the property of the lessor at the termination of the lease, defendant cannot recover the cost thereof. Defendant contends the articles were additions. In finding that plaintiff is indebted to defendant the court impliedly found in accordance with defendant's contention and since there is a conflict in the evidence this court is bound by the determination of the trial court.

[5] Finally, plaintiff contends he should have received credit for his share of the tax on the liquor license which was paid and subsequently refunded to defendant. Plaintiff offered no evidence as to the amount of the tax paid, the amount of the refund or that there was a refund.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

**CITY OF BURLINGAME v. COUNTY OF
SAN MATEO et al.**

Civ. 14594.

District Court of Appeal, First District,
Division 2, California.

April 30, 1951.

Rehearing Denied May 29, 1951.

Hearing Denied June 28, 1951.

Certiorari proceeding by the City of Burlingame, a municipal corporation, against The County of San Mateo, a political subdivision of the State of California, and others, wherein the petitioner contended that the respondents were acting in excess of jurisdiction in a proceeding before the Board for the incorporation of the City of Millbrae. Thomas Scoble & Sons, Inc., a corporation, moved to intervene. The Superior Court, in and for the County of San Mateo, James L. Atteridge, J., made an order denying the motion and rendered a judgment dismissing the main proceeding, and the intervener appealed both from the order and from the judgment. The District Court of Appeal, Goodell, J., held that the intervener's interest was remote, and hence he was not entitled to intervene.

Appeal from judgment dismissed, and appeal from order affirmed.

1. Parties Ⓒ40(2)

Under the statute providing that at any time before trial any person who has an "interest in matter in litigation" or in success of either of the parties may intervene, quoted phrase means one which is direct and not consequential, or direct and immediate, not remote and contingent. Code Civ.Proc. § 387.

See publication Words and Phrases, for other judicial constructions and definitions of "Interest In Matter in Litigation".

2. Municipal corporations Ⓒ39

There cannot be at the same time within the same territory two distinct municipal corporations exercising same powers, jurisdiction and privileges.

3. Municipal corporations Ⓒ33(8)

Where city began certiorari proceeding in Superior Court contending that Board of Supervisors of county was acting in excess of its jurisdiction in a proceeding then before it for incorporation of a city because portion of territory to be

incorporated had already been annexed by the city, owner of property located in area to be incorporated but not in area allegedly annexed, who alleged no interest in city's success other than as a property owner in area to be incorporated faced with prospect of having to pay city taxes in case city failed to halt incorporation, had an interest that was remote and consequential and was not entitled to intervene. Code Civ.Proc. § 387; Gen. Laws, Act 5162.

4. Certiorari Ⓒ60

Where person who sought to intervene in certiorari proceeding had no absolute right to intervene, pendency of motion for intervention could not prevent dismissal of main proceeding. Code Civ. Proc., § 387.

5. Appeal and error Ⓒ143

Where court denied motion to intervene and intervener therefore never became a party to the record in the main case, intervener was in no position to appeal from judgment dismissing main proceeding.

Alfred J. Harwood, San Francisco, for appellant.

Louis B. Dematteis, Dist. Atty. of San Mateo County, John A. Bruning, Deputy Dist. Atty., Redwood City, J. W. Coleberd, South San Francisco, for respondents.

GOODELL, Justice.

In December, 1946 the City of Burlingame commenced a proceeding in certiorari in the Superior Court, contending that the Board of Supervisors of San Mateo County was acting in excess of its jurisdiction in a proceeding then before it for the incorporation of the City of Millbrae. Appellant later moved to intervene in the certiorari proceeding on the side of Burlingame and when its motion was denied this appeal was taken.

Mills Estate, Incorporated, owned land adjacent to the northerly boundary of Burlingame and on August 1, 1946 petitioned for the annexation thereof by that

city under the Annexation of Uninhabited Territory Act of 1939, Stats. 1939, p. 1567, 2 Deering's 1944 Gen. Laws, Act 5162. The Mills Estate land was a strip 100 feet in width and in the shape, roughly, of a horseshoe or the letter "U", with each tip of the horseshoe contiguous to Burlingame's northerly boundary for a distance of 100 feet, discussed in detail in *City of Burlingame v. County of San Mateo*, 90 Cal.App.2d 705, 709-10, 203 P.2d 807. Within the horseshoe-shaped strip lies an area of approximately 730 acres which was not involved in the annexation. No objection was filed with the Burlingame council, and on September 23, 1946 it adopted an ordinance approving the annexation. A certified copy thereof, filed with the Secretary of State on November 12, 1946, completed the annexation, sec. 10 Annexation Act, *supra*.

On September 24, 1946 a petition was filed with the Supervisors for the incorporation, under the Municipal Corporation Act of 1883, Gen. Laws, Act 5233, of Millbrae as a city of the sixth class. *The territory described in that petition included the whole 100-foot strip, the annexation of which by Burlingame had been ordained the day before.* It also included the 730-acre parcel lying within the horseshoe strip (but not involved in the Burlingame annexation).

The Millbrae proceedings progressed to the holding of an election, on December 10, 1946, wherein the proposition for incorporation carried. Four days before the votes were to be canvassed by the Supervisors Burlingame filed its petition in certiorari, alleging that it had annexed the 100-foot strip, and seeking a judgment that by reason thereof the Board of Supervisors had exceeded its jurisdiction by attempting to include the same property within the proposed boundaries of Millbrae. The prayer was that the canvass of votes be restrained and the resolution for the incorporation of Millbrae annulled. An alternative writ issued, halting Board action until further order.

On January 20, 1947 a quo warranto proceeding was filed in the Superior Court of San Mateo County on the relation of a

Burlingame property owner, challenging the validity of Burlingame's annexation of the 100-foot strip. The filing of that case, and the pendency of Burlingame's certiorari proceeding challenging the Millbrae incorporation proceeding, produced somewhat of a deadlock. A motion to consolidate the two cases was denied. A stipulation was then entered into that the court should proceed to try the quo warranto proceeding, and if the State prevailed therein the certiorari proceeding would be dismissed but if Burlingame prevailed the writ of review would be granted.

The trial of the quo warranto case resulted in a judgment annulling the Burlingame annexation. Shortly thereafter the trial court dismissed the certiorari proceeding and the Supervisors thereupon, on the same day, canvassed the votes in the Millbrae proceeding, and a certificate of Millbrae's incorporation was filed with the Secretary of State on January 14, 1948.

Burlingame appealed from the judgment in the quo warranto case, also from the order dismissing the certiorari proceeding. Both judgments were reversed by this court on March 18, 1949 in *City of Burlingame v. County of San Mateo*, *supra*, 90 Cal.App.2d 705, 203 P.2d 807. The quo warranto judgment was reversed with the direction to make new findings and enter judgment in favor of Burlingame. The order dismissing the certiorari proceeding was reversed without any direction and with no discussion except to point out that the stipulation necessitated such reversal in the circumstances. A petition for hearing was denied by the Supreme Court.

About six weeks after the filing of the remittitur this appellant applied for leave to intervene in the certiorari case. The court in denying that application held that Millbrae had become a *de facto* municipal corporation and "the determination of the validity of antecedent proceedings leading up to the * * * incorporation of a *de facto* municipal corporation can be determined only in a quo warranto proceeding"; that the proceeding in which intervention was sought was not of that character, but "on the contrary, it is merely an abandoned proceeding in certiorari".

The four contentions urged by appellant on this appeal are stated by its counsel as follows:

"1. The appellant has an absolute right to intervene in this action.

"2. The trial court erred in holding that, in this action, which is a direct attack by certiorari, the respondents can successfully assert that by reason of their ignoring the certiorari proceeding, the 'City of Millbrae' acquired a 'de facto' existence which ousted the court of jurisdiction, in this action, to pass on the validity of the incorporation proceedings.

"3. The trial court erred in dismissing the action. After a petition for leave to intervene is filed the court has no power to dismiss the action as to the intervenor.

"4. This action is not 'moot'. Even if it were moot as to the petitioner City of Burlingame it is not moot as to appellant."

Respondents' principal contention herein is that appellant has no interest in the matter in litigation within the meaning of § 387, Code Civ.Proc. That section provides that "At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties * * * may intervene * * *."

[1] The courts have held "an interest in the matter in litigation" to mean one which is "direct and not consequential", *Allen v. California Water & Telephone Co.*, 31 Cal.2d 104, 109, 187 P.2d 393, 395; "direct and immediate", *Elliott v. Superior Court*, 168 Cal. 727, 734, 145 P. 101; *La Mesa Lemon Grove & Spring Valley Irr. District v. Halley*, 195 Cal. 739, 741, 235 P. 999; *Jersey Maid Milk Products Co. v. Brock*, 13 Cal.2d 661, 665, 91 P.2d 599; not "remote and contingent", *Bechtel v. Axelrod*, 20 Cal.2d 390, 393, 125 P.2d 836, 837.

What did the principal actor, the City of Burlingame, seek in the certiorari proceeding?

[2] In the Sanitary Board of East Fruitvale Sanitary District case, 158 Cal. 453, 457, 111 P. 368, 370, the court said:

230 P.2d—24½

"It is a well-settled doctrine that 'there cannot be at the same time, within the same territory, two distinct municipal corporations, exercising the same powers, jurisdiction, and privileges.' [Citations]" And in *City of Burlingame v. County of San Mateo*, supra, 90 Cal.App.2d 705, 706-707, 203 P.2d 807, 808, we said: "The litigation thus grows out of the rivalry arising from the efforts to incorporate these lands into one or the other municipality.

"Appellant City of Burlingame entered court first with its petition for writ of review seeking a judgment that by reason of its annexation to Burlingame the board of supervisors exceeded their jurisdiction by attempting to include the same property within the proposed limits of Millbrae. It is undisputed that if the annexation to Burlingame was valid this claim was correct since the first proceeding in point of time excludes the jurisdiction of the later one. *People [ex rel. City of Pasadena] v. City of Monterey Park*, 40 Cal.App. 715, 181 P. 825."

The City of Burlingame in the certiorari proceeding sought to prevent an overlap such as that spoken of in the *East Fruitvale* and *Monterey Park* cases, supra, and asserted the clear priority established by its annexation of the 100-foot strip a month before that proceeding was filed.

What, on the other hand, did the appellant seek? Appellant was not concerned with the validity of Burlingame's annexation of the 100-foot strip or with safeguarding Burlingame against the threatened overlap and conflict in jurisdiction, since it owns no property in Burlingame or within the annexed area. Its sole interest, as disclosed by its proposed pleadings, was in the defeat of the incorporation of Millbrae.

[3] Appellants' motion was accompanied by a proposed petition in intervention wherein it alleged that it was and is "the owner of real property situated within the boundaries described in resolution for the proposed incorporation of the City of Millbrae" and "a taxpayer by reason of the ownership of said real property and, if it should be finally adjudicated

that the proposed City of Millbrae was legally incorporated, petitioner and the said property of petitioner will be liable for taxes assessed by said City of Millbrae." The petition then adopts and incorporates all the allegations of the City's petition for certiorari.

Appellant later filed a notice to amend its motion to intervene, accompanied by a new proposed petition wherein it copied the City's allegations almost verbatim, adding but one paragraph of its own alleging its interest just as it had originally.

Nowhere does either petition allege any interest of the intervener in Burlingame's success *other than as a property-owner in Millbrae (an adjoining area) faced with the prospect of having to pay city taxes therein in case Burlingame fails to halt Millbrae's incorporation.*

In *City of Alhambra v. Jacob Bean Realty Co.*, 138 Cal.App. 251, 31 P.2d 1052, the City sought to condemn for a municipal reservoir, land owned by the Realty Company. The owner of adjoining land intervened, alleging that if the plaintiff acquired the land and constructed a reservoir thereon, "this intervener will sustain damages by reason of the depreciation of the market value of said lands * * *." A demurrer to her complaint was sustained without leave to amend, followed by a dismissal of the intervention. In affirming the court said: "It will be seen at once from the complaint in intervention that the intervener has no interest in the land sought to be condemned, or in the success of either party, or any interest against both parties. The only claim made is that she will ultimately be damaged if plaintiff is successful and some day builds a reservoir on the property taken. * * *

"The complaint here showing no direct interest in the litigation, but only a consequential interest in the probable use of the property if plaintiff is successful, and no possibility of gain or loss from the direct legal effect of any judgment that might be rendered, we fail to see that any right to intervene is shown by the complaint (sections 387 and 1246, Code Civ. Proc.), or how it could possibly be amended to show such a right."

The two cases are parallel. There the intervener connected herself with the main case only by the allegation that the value of her *adjoining land* would be depreciated. Here the intervener connected itself with the main case only by the allegation that it and its land *in an adjoining area* would be subject to city taxes in that area. In both cases the intervener's interest was remote and consequential. See, also, *La Mesa Lemon Grove & Spring Valley Irr. District v. Halley*, supra, 195 Cal. 739, 741, 235 P. 999.

The stipulation made before the trial of the *quo warranto* case was that if Burlingame won the writ of review should issue. After the appeal, 90 Cal.App.2d 705, 203 P.2d 807, Burlingame abandoned the certiorari case. There then remained no reason for it to press for the peremptory writ since by the *quo warranto* judgment the jurisdictional question had been adjudicated and a peremptory writ would have added nothing thereto. While appellant's motion to intervene was pending respondents' motion to dismiss the certiorari proceeding "upon the ground that no issue now exists in said action and that said action has become moot" was granted on that ground without opposition by the City.

[4] Appellant contends that it was the duty of the court to follow the stipulation and issue the peremptory writ, and that it erred in dismissing the main case while the application to intervene was pending. A writ annulling the Millbrae incorporation proceedings (as prayed in the City's petition for certiorari) would have served appellant's own purposes, for in such event it would have had no city taxes to pay. *But its position in pressing for the writ after Burlingame itself had ceased to do so only serves to emphasize appellant's indirect and remote interest in the main case.* Appellant had no absolute right to intervene, see *In re Yokohama Specie Bank, Ltd.*, 86 Cal.App.2d 545, 554-555, 195 P.2d 555, and the pendency of its motion could not prevent the dismissal of the main case.

There is no need to discuss any other points.

[5] An appeal was taken from the judgment dismissing the certiorari proceeding as well as from the order denying permission to intervene. Since appellant never became a party to the record in the main case it is not in a position to appeal from the judgment dismissing it. *Braun v. Brown*, 13 Cal.2d 130, 133, 87 P.2d 1009.

Accordingly the appeal from the judgment dismissing the main case is dismissed.

The appeal from the order denying permission to intervene is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



104 Cal.App.2d 21

**ASSOCIATED BOAT INDUSTRIES OF
NORTHERN CALIFORNIA v.
MARSHALL.
Civ. 14689.**

District Court of Appeal, First District,
Division 2, California.
May 1, 1951.

Action by the Associated Boat Industries of Northern California, a corporation, against Kenneth E. Marshall, Yacht and Ship Broker Commissioner, for declaratory relief to have a court determine validity of certain regulations adopted by defendant. The Superior Court in and for the city and county of San Francisco, Theresa Meikle, J., sustained defendant's demurrer, rendered judgment thereon, and the plaintiff appealed. The District Court of Appeals, Dooling, J., held that plaintiff was not an interested person within statute authorizing any interested person to obtain a judicial declaration as to validity of any regulation by bringing an action for declaratory relief.

Judgment affirmed.

**1. Administrative law and procedure ☞660
Declaratory judgments ☞292**

In enacting statute providing that any interested person may obtain a judicial declaration as to validity of any regulation by bringing an action for declaratory relief, legislature in using words, any interested

person, had before it long established legislative precedent which established that an "interested person" in sense in which those words were used, was a person having a direct and not a merely consequential interest in the litigation. Government Code, § 11440.

See publication Words and Phrases, for other judicial constructions and definitions of "Interested Person".

2. Statutes ☞212.1

Legislature is presumed to know court decisions construing similar language in other statutes.

3. Statutes ☞223.5(4)

Where legislation is framed in language of an earlier enactment on same or an analogous subject, which has been judicially construed, there is a strong presumption of intent to adopt construction as well as language of prior enactment.

4. Declaratory judgments ☞292

A nonprofit corporation, whose membership comprised builders and distributors of, and dealers in, new boats, ships, and yachts which was not itself subject to regulations of yacht and ship broker commissioner and could not be legally affected by enforcement of commissioner's regulations, was not an "interested person" within statute authorizing any interested person to obtain judicial declaration as to validity of any regulation by bringing an action for declaratory relief. Government Code, § 11440.

Sefton & Quattrin, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., of California, Clarence A. Linn, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant, Associated Boat Industries of Northern California, is a non-profit corporation whose membership comprises builders and distributors of, and dealers in, new boats, ships and yachts. Appellant filed a complaint for declaratory relief in which it sought a court determination of the invalidity of certain regulations adopted by re-

spondent, as Yacht and Ship Broker Commissioner.

Appellant purported to bring its action under Government Code, section 11440, reading in part: "Any interested person may obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief in the superior court in accordance with the provisions of the Code of Civil Procedure * * *."

A demurrer was sustained on the ground that appellant is not an "interested person" within the meaning of this section. From the judgment which followed this appeal is taken.

The only question presented is whether an incorporated trade association whose members are subject to the regulations attacked, but which itself is not subject to those regulations, is an "interested person" within the meaning of this section. We have concluded that it is not.

[1] The legislature, in using the words "Any interested person" had before it long established legislative precedents which make it clear that an "interested person" in the sense in which those words are used in the statute is a person having a direct, and not a merely consequential, interest in the litigation.

With the adoption of "An Act to Regulate the Settlements of the Estates of Deceased Persons" in 1851, Stats. 1851, p. 448 "any person interested" came into statutory use in California to describe those persons who may contest the probate of a will, sec. 18, p. 450 and sec. 30, p. 451, Stats. 1851. Those words have ever since continued in the succeeding statutes governing this subject. Prob.Code, secs. 370, 380. Those sections have always been construed to require a direct and primary interest in the testator's estate. "It is settled that an interested person is one who has 'such an interest as may be impaired or defeated by the probate of the will, or benefited by setting it aside * * *'". In re Estate of Plaut, 27 Cal. 2d 424, 425-426, 164 P.2d 765, 766, 162 A.L.R. 837; 26 Cal.Jur., Wills, sec. 344, pp. 1083-1085.

Similarly Code Civ.Proc. sec. 387 permits intervention by "any person, who has an

interest in the * * * litigation". It is settled that to come within this section "(t)he interest * * * must be direct, and not consequential, and it must be an interest which is proper to be determined in the action * * *." Isaacs v. Jones, 121 Cal. 257, 261, 53 P. 793, 794, 1101. "The interest mentioned in the Code which entitles a person to intervene * * * must be * * * of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment." Elliott v. Superior Court, 168 Cal. 727, 734, 145 P. 101, 105; Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 661, 663, 91 P.2d 599; Bechtel v. Axelrod, 20 Cal.2d 390, 392, 125 P.2d 836.

[2,3] The legislature is presumed to know the court decisions construing similar language in other statutes and "where legislation is framed in the language of an earlier enactment on the same or an analogous subject, which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment." Union Oil Associates v. Johnson, 2 Cal.2d 727, 734-735, 43 P.2d 291, 295, 98 A.L.R. 1499.

[4] That the legislature itself knew how to draw the distinction between an "interested person" and a "representative" of such person is shown by section 11425 Government Code, enacted as a part of the same statute, which requires the agency in adopting regulations to "afford any interested person or his duly authorized representative, or both, the opportunity to present statements, arguments, or contentions * * *." Appellant's standing is a purely representative one, acting on behalf of its members, since appellant is not itself subject to the regulations sought to be attacked and can not be legally affected by their enforcement. We are satisfied that it is not an "interested person" within the meaning of the section under which it attempted to proceed.

Judgment affirmed.

NOURSE, P. J. and GOODELL, J., concur.

103 Cal.App.2d 760

SHAVARSH CHUCHIAN v. METROPOLITAN LIFE INS. CO.

Civ. 4092.

District Court of Appeal, Fourth District,
California.

April 25, 1951.

Hearing Denied June 18, 1951.

Shavarsh Chuchian sued Metropolitan Life Insurance Company to recover disability benefits under a policy of life insurance issued to him by defendant. The Superior Court, Kern County, Warren Stockton, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that the evidence sustained the trial court's finding that the plaintiff was not totally disabled within the meaning of the provision of the life policy involved.

Affirmed.

1. Appeal and error ⇨931(1)

In reviewing evidence to determine whether there was sufficient substantial evidence to support findings and judgment of trial court, all conflicts must be resolved in favor of respondent and all legitimate reasonable inferences indulged in to uphold judgment if possible.

2. Appeal and error ⇨989

When judgment is attacked as being unsupported, power of appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by trial court.

3. Appeal and error ⇨996

When two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deduction for those of trial court.

4. Appeal and error ⇨994(3), 1010(1)

Weight and sufficiency of evidence, construction to be put upon it, and inferences to be drawn therefrom are matters for trier of facts as are questions as to credibility of witnesses and determination of conflicts and inconsistencies in testimony.

Cal.Rep. 229-230 P.2d-39

5. Insurance ⇨516.3

Total disability, within meaning of life policy provision providing for waiver of premiums and disability payments during period of "total disability", is a disability that prevents insured from working with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage in view of his physical and mental capacity, but total disability provision may be invoked even though insured is able to perform sporadic tasks or to give attention to simple or inconsequential details incident to conduct of his business.

See publication Words and Phrases, for other judicial constructions and definitions of "Total Disability".

6. Appeal and error ⇨1008(1)

In suit to recover disability benefits under life policy total disability clause, determination of question of whether insured was permanently and totally disabled within meaning of terms of life policy was question of fact for determination of trial court.

7. Appeal and error ⇨994(3)

In suit to recover disability benefits under life policy total disability clause, credibility of witnesses was matter for determination of trial court.

8. Insurance ⇨665(5)

In suit to recover disability benefits under life policy total disability clause, evidence sustained trial court's finding that insured was not totally disabled within the meaning of provisions of life policy.

9. Appeal and error ⇨1010(1)

Where trial court's findings are supported by substantial evidence, its decision is binding upon appellate court.

10. Insurance ⇨661

In suit to recover disability benefits under life policy total disability clause, trial court did not err in admitting profit and loss statements of farming operations in which insured was interested, since such evidence was admissible to show extent of farming operations conducted by insured and his activities with reference thereto.

Siemon & Siemon, Bakersfield, for appellant.

Borton, Petrini & Conron, Bakersfield, for respondent.

MUSSELL, Justice.

Action under insurance policy.

Plaintiff in this action seeks to recover disability benefits under a policy of life insurance issued to him by the defendant in 1927. The complaint, filed October 10, 1948, contains an allegation that on June 2, 1946, "the plaintiff became totally and permanently disabled by reason of disease, to wit, heart disease, so that he was prevented thereby from engaging in any occupation whatsoever, or performing any work for compensation or profit; and ever since said time the plaintiff has been and now is so totally disabled." On January 30, 1950, a trial was had before the court without a jury and from a judgment for the defendant, plaintiff appeals.

The policy involved provides, among other things, that should the insured "become totally and permanently disabled, as the result of bodily injury or disease occurring and originating after the issuance of said policy, so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit, and that such disability has already continued uninterruptedly for a period of at least three months, it (the insurer) will, during the continuance of such disability, (1) Waive the payment of each premium falling due under said policy and this supplementary contract, and, (2) Pay to the insured * * * a monthly income of \$10.00 for each \$1,000 of insurance or of commuted value of instalments, if any, under said policy."

The trial court found that the policy was issued to plaintiff as alleged in the complaint; that plaintiff paid the premiums due under the insurance contract; that plaintiff did not become totally and permanently disabled; that he had not duly made proof to the defendant of disability and was not entitled to the disability benefits or a waiver of premiums.

The decisive question for our determination is whether there was sufficient substantial evidence to support the findings and judgment of the court.

[1-4] In determining this question we are bound by the rules announced in *Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689, to the effect that in reviewing the evidence, all conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged in to uphold the judgment if possible; that when a judgment is attacked as being unsupported, the power of the appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the court; that when two or more inferences can be reasonably deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court, and by the rules announced in *Dillard v. McKnight*, 34 Cal.2d 209, 223, 209 P.2d 387, 11 A.L.R.2d 835, that the weight and sufficiency of the evidence, the construction to be put upon it and the inferences to be drawn therefrom were matters for the trier of the facts as were questions as to the credibility of witnesses and the determination of conflicts and inconsistencies in the testimony.

Resolving all of the conflicting testimony in favor of the respondent, the facts concerning his business affairs and his physical condition as of the time of the trial may be fairly summarized as follows: Plaintiff is a naturalized immigrant, born in Armenia in 1902, and from the time he came to this country in 1920, to the date of the trial, has managed and operated many different businesses. At the time of his first heart attack in 1946, he was engaged in operating a beer distributing and trucking business and in the operation of two farms and a packing shed near Bakersfield. Following this heart attack, plaintiff was in a hospital for about fifteen days and thereafter confined in bed between two and three months. In 1948 he had a second heart attack, following which he was in bed for five or six days. After his first illness, plaintiff

disposed of the trucking and beer business but retained his interest in the farms and packing shed and was actively engaged in the management of his farming operations from the latter part of 1944 to and including 1949. There was evidence that his farming operations during these years were quite profitable and that he received substantial sums therefrom; that he kept a check book of the partnership at home and signed all of the partnership checks; that he took part in the decisions and management of the business, the sale of crops, the sale and leasing of land, the negotiations of oil and gas leases, and made numerous trips to the packing shed and farms.

Motion pictures were admitted in evidence showing plaintiff watering his lawn in June, 1949, driving his car to his farm, packing shed and to the bank. A private investigator hired to observe the actions of plaintiff in January, 1950, testified that plaintiff then stated that he was in the grape business; that the main grape season was for a period of two months each year but that there was always work to be done to the ground and "trees"; that he had to be around to see that the work was done properly, even if he had a superintendent to handle the job.

Dr. Seymour Strongin, a witness produced by plaintiff, testified that he was called when plaintiff had his first attack in 1946; that he examined him on many occasions thereafter and treated him for coronary thrombosis; that in July, 1948, plaintiff suffered a recurrent attack which was diagnosed as of a milder degree; that as far as his heart was concerned, plaintiff "for the most part got along all right"; that plaintiff's condition was much better at the time of trial than in 1946; that in his opinion plaintiff was able to perform some types of occupation; that if the type of work did not entail any undue stress or strain, emotional or physical, it could be done by plaintiff safely; that many people with attacks no more severe than that of plaintiff have continued their occupations for many years. He expressed the feeling that "in any of those cases there is some type of work that an individual with a

heart attack could do without injuring himself."

Dr. Jack Hayes, whose qualifications were admitted, testified that he examined plaintiff on June 26, 1949; that he obtained a lengthy history of plaintiff's illness and condition; that after conducting a complete examination, he was of the opinion that plaintiff had several conditions that were disabling but the disability was not total and complete; that he was able to do something—"some gainful operation which does not entail unusual or heavy physical exertion;" that plaintiff could substantially perform the duties of some occupation or work; that plaintiff could have done supervisory work in farm management.

[5] Total disability, as defined in the quoted portion of the insurance policy involved, has been defined in *Culley v. New York Life Ins. Co.*, 27 Cal.2d 187, 191, 163 P.2d 698, 700, in the following language: "It is settled in this state that total disability within the meaning of this provision is a disability that prevents the insured from 'working with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage in view of his station and physical and mental capacity.' *Erreca v. Western States Life Ins. Co.*, 19 Cal.2d 388, 394, 395, 121 P.2d 689, 694, 141 A.L.R. 68; *Hurwit v. Prudential Ins. Co. of America*, 45 Cal.App.2d 74, 81, 113 P.2d 691. A finding that the insured is totally disabled is not precluded by the fact that he still goes to his office irregularly and engages sporadically in business matters. 'According to overwhelming authority, the term "total disability" does not signify an absolute state of helplessness but means such a disability as renders the insured unable to perform the substantial and material acts necessary to the prosecution of a business or occupation in the usual or customary way. Recovery is not precluded under a total disability provision because the insured is able to perform sporadic tasks, or give attention to simple or inconsequential details incident to the conduct of business.' 19 Cal.2d 388, 396, 121 P.2d 689, 695, 141 A.L.R. 68."

[6] The determination of the question of whether the appellant was permanently and totally disabled within the meaning of the terms of the policy before us was a question of fact for the determination of the trial court. As was said in *Erreca v. West. States Life Ins. Co.*, 19 Cal.2d 388, 397, 121 P.2d 689, 696, 141 A.L.R. 68: "In its final analysis, the question of what amounts to total disability is one of fact. (*Sherman v. Continental Casualty Co.*, supra, [103 Cal.App. 518, 284 P. 946]; *Ives v. Prudential Ins. Co.*, 12 Cal.App.2d 306, 55 P.2d 273), and where, as here, the finding of the trial court is supported by substantial evidence, it will not be disturbed upon appeal."

[7] The credibility of witnesses in the case before us was a matter for the determination of the trial court. *Ives v. Prudential Ins. Co.*, 12 Cal.App.2d 306, 308, 55 P.2d 273.

[8] We conclude that the evidence in the record before us was sufficient to sustain the trial court's finding that the plaintiff was not totally disabled within the meaning of the provision of the policy involved. There was evidence of appellant, his wife and brother to the contrary, but this evidence merely created a conflict. It was shown that the plaintiff had a varied and successful business career; that he worked in a leather factory in Chicago, in a candy shop, restaurant and hotel; that he owned and operated a confectionery in Virginia, then a grocery store, cleaning establishment, and upon arrival in Bakersfield in 1938, became one of three partners in the operation of a refuse and garbage disposal contract of the city of Bakersfield, in connection with which he operated a hog ranch for five years. He attended the highest school in Armenia and apparently has sufficient business ability to engage in occupations which do not require the performance of heavy manual labor.

The evidence was sufficient to support a finding by the trial court that plaintiff's participation in the management of the farming operations was more than casual and was of a substantial and remunerative nature. The testimony of plaintiff's own

doctor indicates that the plaintiff was no more disabled than many men who have had similar attacks and supports an inference that he could actively and safely continue the operations of his business affairs to a substantial degree.

Plaintiff asserts that it was not shown that he received any compensation for any work other than the return on his capital investment and that his activities in attending to simple details incident to the operation of the farms were of a kind with those of the claimant in *Fitzgerald v. Globe Indem. Co. of N. Y.*, 84 Cal.App. 689, 696, 258 P. 458, where the court held that they did not constitute engaging in business or amount to an occupation. He also cites *Erreca v. West. States Life Ins. Co.*, supra, as a case in which the claimant, a farmer who suffered injuries which limited him in the performance of his work, was found to be totally disabled.

In the *Fitzgerald* case the court said, 84 Cal.App. at page 697, 258 P. at page 461: "The ultimate fact to be determined is not what the plaintiff actually did in the way of business duties, but what, in the exercise of common care and prudence, he was reasonably able to do. Proof of what he did is merely evidence tending to show his ability to do, just as the opinion of the physicians who testified are evidence tending to show that his disability was or was not total. This expert opinion evidence alone, in view of the nature of the plaintiff's affliction, is sufficient to create a substantial conflict, and the finding of the trial court thereon is conclusive." In that case plaintiff's physicians advised him to desist from his duties in connection with his occupation and testified at the trial that he was totally and continuously unable to transact his business duties without increasing bodily waste and hastening the progress of the disease which caused the disability. The court went on to say, at page 699 of 84 Cal.App., at page 462 of 258 P.: "It cannot be said as a matter of law that the occasional transactions in which he engaged constituted the performance of 'the substantial and material acts of his business or occupation in the usual and customary way' or conclusive proof that, in the exercise of

reasonable care and prudence he was able to transact such business duties."

In the Erreca case, *supra*, the court held, 19 Cal.2d at page 397, 121 P.2d at page 696, 141 A.L.R. 68, that in its final analysis, the question of what amounts to a total disability is one of fact.

[9] In both of the last mentioned cases the trial court's findings of fact as to total disability were not disturbed on appeal, and where, as here, the trial court's findings are supported by substantial evidence, its decision is binding upon us.

[10] It is argued that the court erred in admitting profit and loss statements of the farming operations in which plaintiff was interested. We find no merit in this contention. It was admissible to show extent of the farming operations conducted by the plaintiff and his activities with reference thereto.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.



103 Cal.App.2d 901

CONSOLIDATED PIPE CO. v. GRIES.

Civ. 4328.

District Court of Appeal, Fourth District, California.

April 30, 1951.

Action on contract by Consolidated Pipe Company, a corporation, against A. J. Gries to recover amount alleged to be due for water well casing and fittings sold defendant. The Superior Court of Kern County, Robert B. Lambert, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Mussell, J., held that question whether plaintiff agreed to furnish 14 inch casing to defendant for prices previously agreed on for the 12 inch casing was one of fact for trial court and its finding thereon adverse to defendant's contention was bind-

ing on District Court of Appeal under evidence presented.

Judgment affirmed.

1. Appeal and error ⇐1008(1)

In action on contract by pipe company to recover price of water well casing sold defendant, whether plaintiff agreed to furnish 14 inch casing for price previously agreed on for 12 inch casing was one of fact for trial court and its finding thereon adverse to defendant's contention was binding on District Court of Appeal under evidence presented.

2. Appeal and error ⇐966(1)

Where case first came on for trial on February 20, 1950 and at that time was continued until 22nd of June following and immediately following order granting continuance plaintiff's counsel served notice of time and place for trial and on June 21st, defendant employed different attorney to represent him and on June 22nd attorney so employed appeared and filed affidavit asking for continuance on ground that he had not had time to prepare for trial, and in his application for continuance, plaintiff made no showing of his inability to secure any witnesses or any desired testimony, order refusing continuance was not prejudicial to rights of defendant and did not prevent defendant from presenting any evidence material to issues.

H. E. Bianchi, Bakersfield, for appellant.

Siemon & Siemon, Bakersfield, for respondent.

MUSSELL, Justice.

On December 18, 1946, plaintiff sold and agreed to deliver to defendant 396 feet of 12 inch, 3/4 inch butt welded well casing and fittings at an agreed price of \$3,063.60. On the following day, defendant purchased from plaintiff 96 feet of 16 inch casing and fittings at the agreed price of \$449.36. During the first week in February, 1947, plaintiff delivered 14 inch well casing and fittings to defendant's ranch instead of the 12 inch casing ordered, and the present controversy then arose as to whether there was an agreement between the parties that

plaintiff would charge the defendant with the additional cost of the 14 inch casing delivered.

Defendant testified that he was assured by plaintiff's agent, Mr. Hay, that the substituted casing would be charged to him without any increase in price. Mr. Hay testified that the difference in price between the 14 inch casing and the 12 inch casing was about 40¢ per foot and that plaintiff would make an equitable adjustment with defendant; that he told the defendant that there would be a difference in price.

The added cost of the substituted casing was the sum of \$232.04 and plaintiff, in its statement to the defendant, allowed a credit thereon of \$113.78 as an adjustment, and charged defendant with the difference of \$118.26.

Defendant appeals from that part of the judgment which allowed plaintiff \$118.26 and interest, as extra compensation for the casing furnished and contends that the trial court erred in denying defendant's application for a continuance of the trial date.

[1] The question as to whether plaintiff agreed to furnish the 14 inch casing for the price previously agreed upon for the 12 inch casing was one of fact for the trial court and its finding thereon adverse to defendant's contention is binding upon us under the evidence presented. *Berniker v. Berniker*, 30 Cal.2d 439, 444, 182 P.2d 557. The evidence concerning the conversation between plaintiff's agent Hay and defendant was conflicting and there being substantial evidence to support the findings of the trial court, they are conclusive on appeal. *Berger v. Steiner*, 72 Cal.App.2d 208, 211, 164 P.2d 559; *In re Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689.

[2] Concerning the trial court's refusal to grant a continuance, it appears that the case first came on for trial on February 20, 1950, and at that time it was continued until the 22nd of June following. Immediately following the order granting the continuance to June 22nd, plaintiff's counsel served notice of the time and place for trial and on June 21st, defendant employed a different attorney to represent him. On June 22nd the attorney so employed ap-

peared and filed his affidavit asking for a continuance upon the ground that he had not had time to prepare for the trial. The court thereupon granted a continuance of one day and put the matter over until June 23rd, at which time the trial was had. In his application for continuance, plaintiff made no showing of his inability to secure any witnesses or any desired testimony. From an examination of the record, it appears that the order refusing the continuance was not prejudicial to the rights of the defendant and it does not appear that the defendant was thereby prevented from presenting any evidence material to the issues.

Judgment affirmed.

BARNARD, P. J. and GRIFFIN, J.,
concur.



103 Cal.App.2d 767

**J. G. BOSWELL CO. v. W. D. FELDER
& CO. et al.**
Civ. 4302.

District Court of Appeal, Fourth District,
California.

April 25, 1951.

Hearing Denied June 18, 1951.

Action by J. G. Boswell Company, a corporation, against W. D. Felder & Company, a corporation, and others, to recover damages resulting from the conversion of 29 bales of cotton. The Superior Court, Fresno County, Edward L. Kellas, J., entered judgment on verdict in favor of defendant Felder and Company and defendant Simpkins, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that the instruction to jury to return a verdict in favor of defendant Felder and Company was correct and supported by the evidence.

Affirmed.

I. Subrogation — 41(1)

Where claimant demanded repayment of loss, occasioned by employee selling as his own certain cotton of claimant, from

indemnity company, which claim was paid pursuant to written agreement that payment was only a loan but was repayable only out of claimant's net recovery against alleged converters, the subsequent action brought by claimant against alleged converters was an action under doctrine of subrogation, though the action was brought in claimant's name.

2. Subrogation Ⓒ1

The right of subrogation is equitable in nature and can be invoked only in cases in which justice demands its application, and the right of one asking subrogation must have greater equity than those who oppose him.

3. Subrogation Ⓒ1

The doctrine of subrogation is called into play only when it is necessary to bring about an equitable adjustment between the parties.

4. Subrogation Ⓒ36

Subrogation is properly applied in favor of a surety on a fidelity bond only against persons who participated in the wrong of its principal, and is never applied against an innocent person wronged by the principal's fraud.

5. Subrogation Ⓒ36

Where employee of owner had charge of shipments of cotton, marked and checked out bales for shipment, arranged for loading of trucks, had an office in which all records concerning shipments of cotton were kept, and was authorized as cotton sampler to bale loose samples and sell them, and employee misappropriated certain bales of cotton and sold them to purchasers who did not participate in the misappropriation or have knowledge of such when they bought cotton, subrogee indemnity company, which had paid owner's loss, could not recover in conversion against bona fide purchasers.

6. Estoppel Ⓒ75

Where employee of owner had charge of shipments of cotton, marked and checked out bales for shipment, arranged for loading trucks, had an office in which all records concerning shipments of cotton were kept,

and was authorized as cotton sampler to bale loose samples and sell them, and employee misappropriated certain bales of cotton and sold them to purchasers who did not participate in the misappropriation or have knowledge of such when they bought the cotton, owner was estopped from asserting his title.

7. Estoppel Ⓒ75

Where an owner clothes another with the apparent title to, or power of disposition over property, and an innocent third party has thereby been induced to deal with the apparent owner in reference thereto, the true owner is estopped from afterward asserting his title.

8. Trover and conversion Ⓒ11

Where owner of goods clothed employee with indicia of ownership thereof, and employee converted and sold the goods to bona fide purchasers for value, bona fide purchasers were protected by statute which provided that if one of two innocent persons must suffer by the act of the third, he, by whose negligence it happened, must be the sufferer. Civ.Code, § 3543.

9. Trover and conversion Ⓒ67

In action of conversion, brought in owner's name, but on behalf of subrogee indemnity company which paid owner's loss before commencement of action, instruction that if jury found that employee of owner misappropriated the goods and that the indemnity company under its fidelity bond paid owner for the loss, and that the buyer of the converted goods did not participate in theft or know that the goods did not belong to employee, and that he had acted as a reasonable, prudent man, exercising due care and caution, then the jury must return a verdict for the defendant buyer, was not error.

10. Trover and conversion Ⓒ40(4)

In action of conversion, brought in owner's name, but on behalf of subrogee indemnity company, against buyer who purchased misappropriated goods from owner's employee, evidence was sufficient to support jury's finding in favor of defendant buyer.

Crider, Runkle & Tilson, Los Angeles, for appellant.

Lawrence W. Young, Fresno, for respondent W. D. Felder & Co.

Lopez & Gomes, Fresno, for respondent B. H. Simpkins.

MUSSELL, Justice.

Plaintiff appeals from a judgment entered after a verdict of a jury in favor of the defendants in an action for damages alleged by plaintiff to have been suffered by and resulting from the conversion of 29 bales of cotton. The points urged by appellant are (1) That the evidence presented as to payment of plaintiff's claim by an insurance carrier did not constitute a defense to the action; and (2) That the court erred in giving certain instructions to the jury.

Plaintiff corporation was engaged in the business of buying, selling and shipping cotton and maintained a plant therefor at Corcoran, California. Defendant W. L. Stuart (whose default was entered in the present action) was employed by plaintiff as a shipping clerk from September or October, 1947, to March 15, 1948. Stuart had charge of the shipments of cotton from the plant, issued bills of lading, marked and checked out the bales for shipment, arranged for the loading of trucks, and when shipping orders came through, they were turned over to him to execute. He had an office near the scale house where the records involving the shipping of cotton were kept and had access to such records. In connection with his duties as shipping clerk, Stuart was engaged by plaintiff as a cotton sampler and the loose cotton left over from his sampling operations was baled by plaintiff and left in plaintiff's yard. This cotton belonged to Stuart and he was authorized to sell it. During the 1947-1948 seasons 30 to 40 bales of this loose cotton were in plaintiff's yard and subject to such sale.

On February 25, 1948, defendant B. H. Simpkins (a cotton buyer) purchased 29 bales of cotton from Stuart. Simpkins had previously purchased loose cotton from Stuart and, as stated by W. S. McLeod, there was nothing unusual in the trade to

purchase cotton from a man working in the yard; that samplers were employed as shipping clerks and have sometimes accumulated as many as 100 bales in a season. At the time Simpkins made the purchase, he issued a shipping order to a trucking firm with instructions to deliver the cotton to the warehouse of the Pinedale Compress and Warehouse Company. Simpkins had no information as to the bale numbers or the weight of each bale which he purchased and this information was apparently typed on the shipping order by Stuart. The 29 bales were delivered to Pinedale according to instructions and Simpkins sold this cotton to McLeod as agent and buyer for defendant W. D. Felder & Company. Felder & Company purchased the cotton on samples, obtained negotiable receipts therefor and had no knowledge or information that plaintiff Boswell Company had or claimed any interest whatsoever in the cotton sold to it by Simpkins.

G. N. Wilson, the controller of plaintiff corporation, testified that in the 1947-1948 season, in checking the records of plaintiff, he found that 79 bales of cotton were missing, including one lot of 29 bales; that he was never able to check the 29 bales or determine what final disposition was made of them.

G. L. Hammond, plaintiff's plant superintendent at Corcoran, testified that in the latter part of December, 1948, he received notice that 29 bales of cotton were missing; that there were other bales of cotton missing and he had a list of it, but not a list of the 29 bales; that he obtained a copy of the shipping order delivered by Simpkins to the trucking firm and checked the list on it with the bale books, yard books and bale receipts of plaintiff and that the numbers did not correspond; that the numbers on this shipping receipt contained the numbers on cancelled bale tags belonging to the plaintiff and that he checked the weight of the bales thereon shown as against the 29 missing and found that they were identical in weight.

W. C. Runkle, an employee of plaintiff in its cotton department, testified that the records of plaintiff showed that the 29 missing bales had been shipped on an order

going to Los Angeles but that they did not arrive there and that these bales were checked off by Stuart as having been shipped.

There is testimony in the record indicating that the missing cotton, according to plaintiff's records, was of a different classification and color than that purchased by Simpkins and sold to Felder & Company.

Before the commencement of the instant action, the Indemnity Insurance Company of North America issued a fidelity bond in favor of plaintiff covering the misappropriations and wrong doings of its employees. Stuart was an employee of the plaintiff and was covered by the bond. After the execution of the bond and before the commencement of this action, plaintiff made a demand on the indemnity company for payment of its loss for 29 bales of cotton and the sum of \$4,919.94 was paid to the plaintiff therefor. This amount was entered on plaintiff's books as payment of plaintiff's claim for damages and a written agreement was entered into as follows:

"Los Angeles, California, May 27, 1949.

"J. G. Boswell Company hereby acknowledges that it has borrowed and received from Indemnity Insurance Company of North America the sum of \$4,919.94 as a loan, repayable only out of any net recovery J. G. Boswell Company may make from any person, firm, bank, corporation, co-partnership or any source, causing or liable for the loss or damage to Boswell to the extent of said \$4,919.94, arising out of or in connection with loss claimed to have been sustained by J. G. Boswell Company due to certain individuals, corporations, or co-partnerships, or other persons having stolen, embezzled, misappropriated, or converted to their own use Twenty-nine (29) bales of certain cotton, the property of J. G. Boswell Company.

"Indemnity Insurance Company of North America is obligated to pay to said J. G. Boswell Company said loss on account of a certain fidelity bond executed by Indemnity Insurance Company of North America in favor of J. G. Boswell Company, and Indemnity Insurance Company of North America contends that said J. G.

Boswell Company has not established the fact the Indemnity Insurance Company of North America is liable to said J. G. Boswell Company under the terms of said fidelity bond.

"And as security for such repayment, J. G. Boswell Company does hereby pledge to the said Indemnity Insurance Company of North America any such recovery as it may make, and agrees to enter and prosecute suit against any person, firm, bank, corporation, co-partnership or source, at the expense and under the direction and control of said Indemnity Insurance Company of North America."

"J. G. Boswell Company

"By Reg Robinson,

Secretary.

"Acknowledgment.

"Notary Seal."

[1-4] It is plaintiff's contention that the payment made was a loan and did not defeat its cause of action. This contention is without merit. It is apparent that the instant action was brought under the doctrine of subrogation for and on behalf of the indemnity company but in the name of the plaintiff. The right of subrogation is equitable in nature and can be invoked only in cases in which justice demands its application and the right of one asking subrogation must have a greater equity than those who oppose him. The doctrine of subrogation is called into play only when it is necessary to bring about an equitable adjustment between the parties. *Meyers v. Bank of America*, 11 Cal.2d 92, 98-99, 77 P.2d 1084. In that case it was said, 11 Cal.2d at page 96, 77 P.2d at page 1086, quoting from *American Surety Co. of N. Y. v. Lewis State Bank*, 5 Cir., 58 F.2d 559: "* * * It (subrogation) is properly applied in favor of a surety on a fidelity bond only against persons who have participated in the wrong of its principal. * * * It is never applied against an innocent person wronged by the principal's fraud."

And quoting from *Northern Trust Co. v. Consolidated Elevator Co.*, 142 Minn. 132, 171 N.W. 265, 4 A.L.R. 510, on page 99 of 11 Cal.2d, page 1088 of 77 P.2d: "'When

it is sought to enforce the right (of subrogation), something more must be shown than that defendant could have been compelled by the original creditor to pay the debt. While a surety may assert the right against one with whom he had no contractual relations, it must appear that the defendant participated, with notice, in the illegal act of the principal which served to bring about the loss. The right to recover from a third person does not stand on the same footing as the right to recover from the principal. As to the latter, the right is absolute—as to the former it is conditional.”

The court further said, 11 Cal.2d at page 101-102, 77 P.2d at page 1089 quoting from First & Tri State Nat. Bank & Trust Co. v. Massachusetts Bonding & Ins. Co., 102 Ind.App. 361, 200 N.E. 449: “The doctrine of (subrogation) has been applied most frequently in the courts to certain types of insurance cases. It has with almost unanimity been held not to apply in favor of surety on a fidelity bond, except only against persons who participated in the wrongful act of the wrongdoer.” (Citing cases.)

[5] In the instant case the uncontradicted evidence before us shows that defendants Simpkins and Felder & Company were innocent purchasers for value of 29 bales of cotton and did not participate in any manner whatsoever in the alleged theft or misappropriation thereof by Stuart; that both Simpkins and Felder & Company purchased the cotton in the ordinary course of trade and had no knowledge of the misappropriation by Stuart or that the plaintiff had or claimed any interest whatsoever in the cotton which they purchased. Under these circumstances, it cannot be said that the indemnity company had a right of subrogation except as to defendant Stuart. As between the defendants Simpkins and Felder & Company, who acted in good faith, and the indemnity company, which, for compensation, undertook to be responsible for Stuart's misappropriations and wrongs, the equities in favor of the indemnity company cannot be said to be greater than those of the defendants.

In American Alliance Ins. Co. v. Capital Nat. Bk., 75 Cal.App.2d 787, 171 P.2d 449,

plaintiff appealed from a summary judgment in a suit against the Capital National Bank of Sacramento for damages sustained as a result of having paid several fraudulent drafts presented by an agent and employee of plaintiff, upon which the agent had forged the names of the payees and appropriated the proceeds to his own use. The names of the payees were certified by the agent of plaintiff as genuine. The plaintiff was insured against the dishonest conduct of its agent by a surety company, which was not a party to the action. Upon demand, the surety company paid plaintiff the amount of its losses before commencement of suit. Plaintiff then brought suit against the bank for wrongfully paying the forged drafts. The court held that since the plaintiff had been fully compensated for its loss, it could not maintain the suit in its own behalf for to do so would result in plaintiff's receiving double pay for its losses, and that it could not maintain the action in behalf of the surety company, the indemnitor of plaintiff, since it was not entitled to be subrogated to the rights of the plaintiff. The court there said, 75 Cal. App.2d at page 796, 171 P.2d at page 454: “In several New York cases, wherein the liability of insurers were absolute, as it was in the present case, in construing language of asserted loan receipts similar to the one here involved, it was held that the receipt of losses from the insurer where there were no provisions for repayment of the moneys *except upon condition that it be recovered from other parties*, and neither interest nor security for the asserted debts were provided for, they constituted payments of the liabilities and not mere loans, in spite of recitals in the written receipts that they were intended as mere loans of money.” (Citing cases.)

In the case of Heuer v. Truck Ins. Exch., 51 Cal.App.2d 497, 504, 125 P.2d 90, 94, the court said, citing from New York cases: “Both cases involved facts showing that the insurer's liability to the insured was absolute and that the so-called loan transactions were mere subterfuges. In the Yezek case [Yezek v. Delaware, L. & W. R. Co., 176 Misc. 553, 28 N.Y.S.2d 35], the court distinguished numerous cases in

which transactions had been upheld as loan transactions and said at page 37 of 28 N.Y.S.2d, 'In the latter class, of which the present case is one, the insurer's liability to the insured is *absolute* when the loss occurs. * * * The insured is entitled to prompt payment without resort to a loan. The transaction is held to be a payment.' And on the same page the court quoted from *Kalle & Co., Inc. v. Morton*, 156 App. Div. 522, 524, 141 N.Y.S. 374, 376, as follows: 'If it be true, as indicated, that the policy could not have been enforced, then the insurance company had a right to exact such terms * * * as it chose as a condition of payment.'

[6,7] The evidence shows that the plaintiff placed defendant Stuart in a position to commit the alleged conversion of the cotton here involved. Stuart was at all times the shipping clerk of plaintiff, had access to all the records, was permitted to sell cotton from plaintiff's yard and to retain for his own use loose cotton which he was permitted to sell in the usual channels of the cotton trade. Where, as here, an owner clothes another with the apparent title to or power of disposition over property, and an innocent third party has thereby been induced to deal with the apparent owner in reference thereto, the true owner is estopped from afterward asserting his title. (24 Cal.Jur., p. 1029.)

[8] As was said in *Phelps v. American Mortgage Co.*, 40 Cal.App.2d 361, 366, 104 P.2d 880, 883: "* * * where an owner deposits his property with another and gives the depository such *indicia* of ownership that a reasonable man dealing with such agent is reasonably led to believe the agent is the owner of such property and parts with value in reliance thereon, the third person will be protected even though the true owner is guilty of no more than misplaced confidence."

Moreover, the defendants are protected by the rule set forth in section 3543 of the Civil Code: "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." This rule has been applied to bona fide purchasers for value from those

who have been clothed with the *indicia* of ownership. *Meadows v. Hampton Live Stock Comm. Co.*, 55 Cal.App.2d 634, 636, 131 P.2d 591. And in *Brown v. Oxtoby*, 45 Cal.App.2d 702, 708, 114 P.2d 622, 625 it is said: "Although the principal may not have actually authorized the particular fraudulent act, yet the principal is responsible for the fraud of the agent if he has entrusted to the agent a matter which puts the agent in a position to perpetrate the fraud complained of, while the agent is executing the agency transaction within the scope of his employment."

[9,10] Plaintiff complains that the court erroneously instructed the jury in several particulars, principally in the instruction which is as follows: "You are instructed that as a matter of law, the Indemnity Insurance Company of North America was obligated to pay the plaintiff J. G. Boswell Company under its fidelity bond for the dishonesty, misappropriation or wrong doing of the said W. L. Stuart, and I instruct you that if you find from the preponderance of the evidence that the said W. L. Stuart stole or misappropriated the 29 bales of cotton in issue and the said Indemnity Insurance Company, under its fidelity bond, paid the said plaintiff J. G. Boswell Company the sum of \$4,919.94 for the said alleged theft or misappropriation of said cotton and that said defendant B. H. Simpkins did not participate nor had he any knowledge of said theft or misappropriation nor had he any knowledge that said cotton belonged to the said plaintiff J. G. Boswell Company, and that he had acted as a reasonable, prudent man, exercising due care and caution, then I instruct you that plaintiff has been paid for said cotton and you are instructed to return your verdict in favor of the defendant, B. H. Simpkins."

We find no error in the instruction when viewed in the light of what we have heretofore said relative to subrogation and payment by the Indemnity Insurance Company. We have examined the other instructions to which objection was made and find no reversible error in them and conclude that the court was correct, in view of the evidence, in instructing the jury to return a

verdict in favor of the defendant W. D. Felder & Company, and that there was sufficient evidence in the record to support the jury's finding in favor of defendant Simpkins.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



103 Cal.App.2d 828

GLOGAU v. HAGAN et al.

Civ. 18234.

District Court of Appeal, Second District,
Division 2, California.

April 27, 1951.

Rehearing Denied May 15, 1951.

Action by Jeanette Glogau against J. A. Hagan and Evert L. Hagan, on an assigned claim for attorney's fees. A writ of attachment was issued and levied upon defendants' bank account. An alias writ was issued and levied upon real property of Evert L. Hagan. The Superior Court, Los Angeles County, William B. McKesson, J., rendered judgment for plaintiff, and from an order denying defendants' motion for an order discharging existing attachments issued and levied, the defendants appealed. J. A. Hagan abandoned the appeal. The District Court of Appeal, Wilson, J., held that court was not authorized to order the release of the attachment on real property on the grounds stated by defendant.

Order affirmed as to defendant Evert L. Hagan; appeal dismissed as to defendant J. A. Hagan.

1. Appeal and error ⇐805

Where one defendant abandoned appeal, such appeal would be dismissed as to him.

2. Attachment ⇐262

Where writ of attachment was issued and levied on defendants' bank account and subsequently a surety bond was posted in lieu of attached bank account, attachment was released by giving of surety bond.

3. Attachment ⇐277

Where writ of attachment was issued and levied on defendants' bank account, and subsequently a surety bond was posted in lieu of attached bank account, and account was released, and defendants then deposited cash with clerk in lieu of surety bond, cash on deposit with clerk was not money under attachment but was posted and held as a bond on release of attachment in lieu of surety bond.

4. Attachment ⇐228

In action on an assigned claim for attorney's fees, wherein an alias writ was issued and levied upon real property belonging to one defendant, court was not authorized to order release of attachment on real property on ground that court had found that fees for certain legal services claimed by plaintiff were not recoverable especially when defendant could have procured release of attachment by perfecting appeal and giving bond as provided by statute. Code Civ.Proc. §§ 942, 946, 948.

Evert L. Hagan, appellant, in propria persona.

Abraham Gottfried, Los Angeles, for respondent.

WILSON, Justice.

Plaintiff brought this action against Evert L. Hagan and J. A. Hagan on an assigned claim for attorney's fees. A writ of attachment was issued and levied upon defendants' bank account where there was on deposit approximately \$5,500. An alias writ was issued and levied upon real property of Evert L. Hagan.

The court granted defendants' motion for permission to post a surety bond in the sum of \$6,000 in lieu of the attached bank account. Upon the filing of the surety bond the bank account was released from the attachment. Defendants then made a motion for permission to substitute a cash deposit of \$6,000 in lieu of the surety bond, which motion was granted; that sum was deposited with the county clerk and the surety bond was discharged.

Judgment was rendered against defendants for the sum of \$4,100 and costs amounting to \$1,025.49. Thereafter defendants made a motion "for an Order specifying undertaking on appeal by deposit in Court of the sum required under Section 948 of the California Code of Civil Procedure out of the cash now on deposit with the clerk of the above-entitled Court, and for an Order refunding the balance of said sum now on deposit to the person entitled thereto." The motion was denied. Thereafter defendants appealed from the judgment.

[1] Subsequently defendants made a motion for an order discharging existing attachments issued and levied on account of certain items of legal services claimed by plaintiff, but which the court found she was not entitled to recover, and requested that the court retain the sum of \$4,100 as a cash undertaking on appeal from the judgment. The court made an order denying defendants' motion, from which order defendants appealed. J. A. Hagan having abandoned the appeal, it will be dismissed as to him.

[2-4] The maneuver by which a surety bond of \$6,000 was filed for the purpose of releasing the bank account from the lien of attachment, followed by the substitution of \$6,000 in cash to release the surety bond, resulted in the transfer of the \$6,000 from the bank to the county clerk. Such transfer, however, did not leave the money under the lien of the attachment. It was released by the filing of the surety bond and is now held by the clerk as security for the payment of the judgment. Defendants' motion was properly denied: (1) the attachment was released by giving the surety bond, and insofar as the cash is concerned there is nothing under attachment; (2) the cash on deposit with the clerk is not money under attachment but was posted and is held as a bond on the release of the attachment in lieu of the surety bond; (3) the provisions for attachment and for release thereof are statutory, and the court is not authorized to order the release of the attachment on the real property on the grounds stated by defendant; (4) defendant

could have procured the release of the attachment by perfecting his appeal and giving a bond as provided in sections 942 and 946 of the Code of Civil Procedure.

The order is affirmed as to defendant Evert L. Hagan; the appeal is dismissed as to defendant J. A. Hagan.

MOORE, P. J., and McCOMB, J., concur.



103 Cal.App.2d 714

VAN DORN v. CITY & COUNTY OF SAN FRANCISCO et al.

Civ. 14574.

District Court of Appeal, First District,
Division 2, California.

April 24, 1951.

Daisy Van Dorn sued the City and County of San Francisco, a municipal corporation, and California Street Cable Railroad Co., a corporation for injuries sustained when plaintiff was tripped at the westerly rail of cable company's northbound track while she was crossing street in a marked cross-walk. The Superior Court in and for the City and County of San Francisco, Robert McWilliams, J., rendered judgment for plaintiff for \$14,056.60 against both defendants and they appealed but the cable company abandoned its appeal. The District Court of Appeal, Goodell, J., held that evidence sustained implied finding of the jury that condition in street complained of had existed for sufficient length of time to constitute constructive notice thereof to city and that reasonable time to remedy condition had existed.

Judgment affirmed.

1. Municipal corporations Ⓒ755(1)

A city is not an insurer of safety of travelers.

2. Municipal corporations Ⓒ723½

Public Liability Act is to be strictly construed against claims and all requirements conditioning city's liability must be supplied. Gen. Laws, Act 5619.

3. Municipal corporations ⇨817(2)**Street railroads** ⇨112(2)

In action against city and cable car company under Public Liability Act for injuries sustained when pedestrian tripped at rail of defendant cable company's track, due to alleged defect in street between rails, *res ipsa loquitur* rule did not apply. Gen. Laws, Act 5619.

4. Municipal corporations ⇨791(1)

There must be shown, in order to charge city with constructive notice of defect in sidewalk or street, some element of conspicuousness or notoriety so as to put city authorities on inquiry as to existence of defect or condition and its dangerous character. Gen. Laws, Act 5619.

5. Municipal corporations ⇨791(1)

Where city is charged with constructive notice of a defect in a sidewalk or street, on basis of a duty to inspect, it must be made to appear that a reasonable inspection would have disclosed defect or dangerous condition. Gen. Laws, Act 5619.

6. Municipal corporations ⇨821(3, 16)

It is a question of fact whether dangerous condition in street or sidewalk existed for a sufficient length of time to constitute constructive notice to city and also whether reasonable time to remedy condition existed. Gen. Laws, Act 5619.

7. Evidence ⇨383(10)

In action against city and cable car company for injuries sustained when pedestrian tripped at rail of cable company's track when her foot was engaged by a depression in street between rails, value of photographs of the crossing was for jury. Gen. Laws, Act. 5619.

8. Evidence ⇨383(10)

In action against city and cable car company for injuries sustained when pedestrian tripped at rail of cable car company's track when her foot was engaged by a depression in street between rails, photographs warranted finding that spot at which pedestrian tripped was conspicuously dangerous and that because of appearance of paving stones and hatch covers and their relation to the rails and slots four different areas shown by photographs had been

settled and sunken for considerable time, resulting in a general, chronic condition of disrepair and not one which, in nature of things, could have arisen suddenly, and sustained finding that city had constructive notice of condition. Gen. Laws, Act, 5619.

Dion R. Holm, City Atty., City and County of San Francisco, Edward F. Dullea, Deputy City Atty., San Francisco, for appellant.

Leslie C. Gillen, John R. Golden, San Francisco, for respondent.

GOODELL, Justice.

Respondent sued for personal injuries and recovered a verdict and judgment for \$14,056.60 against both defendants. The Cable Company abandoned its appeal leaving as the sole appellant the City, against whom the action was prosecuted under the Public Liability Act of 1923, 2 Deering's Gen. Laws 1944, Act 5619.

On July 26, 1948 at noontime the respondent, a woman of 64, was walking westerly on the southerly side of Golden Gate Avenue in San Francisco, and while crossing Jones Street in the marked cross-walk she tripped at the westerly rail of the Cable Company's northbound track and was thrown with such force as to fracture her right shoulder. Other injuries were minor and soon cleared up.

That there was a depression of from 3 to 3½ inches at the spot in question is not disputed, but there was no testimony as to how long it had been there.

At that place there is a hatch containing underground cable pulleys which must be inspected (and perhaps oiled) twice a day, and in order to make them readily accessible the hatch is covered with short, removable boards of varying widths, (mostly about 6 inches) laid between the rails and at a right angle to them. The sunken end of at least one of these boards, where it abuts the westerly rail of the northbound track, caused the depression which engaged the toe of respondent's left shoe.

The act provides, *inter alia*, that a municipality shall be liable for injuries resulting

from the dangerous or defective condition of streets where the agency having authority to remedy such condition, had knowledge or notice thereof and then failed or neglected for a reasonable time to remedy it or take such action as may be reasonably necessary to protect the public against it.

Appellant presents but one point which is, as its counsel states, "whether the evidence will support the implied finding of the jury that the condition complained of had existed for a sufficient length of time to constitute constructive notice and also whether a reasonable time to remedy the condition had existed." It does not dispute that the sunken spot was dangerous at the time of the accident, but contends that "there is no evidence as to how long the condition complained of existed" prior thereto, and that this question was left to surmise.

Respondent relies wholly on constructive notice, for her counsel admit that "there is no evidence that there was actual notice" of the dangerous condition.

[1-3] We agree with appellant that a city is not an insurer of the safety of travelers, *George v. City of Los Angeles*, 11 Cal.2d 303, 308, 79 P.2d 723; that the Public Liability Act is to be strictly construed against the claim, *Whiting v. National City*, 9 Cal.2d 163, 165, 69 P.2d 990; that all the requirements conditioning the city's liability must be supplied, *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 363, 54 P.2d 725, and that the *res ipsa loquitur* rule does not apply.

There was no evidence (as in some cases) of any prior accident, or of any complaint or report of a dangerous situation having been turned in.

Despite all these considerations we are convinced that there was substantial evidence to sustain this verdict against the city.

In *Fackrell v. City of San Diego*, 26 Cal.2d 196, 206-207, 157 P.2d 625, 630, 158 A.L.R. 773, the court says: "The rules governing constructive notice require reasonable diligence in making inspections for the discovery of unsafe or defective conditions. * * *

"As to what constitutes a dangerous or defective condition no hard-and-fast rule can be laid down, but each case must depend upon its own facts [citations]. Whether a given set of circumstances creates a dangerous or defective condition is primarily a question of fact [citations]. The findings of the trial court must be sustained if they are supported by substantial evidence. All legitimate and reasonable inferences must be indulged toward upholding the findings. Appellate courts, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover whether such doubt or conflict exists, the court should be realistic and practical. *Estate of Bristol*, 1943, 23 Cal.2d 221, 223, 143 P.2d 689."

[4, 5] In *Laurenzi v. Vranizan*, 25 Cal. 2d 806, 812, 155 P.2d 633, 636, the court, quoting *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 364-365, 54 P.2d 725, says that "there must be shown, in order to charge the city with constructive notice * * * some element of conspicuousness or notoriety so as to put the city authorities upon inquiry as to the existence of the defect or condition and its dangerous character. It is equally clear, we think, that, where the city is charged with constructive notice on the basis of a duty to inspect, it must be made to appear that a reasonable inspection would have disclosed the defect or dangerous condition; that is, that, had there been no neglect of duty there would have been actual knowledge on the part of the city officers.'"

Perry v. City of San Diego, 80 Cal.App. 2d 166, 170, 181 P.2d 98, 101, follows *Laurenzi v. Vranizan*, supra, and quotes from *Kirack v. City of Eureka*, 69 Cal.App.2d 134, 158 P.2d 270, as follows: "The rule is well established that constructive as well as actual knowledge of a dangerously defective sidewalk or street may render a municipality liable for damages for injuries sustained on that account when such defects should be reasonably anticipated by the officers in charge, or when reasonable

inspection would have disclosed the dangerous condition.”

[6] Numerous cases hold that “it is a question of fact * * * whether the dangerous condition * * * had existed for a sufficient length of time to constitute constructive notice, and also whether a reasonable time to remedy the condition had existed.” *Wise v. City of Los Angeles*, 9 Cal.App.2d 364, 366, 49 P.2d 1122, 1123, 50 P.2d 1079. In the latter case it was held that the existence of a defect for four or five days was substantial evidence to sustain a finding of constructive notice.

[7] The factors of constructive notice and adequacy of inspection both enter into this case, and in discussing them the effect which the photographs of the crossing might have had on the jury cannot for a moment be discounted. The fairness of the photographs is not questioned, and their value was for the jury to determine. 10 Cal.Jur. p. 896.

Respondent contends that the photographic evidence, by itself, portrays a situation conspicuously dangerous, from which the jury must have concluded that it had existed for a considerable time.

Eight photographs were in evidence. Six of them (taken four days after the accident) were plaintiff's exhibits, and two (taken about two months later) were defendants'.

The best view of the crossing as a whole is found in one of defendants' exhibits. In addition to the spot in question it shows between the slot and the easterly rail and well within the pedestrian lane, a depression much longer—probably 4 feet in length—than the one in question, and much deeper. Within this sunken area it shows 18 or more paving stones of varying sizes and shapes—no two alike—laid unevenly and roughly, and not firmly embedded like others shown. Lying beside these, and between the slot and the westerly rail, there are about ten paving stones, irregular, uneven and unmatched, and a large slab of some kind. It shows a concrete patch outside the easterly rail leading up, apron-fashion, from the surface of the street to the top of the

rail, obviously to bridge a difference in elevation between the surface of the street and the rail. It shows to the south of the pedestrian lane two hatch-covers of low grade lumber, one of irregular shape, split and containing a large knot, and the other likewise split. Adjoining them to the south is a large, gaping hole from which the hatch-cover is either missing or sunken out of sight. Next beyond, on the southerly side, the paving stones on each side of the slot are sunken, rough, unmatched, and unevenly laid. The same photograph shows the south-bound track as well, with still another sunken area deeper than the one in question, perhaps four feet long, lying partly within and partly without the pedestrian lane, the wooden hatch-covers whereof are not uniform but rough, uneven and unmatched.

We have stated what this one photograph shows, and it probably gave the jury a very bad impression. Several close-ups of the spot in question show in detail the coarse-grained wood of the hatch-covers, the large knot in the split chunk, also the irregular way in which they are laid. Other photographs show the sunken and irregular spots from different view-points.

The over-all picture presented by these eight photographs, singly and in combination, was that of four distinct sunken and irregular areas in the surface of the street, three of them unquestionably worse than that which caught respondent's shoe.

We appreciate that the issue before the jury was whether the precise spot wherein respondent tripped, was dangerous. The city does not claim that it was not, and the uncontradicted evidence shows that it was 3 to 3½ inches deep. But in considering the questions whether it was *conspicuous* or *notorious*, and whether it had existed for a long time the jury could also consider the three other sunken areas surrounding it, all of which were worse. Ordinarily the only dangerous spot before a court is the one which does the damage.

[8] In “searching the record and exploring the inferences which may arise from what is found there” (*Fackrell* case, *supra*) a reviewing court studying these

photographs—or even glancing at them for that matter—cannot help concluding that they warranted the jury in finding not only that the spot in question was conspicuously dangerous, but that, because of the appearance of the paving stones and hatch-covers, and their relation to the rails and slots, all four areas had been settled and sunken for a considerable time, resulting in a general, chronic condition of disrepair and not one which, in the nature of things, could have arisen suddenly.

In *Sebern v. City of Riverside*, 42 Cal. App.2d 701, 109 P.2d 747, 748, the photographs in evidence were alone held to justify the inference that “an extremely dangerous hazard for pedestrians” existed. The court there said: “The photographs in evidence disclose such a conspicuously dangerous situation that the court would be justified in finding that the city had constructive notice under the rules discussed in *Nicholson v. [City of] Los Angeles*, 5 Cal. 2d 361, 54 P.2d 725.”

Counsel for respondent argue here (as they undoubtedly did to the jury) that the photographs also demonstrate that when the crosswalk was painted on June 30, 1948 the depression must have been there because (they argue) in the pictures taken four days after the accident white paint is to be detected beneath the rail, which would be there only if the surface had already sunken. This question was solely for the jury to decide.

When the jurors came to consider the important question whether “a reasonable inspection would have disclosed the defect or dangerous condition” (*Laurenzi and Nicholson cases*, *supra*) they likewise had the photographs before them.

The only testimony respecting inspection was given by two employees of the City, both called by the plaintiff. The City called no witness on this or any other subject.

The witness Lang, an assistant traffic engineer, had charge of the paint crews whose job it was to put the white signs and markings on the streets. The pedestrian lanes are painted (with a spray-gun) about every six months, and the witness tes-

tified from records that this cross-walk was painted on June 30, 1948, 26 days before the accident. He testified that it is not the duty of his inspectors, who take care of painted lines, to inspect for defects in streets, but he could not answer whether they had to report such defects in case they discovered them. He testified that his own department was “traffic-conscious;” that anyone out on the job would report any broken pavement as a matter of custom and office policy.

The witness Hiden (called by plaintiff) testified that he had six assistants whose duties include inspections for defects or hazards in sidewalks and streets. He testified that nothing connected with this intersection had been brought to his visual notice. At the time of the accident two men were inspecting on foot in the Mission district and one in the Richmond, and two other inspectors used automobiles. When asked if anybody was inspecting the downtown district he answered “The downtown district had been inspected in 1947.”

“Q. And you ignored that district in the matter of any routine inspections of conditions of the streets since 1947, is that correct? A. We have one inspector who takes care of any defects which are reported or complaints that are made * * *

“Q. So far as your recollection of the physical performance of the inspection that would have covered the intersection of Golden Gate Avenue and Jones Street, nothing has been done in that area since 1947?

A. That is my opinion, yes, sir.

“The Court: Q. What part of 1947?

A. Up to about November of 1947.

“Q. Do you mean inspections had been made in 1947? A. Yes, sir, they had, and we began again in the latter part of 1948 down there.

“Q. What part of 1948? A. Started in September of 1948.”

None of the crew who painted the cross-walk 26 days before the accident was called by the City to show its condition as they had then found it. None of the witness Hiden's inspectors was called, and the last testimony (except medical) that the jury heard was the latter's admission that there

had been no inspection of the downtown area between November, 1947 and the time of the accident. This testimony was only with respect to the downtown area in general, and not with respect to this intersection or even the neighborhood surrounding it. Approximately eight months, then, had gone by just before the accident without any inspection, and apparently ten months elapsed (November to September) between inspections.

We are satisfied that the verdict is supported by substantial evidence and that the court properly denied the motions for judgment notwithstanding the verdict and for new trial.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J.,
concur.



103 Cal.App.2d 830

PEOPLE v. SELLERS.

Cr. 4572.

District Court of Appeal, Second District,
Division 2, California.

April 27, 1951.

Russell L. Sellers was convicted in the Superior Court of Los Angeles County, H. J. Borde, J., of violation of section 288a of the Penal Code, and he appealed from judgment and order denying motion for new trial, and purportedly appealed from verdict. The District Court of Appeal, Wilson, J., held that evidence sustained conviction.

Judgment and order denying motion for new trial affirmed, purported appeal from verdict dismissed.

1. Sodomy ☞6

Evidence sustained conviction of violation of section 288a of Penal Code, though arresting police officers' testimony was not corroborated. Pen.Code, § 288a.

2. Criminal law ☞381

In prosecution for violation of section 288a of the Penal Code, effect of testimony of defendant's witnesses that his reputation in the community for morality, chastity, and nonhomosexuality was good, was for jury. Pen.Code, § 288a.

3. Sodomy ☞6

In prosecution for violation of section 288a of the Penal Code, refusal to permit physician specializing in neurology and psychiatry to express opinion as to whether, after having made psychiatric examination, defendant was homosexual, was proper, since it would not prove performance or nonperformance of the criminal act. Pen. Code, § 288a.

Richard C. Fildew, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Appellant and his codefendant, Spencer, were convicted of a violation of section 288a of the Penal Code. Sellers has appealed from the judgment and from the order denying his motion for a new trial. There is also a purported appeal from the verdict.

Appellant contends that the evidence is insufficient to sustain his conviction. The act took place in a restroom having doorless stalls; there was a hole in the partition between the two stalls occupied by defendants; some of the partitions between other stalls did not have such holes. Two police officers who had been observing the premises for two weeks entered a vacant space behind the restroom and lifted aside a portion of the wooden wall which had previously been cut out; the distance from the point where the officers were conducting their observation to the top of the toilet seat was between 7½ and 8 feet. Three 100-watt light bulbs were burning in the restroom.

After Sellers and Spencer entered adjoining stalls they waited until the room was

vacant with the exception of one person in another stall; the officers observed Spencer committing the act on Sellers. They left their observation posts, entered the restroom and found both defendants in the process of rearranging their clothing, whereupon they placed defendants under arrest.

[1] The foregoing evidence is sufficient to sustain the conviction. *People v. Bentley*, 102 Cal.App.2d 97, 226 P.2d 669. Corroboration of the police officers' testimony is not required.

[2] Defendant denied he had engaged in the act charged and several witnesses testified that his reputation in the community for morality, chastity, and nonhomosexuality was good. The effect of such evidence was for the jury to determine.

Defendant assigns as error the refusal of the court to permit a physician specializing in neurology and psychiatry to express an opinion as to whether, after having made a complete psychiatric examination, defendant was to any extent a homosexual. Defendant's argument is to the effect that by reason of the admissibility of evidence against a defendant of other sex crimes for the purpose of showing his tendency in that regard, he should be permitted to offer expert testimony that he is not a homosexual. He concedes that there are no authorities sustaining his position.

[3] The law does not make a distinction as to the type of person who may commit the act charged. It is a punishable offense whether the person is normal or abnormal. The proffered evidence is not, as argued by defendant, a type of circumstantial evidence admissible for the purpose of proving the performance or nonperformance of a criminal act.

The cases cited by defendant do not sustain his position. In *People v. Baldwin*, 117 Cal. 244, 248, 49 P. 186, the court held that evidence offered by the defendant should have been admitted to show that it was physically impossible for a man to commit rape upon a small girl in the manner and under the circumstances described by her, and to show that the condition in which the child's person was found had been produced by means other than that claimed by her.

In *People v. Camp*, 26 Cal.App. 385, 147 P. 95, it is said that the evidence of an expert is admissible for the purpose of determining what effect the acts charged against the defendant would have in arousing the feelings or gratifying the lust or passions or sexual desires of the man in the case. Such evidence is entirely different from that offered by defendant in the instant case.

The judgment and the order denying defendant's motion for a new trial are affirmed. The purported appeal from the verdict is dismissed.

MOORE, P. J., and McCOMB, J., concur.



103 Cal.App.2d 872

ALEXANDER et al. v. HAMMARBERG et al.
Civ. 14649.

District Court of Appeal, First District,
Division 1, California.

April 28, 1951.

Hearing Denied June 25, 1951.

Boyd R. Alexander and Elizabeth H. Alexander brought action against Paul H. Hammarberg and others to recover damages for defective construction of house for plaintiffs. The Superior Court of the State of California in and for the County of Alameda, Thomas J. Ledwich, J., entered a judgment for the plaintiffs, and the named defendant appealed. The District Court of Appeal, Peters, P. J., held that doctrine of res judicata was not applicable.

Judgment affirmed.

I. Estoppel Ⓒ68(2)
Judgment Ⓒ630

Where building contractors, who constructed house, filed a mechanic's lien and suit to foreclose against owners of realty, and owners filed a counterclaim and cross-complaint setting up cause of action for negligence against contractors, on ground that front foundations were placed on

loosely filled dirt, with result that foundations sank and damaged house, and owners filed independent suit against contractors and architect, based on negligence, and actions were consolidated, and architect moved for severance of cause of action against him, and motion was granted, and in foreclosure action contractors were awarded judgment for balance due them less amount for cost of remedying defects, architect could not escape liability in action against him on ground that he and contractors were joint and concurrent tort-feasors, and that satisfaction of judgment in foreclosure action released him from liability, and architect waived or was estopped from successfully urging that defense.

2. Torts ⚡22

To constitute parties "joint tort-feasors" there must be a concert of action, a unity of purpose or desire, and two or more defendants working separately but to a common purpose, and each acting with knowledge and consent of the others.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Tort-Feasors".

3. Judgment ⚡630 Torts ⚡22

Where there was no unity of purpose between contractors who constructed house and architect who drew up plans, and there was no concert of action between them, and architect had no contractual relationship with contractors, architect and contractors were not "joint tort-feasors," and hence judgment in foreclosure action by contractors against owner of realty wherein owners of realty claimed damages for defective construction of house did not bar subsequent action by owners of realty against architect for damages for defective construction of house.

4. Judgment ⚡590(4)

Where judgment for owners of realty for damages for defective construction of house in action by contractors to foreclose mechanic's lien covered only part of damages suffered by owners of realty, and remainder of damages for defective construction were due to negligence of archi-

tect, and architect was agent of owners of realty, and contractors were entitled to rely on architect's instructions, judgment in foreclosure action did not bar owners of realty from maintaining action against architect for damages.

5. Release ⚡29(1)

The rationale of the rule of that release of one joint tort-feasor releases all is that injured party should not be entitled to recover double compensation.

6. Release ⚡29(1)

Where no double compensation is awarded in two separate actions against tort-feasors, rule that release of one joint tort-feasor releases all was not applicable.

7. Judgment ⚡632

In a proper case a person not a party to a prior action may urge that prior judgment is res judicata.

8. Judgment ⚡634

Questions involved in determining validity of plea of res judicata are whether issue decided in prior adjudication was identical with one presented in subsequent action, whether there was a final judgment on the merits in prior case, and whether party against whom plea was asserted was a party or in privity with a party to prior adjudication.

9. Judgment ⚡715(3)

Where building contractors, who constructed house, filed a mechanic's lien and suit to foreclose against owners of realty, and owners filed a counterclaim and cross-complaint setting up cause of action for negligence against contractors, on ground that front foundations were placed on loosely filled dirt, with result that foundations sank and damaged house, and owners filed an independent suit against contractors and architect, based on negligence, and the actions were consolidated, and architect then moved for severance of cause of action against him, and motion was granted, judgment in foreclosure action was not res judicata in negligence action against architect by owners of realty.

10. Contracts ⚡353(3, 8)

In action by owners of realty against contractor to recover damages for defec-

tive construction of house, court properly refused architect's requested instruction that architect was not a party to contract between contractors and owners of realty, and that contractors were not bound to comply with instructions or requests made by architect.

11. Trial ⇐251(1)

Requested instruction, which correctly stated the law, but which related to a problem not involved in the action, was properly refused.

12. Trial ⇐228(3)

In action by owners of realty against architect to recover damages for defective construction of house, instruction that one whose property has been damaged by the wrongful act of another must exercise reasonable care and diligence to avoid loss and minimize damages, and that he may not recover for losses which he could have prevented by reasonable efforts on his part and by expenditures that he might reasonably have made "provided he is financially able to pay the cost of such expenditures", was not erroneous because of inclusion of the quoted phrase.

13. Trial ⇐251(1)

Where contributory negligence was not pleaded in defendant's answer, and no evidence of contributory negligence was introduced, failure to give instruction on legal effect of contributory negligence was not error.

14. Trial ⇐253(5)

In action by owners of realty against architect to recover damages for defective construction of house, instruction that when negligent acts or omissions of two or more persons, whether committed independently or in course of jointly directed conduct, contribute concurrently, and as proximate causes, to injury or damage of another, each of such persons is liable, and that such is true regardless of relative degree of contribution, and that it is no defense for one of such persons that the other person, not joined as defendant, participated in causing injury or damage, was not erroneous on ground that it impliedly told jury that jury could disregard contractors completely.

Oswald G. Ingold, Henry Poppic, Berkeley, for appellant.

Norman Elkington, San Francisco, for respondents.

PETERS, Presiding Justice.

The Alexanders, who are the plaintiffs and respondents, desired to build a house on a lot owned by them in Berkeley. Hammarberg, the defendant and appellant, who is an architect, was employed by the Alexanders to draw plans and specifications for the proposed house, and later employed to supervise its construction. Rahlves and Rahlves, building contractors, hereafter referred to as Rahlves, contracted with the Alexanders to construct the house according to the plans and specifications prepared by Hammarberg. Shortly after the Alexanders moved into the completed house they discovered that the floors were not level, the plaster cracked, and other defects appeared, all caused by a sinking and cracking of the foundations. It was then discovered that the front foundations had been placed on loosely filled dirt and not in the solid earth as called for by the plans and specifications. The Alexanders, although they had signed a notice of completion on the advice of Hammarberg, refused to make the final payment to Rahlves, who filed a mechanic's lien and a suit to foreclose. The Alexanders filed an answer denying liability, and a counter-claim and cross-complaint setting up a cause of action for negligence against Rahlves. The Alexanders also filed an independent suit against Rahlves and Hammarberg. This complaint set forth two causes of action against Rahlves, one in negligence and the other for rescission. It also set forth two causes of action against Hammarberg, one for negligence in the preparation of the plans and in supervising construction, and the second for rescission. The Alexanders moved to consolidate the foreclosure action with their action. This motion was granted. When the consolidated actions were called for trial, Rahlves moved that the Alexanders be compelled to elect between their cause of action for negligence and their cause of action for rescission. This motion was also granted. The Alex-

anders elected to stand on their negligence counts, and dismissed the rescission counts against all parties. Hammarberg then moved for a severance of the cause of action against him from that stated against Rahlves. This motion was predicated on the theory that the liability of Rahlves and Hammarberg, as disclosed by the pleadings, was several and not joint, that the issues against both defendants were not the same, and that to try both actions together would be prejudicial to Hammarberg. This motion of Hammarberg for a severance was granted. The actions between Rahlves and the Alexanders were tried first. This trial resulted in a judgment that Rahlves were entitled to the balance due them under their construction contract, namely, \$2,720, and the Alexanders were entitled to \$2,027.45 as reimbursement for the cost of remedying defects caused by the negligence of Rahlves. Thus, the net result of this action was a judgment for Rahlves in the amount of \$692.55.

Then the action involving only Hammarberg and the Alexanders was tried before a jury. That is the present case. The trial court instructed that, should the jury find for the Alexanders, they should first deduct the amount of the damages already allowed the Alexanders in the case against Rahlves. The jury brought in a verdict in the amount of \$4,972.55, which, when added to the judgment in the Rahlves case, indicates that the jury fixed the total damage to the Alexanders at \$7,000. Hammarberg had made motions for a nonsuit and directed verdict, which were denied, as was his motion for a judgment notwithstanding the verdict. Judgment was entered in accordance with the verdict, and Hammarberg appeals. He makes three main contentions:

1. That the trial court should have granted the three motions mentioned above because, so it is asserted, the evidence establishes that Rahlves and Hammarberg are joint or concurrent tort-feasors; that for this reason the satisfaction of judgment filed in the Rahlves case constituted the release of a joint or concurrent tort-feasor, which, as a matter of law, released Hammarberg;

2. That the three motions should have been granted because, so it is urged, the subject matter of this action is the same as that involved in the Rahlves case, and the first adjudication estops the Alexanders from securing any recovery against Hammarberg; and

3. That the trial court erred in refusing to give, in modifying, and in giving certain instructions.

The pertinent facts are that in late July of 1947 the Alexanders hired Hammarberg to prepare plans and specifications for a house to be built on a hillside lot in Berkeley, and a contract was executed whereby the architect was to receive four per cent of the estimated cost of construction as his fee for this service. This contract did not include any agreement for supervising construction by Hammarberg, it being agreed that such service, if desired, would cost an additional four per cent. Hammarberg drafted the plans and specifications and was paid \$490 for this service. Thereafter, the Alexanders entered into a building contract with Rahlves, building contractors, who agreed to construct the building according to the plans and specifications for \$13,600. Construction started in the fall of 1947. Shortly thereafter the Alexanders consulted Hammarberg and asked him if he would take over supervision of the construction. They testified that he agreed to undertake supervision of the construction. Admittedly, they subsequently paid him, by a series of checks, a total of \$441.10. Hammarberg testified that these payments were for advice and not for supervision. He admitted, however, that Mrs. Alexander had requested him to take over the supervision of construction, and that he had never talked with her or her husband about simply giving advice. Nevertheless, he insisted that he had not agreed to supervise. This conflict, if there be a conflict on the issue, has been resolved against him by the trial court. The evidence overwhelmingly supports the implied finding of the jury that Hammarberg contracted to supervise construction.

There is no doubt that Hammarberg did supervise to some extent. Within a day or two of this last agreement between the

Alexanders and Hammarberg, Mr. Alexander reported to the architect that he had seen workmen putting in inadequate trenches, and placing foundation forms on loose earth fill. Hammarberg said "I can't believe it," but promised to straighten the matter out. A day or two later he informed Alexander that he had been out to the job, had seen one of the builders, and that everything had been fixed up. Hammarberg admitted that he had visited the property and had then instructed one of the builders to place the foundations on solid ground, that the builder had agreed to do so, but that he made no further examination to ascertain if his instructions had been carried out. The plans and specifications called for the west or front foundations to be a minimum of six inches, and a maximum of eighteen inches below the natural ground level. Hammarberg admitted that the west foundation was in fact constructed on loose earth from eighteen to twenty inches above the natural ground level.

Hammarberg admitted that it is the custom for a supervising architect to check the foundations, and admitted that all that he did was to talk about it to the men on the job. He testified that he had "told the men to go ahead and pour when the foundations were, in fact, 18 inches above ground level, natural ground level" and answered "That is right" to the question "if you had not told the concrete men to pour concrete in forms, the bottoms of which were 18 inches above the natural ground level, this thing would not have taken place, would it?"

After the house was completed Hammarberg presented to Alexander, and advised him to sign, a notice of completion. This was signed by Alexander. The Alexanders moved into the house on March 24, 1948, and shortly thereafter noticed that rugs and furniture had a tendency to slide toward the front of the house. An inspection disclosed sloping floors and cracks in the plaster, which condition continued to get worse, and shortly thereafter big cracks were found in the front foundations. Hammarberg admitted that the front foundations settled at least two inches. Crab-

tree, acting chief of the appraisal division and former chief of the architectural section of the Veterans Administration, testified that he first inspected the house in April or May, 1948, and found the living room floor in excess of two inches off level, found the ceilings off level, and small cracks in the plaster. He inspected the premises three times, the last time a week before this trial, and discovered that the cracks had increased in number and size after each inspection. When he first inspected the foundations there was a crack in the west wall. On his second inspection this crack had increased in size and others were present. By the time of his third inspection cracks had appeared in the center and end foundations, and the fireplace had settled. He testified that it would be necessary to rebuild virtually the entire house to put it in the condition contemplated by the plans and specifications. He approved a plan of repair submitted by an engineer by the name of Engle, and testified that the repairs proposed by Engle would cost between \$12,500 and \$13,000, plus certain supervisory costs. There were many other estimates made by various experts. Their estimates vary greatly running from \$1,846.50 to \$17,354. No point is made on this appeal challenging the amount of damages fixed by the jury. Alexander testified that he could not make the repairs because he did not have the money to pay for them.

The experts, while agreeing that the house had settled, disagreed as to whether the settling of the foundations occurred after the house was complete, before it was plastered, or both. They also disagreed, substantially, as to what had to be done to make the house conform to the plans and specifications.

Alexander, on cross-examination, testified that in the Rahlves case he had testified as to the damages as they existed at that time, and that his testimony on the present trial was as to the damages as they now exist. He conceded that the damages as they existed at the times of the Rahlves and the present trials were fundamentally the same, but that the cracks increased in size and number between the two trials.

[1] The first point urged by appellant is that the builders and the architect, under the evidence, were joint or concurrent tort-feasors, and that, since the judgment in the Rahlves case has been satisfied, the release of the Rahlves judgment automatically released Hammarberg. As already pointed out, when Rahlves and Hammarberg were joined in the same complaint, Hammarberg successfully requested and secured a severance. At that time he urged that, under the pleadings, Rahlves and Hammarberg were not jointly affected; that the cause of action against Rahlves was "for damages as a result of alleged improper performance of a builder's contract, whereas, Alexander and Hammarberg are now parties to an action which, in its nature, appears more like a malpractice suit for negligence on the part of an architect"; that in the Alexander-Rahlves causes of action the issues were, "Was the contract substantially performed? In what respects was there a failure to perform? What damage was suffered by such failure?" while in the Alexander-Hammarberg cause of action the question revolved around the sufficiency of the plans and specifications, "the extent, if any, of supervisory responsibility, and the competence of the architect." For these reasons a severance was demanded and secured. Now, after securing the severance, and after a trial in which the evidence demonstrated that the issues were substantially as he outlined them in his motion for a severance, he contends that the parties were joint or concurrent tort-feasors. These two positions are entirely inconsistent. The courts will not recognize or tolerate such tactics. A party cannot thus "blow both hot and cold." *McDanels v. General Ins. Co.*, 1 Cal.App.2d 454, 459, 36 P.2d 829, 832; *Chaquette v. Ortet*, 60 Cal. 594, 600. The courts would be impotent indeed if they were compelled to approve such duplicity. Under elementary principles, even if the point were sound which it is not, Hammarberg has waived or is estopped from successfully urging it.

[2,3] Even if a waiver did not exist or if Hammarberg were not estopped, the point now under consideration is without

merit. To constitute the parties joint tort-feasors, the following three elements must all exist: "(1) A concert of action; (2) A unity of purpose or design; (3) Two or more defendants working separately but to a common purpose and each acting with the knowledge and consent of the others." *Weinberg Co. v. Bixby*, 185 Cal. 87, 106, 196 P. 25. In *Slater v. Pacific American Oil Co.*, 212 Cal. 648, 300 P. 31, the court held that the mere fact that consequences of different torts unite where there was no concert or unity of design among the defendants, does not create joint liability. The Court, 212 Cal. at page 651, 300 P. at page 32, quoted the following, with approval, from *Miller v. Highland Ditch Co.*, 87 Cal. 430, 431, 25 P. 550: "It is clear that the rule, as established by the general authorities, is that an action at law for damages cannot be maintained against several defendants jointly when each acted independently of the others, and there was no concert, or unity of design, between them. It is held that, in such case, the tort of each defendant was several when committed, and that it does not become joint because afterwards its consequences united with the consequence of several other torts committed by other persons." See, also, *Key v. Caldwell*, 39 Cal.App. 2d 698, 104 P.2d 87. In the instant case the pleadings and evidence demonstrate that there was no unity of purpose between Rahlves and Hammarberg, and that there was no concert of action between them. Hammarberg had no contractual relationship with Rahlves. He was the agent of the Alexanders. It was his duty to draft the plans and specifications and to supervise construction. It was the duty of Rahlves to build in accordance with the plans and specifications. The Rahlves are charged with the violation of one duty, Hammarberg with the violation of a separate and distinct duty. The builders and the architect were not joint tort-feasors.

[4] Moreover, the judgment in the Rahlves case and in this one do not duplicate each other. In the Rahlves case the judgment covered only part of the damages suffered by the Alexanders. In that case the court found that Hammarberg was the

agent of the Alexanders; that the builders were entitled to rely upon Hammarberg's instructions, and, where they did so, it constituted a waiver by the Alexanders of any failure to follow the plans and specifications in this respect; that the depth of the front foundation trench was approved by Hammarberg; that such approval constituted a waiver by the Alexanders of any defect existing therein. The court then found the damages for "that portion of the said defects for which * * * [Rahlves] were and are responsible and which were not waived by * * * [Alexanders] by and through their architect was and is the sum of \$2,027.45." Thus, it is clear that the court found that the Alexanders suffered damage beyond that found in the Rahlves case, which damages, so far as Rahlves are concerned, was found to have been waived.

[5,6] In the instant case the court was equally careful to separate the two liabilities. It instructed that if the jury found the total damage to the Alexanders exceeded \$2,027.45, the amount awarded in the Rahlves case, they should deduct that sum from the total damage. It is clear that double compensation was prevented. This demonstrates that the present case does not fall within the rationale of the rule that the release of one joint tort-feasor releases all. The theory behind that rule is that if this were not the rule the injured party would recover double compensation. *Dougherty v. Cal. Kettleman Oil Royalties, Inc.*, 13 Cal.2d 174, 88 P.2d 690: Where, as here, it is clear that no double compensation has been awarded, the rule does not apply. Thus, in *Wallner v. Barry*, 207 Cal. 465, 473, 279 P. 148, 151, the Court, after first deciding that certain possible defendants were not joint tort-feasors, stated: "Even if it were to be conceded that the city of Los Angeles was a joint tort-feasor with these appellants and that the same liability rested upon it as such for her injuries, it is well-settled rule that before one joint tort-feasor can be held to be discharged from liability through the release of another, the consideration for such release must have been accepted by the plaintiff

in full satisfaction of the injury. [Citing authorities.]"

Another case announcing the same principle is *Ash v. Mortensen*, 24 Cal.2d 654, 150 P.2d 876. There the plaintiff was injured in an automobile accident, which injuries were aggravated by negligent medical care—a legal situation somewhat analogous to the one here involved. Plaintiff sued the negligent motorist and got a \$15,000 judgment which she settled for \$5,753.22. The judgment was satisfied of record, and plaintiff signed a document releasing the motorist from all liability. Then plaintiff sued the doctors for malpractice. The doctors set up the defense of the prior judgment, the satisfaction entered of record and the release, and urged that by reason of these factors they were released. The lower court so decided. The Supreme Court, in reversing, held that the motorist and the doctors were independent wrongdoers. The Court stated, 24 Cal.2d at page 658, 150 P.2d at page 878: "A release of a cause of action against a wrongdoer is not a release of a separate or distinct cause of action against another independent wrongdoer. It follows that the mere release of Wubben [the motorist] from liability did not result in the discharge of the cause of action against defendants [the doctors]. We are of the opinion that a release of the original wrongdoer should release an attending doctor from liability for aggravation of the injury 'if there has been full compensation for both injuries, but not otherwise.' [Citing authorities.]"

The Court then pointed out that, although the plaintiff had attempted to secure full recovery in the first action, she had settled the \$15,000 judgment for something over \$5,000. The Court stated, 24 Cal.2d at page 659, 150 P.2d at page 878:

"It has been held in some cases involving unliquidated tort demands that the payment of any sum in consideration of the release of one of several joint or independent concurrent tort feasers will be presumed to have been made and accepted as full compensation or satisfaction for the alleged injury. [Citing authorities.] There is also authority to the contrary. [Citing

a Federal case.] But whatever may be the rule with regard to a settlement with joint or independent tort feors whose acts concur to produce a single injury, it does not follow that such presumption should be indulged where, as here, the injured person's claim embraces separate injuries caused by independent successive tort feors and is liquidated by a judgment against the original tort feor. The presumption of full compensation or satisfaction found in the cited cases must be based on the fact that there is but a single indivisible injury and that the claim arising therefrom is unliquidated. Under the circumstances of this case, it would be more logical to presume that part payment of the Wubben [motorist] judgment represented merely the best obtainable compromise for the liability of the judgment debtor. [Citing a case.]

"We do not wish to be understood as holding that in every case of this kind the question of double recovery is to be determined solely by reference to the amount awarded in the first action. The jury's award in the action against Wubben is not binding on defendants or *res judicata* as to them. They have the right to show what damage, if any, was actually suffered by reason of malpractice and to have the jury's award in this action restricted to the difference between such damage and any sum already received by plaintiff as compensation therefor." This is exactly what was done in the present case.

[7,8] Appellant next contends that the judgment in the Rahlves case is *res judicata* in this action, and that the Alexanders are estopped by that judgment from recovery here. Hammarberg urges that, although he was not a party to the Rahlves judgment, he may urge *res judicata* as against the other party to that action. Reliance, in this connection, is had on the rules announced in *Bernhard v. Bank of America*, 19 Cal. 2d 807, 122 P.2d 892, and *Loughran v. Reynolds*, 70 Cal.App.2d 241, 160 P.2d 904. It is undoubtedly true that in a proper case a person not a party to a prior action may urge that the prior judgment is *res judicata*. There is no absolute requirement of

mutuality. But for this rule to apply, the following conditions must exist: "In determining the validity of a plea of *res judicata* three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" *Bernhard v. Bank of America*, 19 Cal.2d 807, 813, 122 P.2d 892, 895.

[9] The issues in the present case, as already pointed out, are not identical with those in the Rahlves case. The Rahlves case was for damages for breach of a builder's contract, while the instant case is for negligence of the architect in supervising the work. The two courts kept these issues clearly separate and distinct. For these reasons, the rule of the *Bernhard* case is not here applicable.

[10] Appellant makes certain arguments in connection with the instructions. The appellant proffered and the court refused to give an instruction to the effect that Hammarberg was not a party to the contract between Rahlves and the Alexanders, and that the builders were not bound to comply with the instructions or requests made by appellant. The instruction was properly refused. An architect is the agent of the owner, empowered to supervise and instruct the builders, and to see to it that they comply with their contract.

[11] The court also refused to give an offered instruction to the effect that Hammarberg had no authority "to change, modify or alter the contracts entered into between the Alexanders and the builders." The instruction undoubtedly correctly stated the law, but it related to a problem not involved in the action. There was no evidence introduced and no contention made that Hammarberg altered the Rahlves-Alexander contract. The contention was that the plans and specifications called for foundations constructed in the natural soil, and that Hammarberg negligently per-

mitted the builders to breach that portion of the contract. The instruction was properly refused.

Appellant next complains of the failure to give three proffered instructions on the duty of the Alexanders to minimize damages. While the court did not give the instructions offered by appellant, it did give the following instruction: "A person whose property has been damaged by the wrongful act of another is bound to exercise reasonable care and diligence to avoid loss and to minimize the damages, and he may not recover for losses which could have been prevented by reasonable efforts on his part and by expenditures that he might reasonably have made, *provided he is financially able to pay the cost of such expenditures.*" (Italics added.)

[12] This instruction adequately covered the issue. But appellant urges that the court erred in modifying the instruction above quoted by adding thereto the last italicized clause. The modifying clause properly states the law. *Valencia v. Shell Oil Co.*, 23 Cal.2d 840, 147 P.2d 558.

[13] Appellant next complains of the failure to give an instruction on the legal effect of contributory negligence on the part of the Alexanders, if such were found to exist. Contributory negligence was not pleaded in appellant's answer. Moreover, no evidence of contributory negligence was introduced. The evidence shows that as soon as the Alexanders suspected that the foundations were being incorrectly constructed, they communicated with Hammarberg, that he promised to remedy the defect, and reported that he had done so. Of course, where contributory negligence is not pleaded, and there is no evidence of such, it is not error to refuse to instruct on the issue. *Dover v. Archambeault*, 57 Cal.App. 659, 208 P. 178; *Van Horn v. Pacific Refining, etc. Co.*, 27 Cal.App. 105, 148 P. 951.

Appellant objects to the following instruction given by the trial court: "When the negligent acts or omissions of two or more persons, whether committed independently or in the course of jointly di-

rected conduct, contribute concurrently, and as proximate causes, to the injury or damage of another, each of such persons is liable. This is true regardless of the relative degree of contribution. It is no defense for one of such persons that some other person, not joined as a defendant in that action, participated in causing the injury or damage."

[14] Appellant claims that this instruction impliedly told the jury that it could disregard the *Rahives* case completely. This construction of the instruction is unwarranted. The court was careful to instruct as to how the jury should treat the *Rahives* judgment. It instructed: "You are instructed that there can be only one satisfaction for an injury. Therefore, as already stated, if you find that Captain and Mrs. Alexander have been injured as a proximate result of the negligence of Mr. Hammarberg, in a sum less than \$2,027.45, you must find for the defendant, Paul H. Hammarberg, and if you find that Captain and Mrs. Alexander have been injured, as a proximate result of the negligence of Mr. Hammarberg, in a sum more than \$2,027.45, you must reduce the amount of your finding for the damages sustained by the sum of \$2,027.45, and your verdict should be for the difference between the amount of damages and the amount for which the plaintiffs have been compensated."

While the jury was deliberating it asked to be instructed specifically as to whether the amount recovered in the *Rahives* case should be deducted from the amount here awarded. The court answered this question by re-reading the instruction last quoted above. After doing so, it stated: "Now, that is about all I can give you on that. I hope that is clear." Counsel for appellant responded: "That is clear, your Honor." Under such circumstances the jury could not possibly have been misled by the challenged instruction.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

103 Cal.App.2d 755

FAUST v. FAUST.

Civ. 17512.

District Court of Appeal, Second District,
Division 3, California.

April 25, 1951.

Divorce action by Ardoth Mildred Faust against Don Dewey Faust, in which plaintiff was granted an interlocutory judgment of divorce and defendant ordered to pay \$15 a month towards support of his children. Subsequently the order of support was reduced to \$10 a month until defendant obtained work again, and about eight years later, plaintiff filed an affidavit for issuance of writ of execution and alleged that defendant had obtained a job soon after the modification order and became liable for \$15 a month support again. The writ was issued, and defendant thereupon moved to quash writ of execution. The Superior Court, Los Angeles County, Arnold Praeger, J., ordered execution under which defendant's funds were reached in the bank, in excess of \$10 a month quashed, and plaintiff appealed. The District Court of Appeal, Vallée, J., held the order reducing the children's support until defendant obtained work again relieved defendant from paying the amount of the original order only so long as he was unemployed.

Reversed.

1. Divorce ⇨309

Court order, reducing the amount defendant was required to pay for support of children to \$10 a month until he got work again, suspended operation of the original judgment of divorce and order to pay support of \$45 per month only until defendant got work again, and when defendant did obtain work, he became liable for amount of support ordered by original interlocutory judgment.

2. Divorce ⇨309

Court order, reducing the amount defendant was obligated to pay for support of children by interlocutory judgment of divorce, was to be construed according to the same rules as apply to other writings.

3. Judgment ⇨229

A court order may be limited by its terms to a particular day or event.

4. Divorce ⇨309

Where court order reduced amount defendant was obligated, by interlocutory judgment of divorce, to pay for support of his children, until defendant got work again, the court's use of the word "until" meant that the reduced payment was to remain in force up to the time defendant got work again, and when defendant did get work again, the provision of the interlocutory judgment, which had continued in effect at all times, except for the period the court reduced the amount, was the measure of defendant's obligation.

See publication Words and Phrases, for other judicial constructions and definitions of "Until".

5. Divorce ⇨309

Where court order reduced amount defendant was obligated to pay, by interlocutory judgment of divorce, for the support of his children until defendant got work again, the moment defendant obtained work it was incumbent upon him to make payments provided by interlocutory judgment, and no new order was necessary.

6. Divorce ⇨311

Where the amount defendant was obligated by interlocutory judgment of divorce to pay for support of his children was reduced until defendant got work again, defendant's wife upon prima facie showing that defendant obtained work, was entitled to have a writ of execution issued for all sums unpaid during the minority of the children.

B. W. Burkhead, Los Angeles, for appellant.

William Kinley, Long Beach, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from an order quashing a writ of execution as to all sums in excess of \$10 a month.

In 1938 plaintiff was granted an interlocutory judgment of divorce which provided: "The defendant is hereby ordered to pay to plaintiff, for the support and

maintenance of each of said minor children, the sum of \$22.50 per month payable one-half on the 12th and one-half on the 27th days of each month commencing May 12, 1938, and continuing until the further order of this Court or until said children reach the age of 21 years." There were two minor children.

On November 4, 1941, the following minute order was made: "Order for support is reduced to \$10.00 per month until defendant gets work again." Defendant has never made any payment to plaintiff under the order as reduced.

On August 10, 1949, plaintiff filed an affidavit for the issuance of a writ of execution in which she set forth the above quoted provision of the interlocutory judgment, the order of November 4, 1941, and stated that defendant had remarried on November 22, 1941; that he had hidden his assets by transferring them to his new wife in December, 1941, to avoid supporting his children; that he got work in 1942; that his income tax returns showed a net profit of \$1,605.64 in 1943, of \$1,718.31 in 1944; that one of his children (Thomas) had attained majority on April 18, 1945, and the other (Don) on July 20, 1946; that the order for the support of Thomas was in force 8 months and 10 days during the five year period next preceding August 10, 1949, during which time \$187.50 accrued; that the order for the support of Don was in force 1 year, 11 months, and 12 days during the five year period next preceding August 10, 1949, during which time \$526.50 accrued; that defendant had not made any payment pursuant to the order of November 4, 1941; and that \$714 was unpaid. The affidavit prayed that execution issue for \$714.

On August 10, 1949, an order was made that execution issue as prayed.

A writ of execution for \$714 was issued and levied against \$3,873.56 belonging to defendant and held in escrow by a bank pending the final outcome of the case of Faust v. Faust, 91 Cal.App.2d 304, 204 P.2d 906, a divorce action between defendant and his second wife.

In September, 1949, defendant moved to quash the writ. None of the averments made in the affidavit of plaintiff was denied in the affidavit filed by defendant in support of his motion to quash the writ. On September 30, 1949, the court ordered that "Execution under which the funds were reached in the bank, in excess of all sums over \$10.00 per month is quashed." Plaintiff appeals from the latter order.

[1] Plaintiff-appellant contends that the only effect of the order of November 4, 1941, reducing the payments to be made by defendant for the support of his children to \$10 a month "until defendant gets work again," was to suspend operation of the provision of the judgment providing for payment of \$45 a month, "until" defendant got work again; that the order of November 4, 1941, terminated when defendant got work again, and from that moment until each child attained majority his obligation was to pay plaintiff \$45 a month. Defendant asserts that plaintiff should have brought him into court on an order to show cause why he should not pay more than \$10 a month. We have concluded that plaintiff's contention must be sustained.

[2,3] Defendant's obligation to pay plaintiff for the support of the children was fixed by the interlocutory judgment. The order of November 4, 1941, did not order defendant to pay any amount. It merely reduced the amount—not until further order of the court but for a prescribed indefinite period, "until defendant gets work again." The order of November 4, 1941, is to be construed according to the same rules as apply to other writings. *Roraback v. Roraback*, 38 Cal.App.2d 592, 596, 101 P.2d 772. An order may be limited by its terms to a particular day or event. 60 C.J.S., *Motions and Orders*, § 65 (b), p. 80. "Until" is a "restrictive word—a word of limitation." *Tolle v. Superior Court*, 10 Cal.2d 95, 97, 73 P.2d 607, 609. It means "up to the time of". It implies cessation or reversal at that time. It presupposes that when the condition following such word shall become operative, the precedent condition or status

shall fall. In re Wiegand, D.C.Cal., 27 F.Supp. 725, 729.

[4, 5] The original order provided for stipulated monthly payments, "continuing" until further order of the court or until the children reached majority. It is significant that the court did not reduce the amount "until the further order of the court." It reduced it "until" defendant got work again. Use of the word "until" meant, and can only mean, that the payment of \$10 a month was to remain in force up to the time the defendant got work again. The effect of the order was to relieve defendant from paying the amount of the original order only so long as he was unemployed. *Eo instanti* when the defendant got work again the precedent condition—payment of \$10 a month—fell. When he got work again the provision of the interlocutory judgment, continuing in effect at all times except as the amount was reduced for the indefinite period, was the measure of his obligation. The evidence is uncontradicted that in 1942 defendant got work again, had work, and was well able to pay \$45 a month, during the period covered by the writ. It was incumbent on him at the time he got work again to make the payments provided by the interlocutory judgment. Plaintiff was not compelled to ferret defendant out, from time to time, to ascertain if he got work again. The obligation to support the children was on defendant. Defendant acquired the money on which the writ was levied "by disregarding his obligation to support his children so that the burden of their support fell upon plaintiff." *Di Corpo v. Di Corpo*, 33 Cal.2d 195, 201, 200 P.2d 529, 532; see *Faust v. Faust*, 91 Cal.App.2d 304, 204 P.2d 906. As plaintiff says, "He preferred to hide behind his second spouse and now cries 'too late' when his shirking scheme comes to light through *Faust v. Faust*."

To hold that when defendant got work again a new order was required fixing the payments at \$45 a month, or at some other amount, would require the insertion in the order of language which is not there, something neither the court below nor this court may do.

[6] Plaintiff made a *prima facie* showing that defendant got work again in 1942. She was then entitled to have a writ of execution issued for all sums unpaid within the previous five years and during the minority of the children. *Wolfe v. Wolfe*, 30 Cal.2d 1, 4, 180 P.2d 345. If defendant, after obtaining work, had any valid ground for modification, the court, on his application, could have again modified the interlocutory judgment. *Streeter v. Streeter*, 67 Cal.App.2d 138, 143, 153 P.2d 441. However, the accrued installments may not be modified. *Stevens v. Stevens*, 88 Cal.App.2d 654, 655, 199 P.2d 314.

We are not to be understood as approving the form of the order of November 4, 1941. It should have provided for payments until further order of the court or for a definite period. In the present case there is no dispute as to the fact that defendant got work again in 1942. In the usual run of cases the form of the order can only lead to uncertainty, further controversy, and needless litigation.

There are other considerations which require a reversal but as they are not mentioned in the briefs they need not be discussed.

Order reversed.

WOOD, J., concurs.

SHINN, Justice.

I concur in the judgment. I would place the reversal on a different ground.

The order quashing the writ was in my opinion improper and futile. Some three weeks prior to defendant's notice of motion to quash the writ the sheriff made his return showing that he had collected and paid to plaintiff's attorney the full amount called for. The writ had served its purpose. It was *functus officio*. There was no writ to recall. Defendant moved to quash the writ, leaving the return unchallenged. The effect of vacating an outstanding writ of execution is to stay further proceedings and to release the lien of any levy made under it. When the writ has been duly executed and returned any attack should be directed against what

has been done, such as a sale of property, or, as here, the collection and payment of money. The writ being dead the attempt to set it aside in part was a vain act. The order should be reversed because it purports to affect the rights of plaintiff by an unauthorized and wholly ineffective procedure. I would not wish to say, even by implication, that an order purporting to quash a writ of execution that has been duly executed and returned can affect in any manner the proceedings had under it.



103 Cal.App.2d 729

PEOPLE v. McNAMARA.

Cr. 2711.

District Court of Appeal, First District,
Division 2, California.

April 24, 1951.

Rehearing Denied May 9, 1951.

Hearing Denied May 24, 1951.

William McNamara was convicted in the Superior Court in and for the City and County of San Francisco, Albert C. Wollenberg, J., of conspiracy to commit forgery and from the judgment and from orders denying his motions for new trial and in arrest of judgment, defendant appealed. The District Court of Appeal, Nourse, P. J., held that order denying motion in arrest of judgment was not appealable and that there was sufficient corroborating evidence to connect defendant with the conspiracy established by testimony of accomplices.

Appeal from order denying motion in arrest of judgment dismissed, and judgment and order denying motion for a new trial affirmed.

1. Criminal law $\S$ 1023(8), 1134(10)

Order denying motion in arrest of judgment is reviewable on appeal from judgment, but the order itself is not appealable and purported appeal from such order must be dismissed.

2. Criminal law $\S$ 878(4)

Acquittal on two counts of indictment charging the forging and passing of

forged checks did not vitiate conviction on third count charging a conspiracy to commit forgery, though such verdicts were logically inconsistent in that overt acts alleged in conspiracy count related solely to the checks on which the other two counts were based, and, under the evidence, defendant, if a participant in conspiracy, would be necessarily guilty as a principal with respect to the passing of forged checks charged in indictment. Pen.Code, $\S\S$ 31, 182, 470, 954.

3. Criminal law $\S$ 200(6)

Conviction on count charging conspiracy to commit forgery at trial resulting in acquittal on two other counts of same indictment charging the forging and passing of checks did not constitute double jeopardy, since the crime of conspiracy and the specific crimes forming the object of the conspiracy were not necessarily included offenses but distinct offenses of both of which the guilty party could be legally convicted. Pen.Code, $\S\S$ 182, 470.

4. Criminal law $\S$ 511(2)

The evidence required by statute to corroborate the testimony of an accomplice must tend to connect defendant with the commission of offense without the aid of the testimony of accomplice. Pen.Code, $\S$ 1111.

5. Criminal law $\S\S$ 741(5), 1158(4)

The weight of the evidence offered in corroboration of the testimony of an accomplice is a question for jury, whose finding on such issue should not be disturbed unless appellate court can say that the corroborating evidence is either incompetent or is, as a matter of law, of such a character that it could not tend to connect defendant with the commission of offense and could not reasonably support an inference of such connection. Pen.Code, $\S$ 1111.

6. Criminal law $\S$ 511(4)

Possession of the probable instrument of a crime may be sufficient corroboration to warrant conviction upon the testimony of an accomplice, unless an explanation of such possession is given sufficient to raise a reasonable doubt. Pen.Code, $\S$ 1111.

7. Criminal law ⚭511(2)

The corroborating evidence necessary to warrant a conviction on testimony of an accomplice need not establish the corpus delicti or actual commission of the offense but it must tend in some slight degree at least to implicate defendant and, while it need not be strong, more is required by way of corroboration than a mere suspicion. Pen.Code, § 1111.

8. Criminal law ⚭511(2)

Corroborating evidence is sufficient to warrant a conviction on testimony of an accomplice, if such evidence tends to connect defendant with the commission of the offense, though standing alone, it would be entitled to little weight. Pen.Code, § 1111.

9. Criminal law ⚭511(3)

The testimony of an accomplice need not be corroborated by direct evidence, but it is sufficient, if defendant's connection with alleged crime may be inferred from the corroborating evidence. Pen.Code, § 1111.

10. Criminal law ⚭511(4)

Evidence as to possession of check protector and the circumstances relating thereto inferentially connected defendant with conspiracy to commit forgery established by testimony of accomplices and constituted sufficient corroborating evidence to sustain conviction of such conspiracy. Pen.Code, §§ 182, 470, 1111.

11. Criminal law ⚭741(5)

In prosecution for conspiracy to commit forgery, the weight of the evidence as to the similarity found between exemplars made with check protector allegedly found in defendant's possession and forged checks, was a matter of fact for jury. Pen.Code, §§ 182, 470.

12. Criminal law ⚭742(2)

Conflicts in the testimony of alleged accomplices must be resolved by jury.

13. Conspiracy ⚭47

Proof of a single alleged overt act by one of the conspirators is sufficient to support conviction of conspiracy. Pen.Code, § 182.

William Klein, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

[1] Found guilty, by a jury, of conspiracy to commit forgery, defendant William McNamara appeals from the judgment rendered accordingly and from the orders denying his motions for a new trial and in arrest of judgment. Although the latter order is reviewable on the appeal from the judgment the order itself is not appealable and the purported appeal from said order must be dismissed. *People v. Williams*, 184 Cal. 590, 194 P. 1019.

William McNamara together with Henry Rekula and Eileen Rekula, his wife were charged by one indictment with two counts of forging and passing with knowledge of falsity a check with intent to defraud, sec. 470, Penal Code, and with one count of conspiracy to commit forgery. Sec. 182, Penal Code. In each of the first two counts one check which is alleged to have been forged and passed is fully set out. The check set out in the first count was purportedly drawn by Moore Machinery Company, the one in the second count by Charles E. Hires Co. The conspiracy count alleges two overt acts, the first being that Henry Rekula on or about February 24, 1950, entered the premises of "Benatars" at Fourth and Market Streets, San Francisco, at which time and place the evidence showed he passed the above Moore Machinery Company check and the second that Eileen Rekula, on or about March 31, 1950, entered the premises of H. Liebes & Co., Grant Avenue and Geary Street, San Francisco when and where, according to the evidence, she passed the above Charles E. Hires Company check. Appellant pleaded not guilty. The Rekulas turned state's evidence and testified for the People. The jury found appellant not guilty on the first two counts and guilty on the last count. On appeal he contends that in view of the evidence said verdicts are inconsistent and that the not guilty verdict as to the specific

acts of forgery necessarily implied acquittal on the conspiracy count and further that the evidence was insufficient to support the verdict of guilty because the testimony of the Rekulas, who were accomplices, was not corroborated as required by section 1111, Penal Code.

It is undisputed and proved by evidence independent of that of the Rekulas that the two checks set out in the indictment were forged and passed. The numbered blank form used for the false Moore Machinery Company check (which check was introduced in evidence as People's Exhibit 2) was taken in a burglary of said company in the year 1949; in filling out the check a check protector was used differing from the one in use with said company; no person of the name of the purported signer for the company or of the purported payee had any connection with said company; the check was cashed at Benatars drugstore in San Francisco. Its manager identified Henry Rekula as the person who passed it. The numbered blank form of a payroll check used for the false Charles E. Hires Company check (this check was in evidence as People's Exhibit 3) was taken in a burglary of said company on March 19, 1950; a check protector was used in the forgery, whereas said company did not use such protection; no person of the name of the purported drawer was authorized to sign for the company and no person of the name of the purported payee was on its payroll. The check was cashed at H. Liebes Company in San Francisco.

With respect to the relation of appellant to the alleged crimes the evidence was in short as follows: Henry Rekula testified that having heard of defendant McNamara he went to look for him and found him in his car on 22nd and Mission in San Francisco. As to the date of this first meeting Rekula's testimony was first vague and conflicting, varying from the beginning of March to the end of January, 1950, but finally it was fixed on Saturday, February 18, 1950. At that meeting McNamara asked Rekula if he wanted to pass some checks. They agreed that if Rekula would pass checks each would get half of the pro-

ceeds. In the car McNamara gave him some Moore Machinery Company checks including the check in evidence as People's Exhibit 2. McNamara took him down to a place on Market near Second to get an identification card in the name of William H. Chase, the purported payee of said check. (After investigation it was stipulated at the trial that the date on which said identification card was made at said place was February 18, 1950.) From there they went to San Jose where Rekula cashed four checks at different places while McNamara remained in the car. Rekula got \$200 from those checks of which he gave \$100 to McNamara. Some days later he cashed the check People's Exhibit 2 at Benatars store. Two more Moore Machinery Company checks he cashed at other places in San Francisco. When he got the check, Exhibit 2, it was complete except for the signature of William H. Chase on the back which he signed at Benatars. Some two or three weeks later McNamara picked him up in a car and gave him seven Golden Gate Terminal checks. Two or three days later he met McNamara's brother and gave him \$100 for appellant. Thereafter appellant phoned Rekula at home and asked if he wanted more checks. Rekula told him he wanted to see him first. McNamara said he would bring them up. McNamara then brought the Hires Root Beer checks up to Rekula's home. One of them was People's Exhibit 3. First he gave him three or four of these checks. The proceeds of these would go to McNamara and then he would bring the rest of them. Rekula gave him the money for the first three checks and ultimately got ten to fifteen of such checks, all of which he and his wife cashed. Later McNamara phoned again and brought Clement Sports Center checks to Rekula's apartment. That was in the last part of April, 1950. He did not cash any of those. On May 3rd, 1950, he was arrested. Later in the trial Rekula declared that he made a mistake when he testified that the check, People's Exhibit 2, was one of the Moore Machinery Company checks appellant gave him. "He got it off another guy." He met that other person,

for whom he cashed more checks, after he cashed checks for McNamara. Otherwise he confirmed his former testimony.

Eileen Rekula testified she saw McNamara first when he brought some checks to their home. She thought they were Charles E. Hires checks. It was in the end of February, 1950. She endorsed the signature on the back of the check, People's Exhibit 3, and passed it. She passed one at Liebes. She passed Charles E. Hires checks, Golden Gate Terminal checks and some Clement Sports Center checks, but no Moore Machinery Company checks. The Golden Gate Terminal checks she passed were received from McNamara. She was arrested when cashing a Clement Sports Center check. McNamara came to their house a second time about three weeks or a little more after the first occasion. He then brought the Clement Sports Center checks. She did not know that her husband got checks from anybody except Bill McNamara. She had an identification card for each name in which checks were made out. Defendant did not go with her when she had them made out but she told him that she was going to do it.

Alfred Torre, a police inspector, testified that he arrested McNamara on May 6, 1950. For three weeks preceding the arrest he had had McNamara from time to time under surveillance. On the day of the arrest he saw McNamara, whose car was parked in the wrong direction, drive away from the curb across the opposing traffic. He followed him and brought him to the curb. McNamara was driving and his wife was sitting in the front seat. After the car was brought to the curb the witness heard McNamara say "frameup." Witness and the officers with him then searched the car. When he was opening the glove compartment he saw a check protector with a cover on it on the floor of the car, directly under the front passenger seat at the place where the feet of the passenger would be. At most a slight portion of it was under the seat. There was not sufficient room for the check protector to fit under the bottom of the seat. He questioned McNamara who denied that he knew anything about it. Mrs. McNamara

stated that she saw the check protector in the car when she got into the car. On a question how the check protector got into the car McNamara gave no reply. Witness then placed McNamara under arrest without further questioning.

Francis X. LaTulipe, Director of the Bureau of Identification, Photograph Bureau and the Technical Laboratory of the San Francisco Police Department examined printing made by a check protector on the checks People's Exhibits 2 and 3 in conjunction with the check protector found in McNamara's car, received in evidence as People's Exhibit 7. He made several exemplars with that check protector and made photographic enlargements both of these exemplars and of the printing on the checks. He found five characteristic similarities between them (for instance each time the first star of the four stars which appear at the left hand side of the amount of the check was faint, both in the check in evidence and in the exemplars) and concluded that it was quite possible that these checks could have been made on that machine.

Defendant McNamara as a witness in his own behalf denied all testimony of the Rekulas with respect to his connection with the checks. He testified that he met Rekula only after he had been released from a hospital where he had been from February 23 to March 3, 1950. He had visited the Rekula home only once to give an invitation for his wedding. When three weeks before his arrest his house had been searched he had voluntarily visited the police department and had given specimens of his handwriting, writing down what he was asked to write. On the day of the arrest a certain Paul Robbins had borrowed his car for the day and had returned it by parking it around the corner. When later he, McNamara, and his wife went into the car he had not seen the check protector. He got in at the driver's side, his wife at the other side. He only saw the check protector when inspector Torre pulled it from where his wife had been sitting. It was right under where his wife's legs had been, right up against the seat. His wife hadn't said anything about it when she got into the car. He told the inspector that he did

not know where it came from; that it was the first time he saw it. He did not say anything about Robbins then. None of the signatures on the checks had been in his handwriting; he had not given checks to others for signature. He had been previously convicted of a felony (two charges of robbery).

Daniel Edward McNamara, brother of defendant, denied having received \$100 from Rekula for his brother.

Dolores McNamara, wife of appellant, testified that she noticed the check protector when she entered the car. It was not in plain view, but pushed back. She was wearing slacks. She did not mention the machine to her husband. She did not know what it was. She told the inspector she saw something on the floor and figured it was a piece of something her husband was working on. He often had radio equipment in the car. She had her feet right on top of it. The car of appellant, especially the inside, was viewed by the jury.

[2] On the basis of the above evidence appellant offers in the first place an argument to the following effect. As the two overt acts alleged related solely to the checks, People's Exhibits 2 and 3, appellant could only be found guilty of a conspiracy embracing the forging or passing of one or both of these checks. If he was a participant in such a conspiracy (in view of the evidence, probably by providing them for the persons who actually passed them) he would be necessarily guilty as a principal with respect to the actual passing charged in the first two counts of the indictment sec. 31, Penal Code. The verdict of not guilty on these counts absolved the defendant of all such forms of participation in the forging and passing as would make him a principal and therefore likewise acquitted him of the conspiracy. This reasoning may well be correct insofar as it is argued that the verdict of not guilty on the first two counts and of guilty on the conspiracy count are logically inconsistent in view of the evidence and the provision of sec. 31, Penal Code. However it does not result, as contended by ap-

pellant, that the conviction on the conspiracy count is void.

In *People v. Amick*, 20 Cal.2d 247, 251-252, 125 P.2d 25, 28, the Supreme Court quotes with approval the following from *People v. Ranney*, 123 Cal.App. 403, 11 P.2d 405: "The disposition of one count had no bearing upon the verdict with respect to other counts, regardless of what the evidence may have been. Each count must stand upon its own merit. The amendment to section 954 of the Penal Code conclusively settles this controversy adversely to the contention of the appellant. That section provides for the charging of 'two or more different offenses of the same class of crimes or offenses, under separate counts.' That section, as amended in 1927, then provides that, 'A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.' This language clearly means that each count in an indictment or information, which charges a separate and distinct offense must stand upon its own merit, and that a verdict of either conviction or acquittal upon one such charge has no effect or bearing upon other separate counts which are contained therein. * * * There are no authorities to the contrary in other jurisdictions where a statute exists similar to the California law above quoted." See also *People v. Guerrero*, 22 Cal.2d 183, 190, 137 P.2d 21; *People v. Codina*, 30 Cal.2d 356, 360-361, 181 P.2d 881; *People v. Hartshorn*, 59 Cal.App.2d 285, 287, 138 P.2d 782; *People v. Wallace*, 78 Cal.App.2d 726, 742-743, 178 P.2d 771.

Actually there is no indication that the jury by its not guilty verdicts with respect to the forgery counts intended to decide that there was not sufficient proof of defendant being concerned in these forgeries in any manner which would make him a principal under sec. 31, Penal Code. No instruction as to aiding, abetting, advising or encouraging was given. Forgery was defined in the instructions in accordance with sec. 470, Penal Code only. This may well have led the jury to the incorrect belief that defendant could be found guilty on the forgery counts only if it was proved

that he had physically forged or passed the alleged checks and that otherwise he would be found guilty on the conspiracy count only.

Appellant relies mainly on *Oliver v. Superior Court*, 92 Cal.App. 94, 267 P. 764. In that case it was held that where defendant was found not guilty of any of the specific crimes alleged in the first 33 counts of the indictment and the 34th, the conspiracy count, alleged as the only overt acts the specific crimes alleged in the other 33 counts, described as such, there was a special adjudication that none of the overt acts alleged had been proved and without any overt act there could be no criminal conspiracy. To the same effect is *In re Johnston*, 3 Cal.2d 32, 43 P.2d 541. The distinction with respect to our case is obvious. In this case the overt acts alleged are not the specific crimes alleged to have been committed by the defendant and of which he was found not guilty but certain acts of the other conspirators in the execution of said specific crimes. The fact that appellant was found not guilty of these specific crimes does not negative in any way the alleged and undoubtedly proved overt acts, to wit, that his alleged co-conspirators went into certain shops for the purpose of passing the false checks. All attempts made in behalf of the convicted defendant to extend the decisions in the *Oliver* and *Johnston* cases to other situations of alleged inconsistency between verdicts have failed. See for instance *People v. Guerrero*, supra, 22 Cal.2d 183, 137 P.2d 21; *People v. Dukes*, 2 Cal.App.2d 698, 700, 38 P.2d 805; *People v. Gilbert*, 26 Cal.App.2d 1, 22-23, 28 P.2d 770; *People v. Yant*, 26 Cal.App.2d 725, 731, 80 P.2d 506. We agree that there should not be any extension which would conflict with the principle of section 954, Penal Code.

[3] Appellant's reference to double jeopardy and to *People v. Greer*, 30 Cal.2d 589, 184 P.2d 512, is not in point, where here there was only one indictment, one trial, simultaneous verdicts and where the crime of conspiracy and the specific crimes forming the object of the conspiracy are not necessarily included offenses but distinct offenses of both of which the guilty party

may be legally convicted. *People v. Talbot*, 220 Cal. 3, 21, 28 P.2d 1057; *People v. Clensey*, 97 Cal.App. 71, 73, 274 P. 1018; *People v. Martin*, 114 Cal.App. 392, 396, 300 P. 130.

[4,5] With respect to the contended lack of corroboration of the evidence given by the *Rekulas* it is conceded that they were accomplices and trial was had on that basis, the jury expressly having been instructed to that effect. Therefore under section 1111 of the Penal Code corroboration of their testimony was required "by such other evidence as shall tend to connect the defendant with the commission of the offense". It is generally held that the corroborating evidence must tend to do so without the aid of the testimony of the accomplice, notwithstanding the fact that an express clause to that effect has been eliminated from section 1111 in the year 1911. *People v. Robbins*, 171 Cal. 466, 473, 154 P. 317; *People v. Rankin*, 10 Cal.2d 198, 201, 74 P.2d 71. The weight of such corroborative evidence is a question for the jury to determine. *People v. Trujillo*, 32 Cal.2d 105, 112, 194 P.2d 681; *People v. Griffin*, 98 Cal.App.2d 1, 28, 219 P.2d 519. "Therefore, unless the appellate court can say that the corroborating evidence is either incompetent or is, as a matter of law, of such a character that it could not tend to connect defendant with the commission of the offense and could not reasonably support an inference of such connection, the finding of the jury on that issue should not be disturbed." *People v. Collier*, 111 Cal.App. 215, 229-230, 295 P. 898, 903; See also *People v. Shurtleff*, 113 Cal. App. 739, 743, 299 P. 92; *People v. Menne*, 4 Cal.App.2d 91, 102, 41 P.2d 383.

[6] In this case the corroborating evidence is the independent evidence as to the passing of the false checks, *People's Exhibits 2 and 3*, by the *Rekulas*; appellant's testimony that he knew the *Rekulas*; the stated testimony of police inspector *Alfred Torre*, appellant himself, and appellant's wife with respect to the facts that when appellant was arrested on May 6, 1950, there was in the front part of his car under the feet of *Mrs. McNamara* the check protector, *People's Exhibit 7*, and

that appellant denied that he knew anything about that check protector or that he had even seen it before; the testimony of Francis X. LaTulipe with respect to the similarities found between the exemplars made with said check protector and the forged checks People's Exhibits 2 and 3, and the view of appellant's car by the jury for the purpose of determining in how far the check protector could have been invisible to appellant at the place where it was found in his car. As the jury after full instruction on the requirement of corroboration and all rules pertaining to it found appellant guilty said verdict implies that, after having viewed the car the jury disbelieved appellant's testimony that he did not know of the presence of the check protector, that it considered said check protector as the probable instrument with which the forgeries to which the conspiracy related were executed and that his possession of said instrument considering his denial of all knowledge of it, tended sufficiently to connect him with the commission of the crime. We cannot say as a matter of law that such findings and inferences cannot reasonably be made. "It is well established that possession of stolen property may be sufficient corroboration to warrant a conviction upon the testimony of an accomplice." *People v. Rice*, 29 Cal.App. 2d 614, 620, 85 P.2d 215, 218, at least when no explanation of the possession is given sufficient to raise a reasonable doubt. *People v. Miller*, 54 Cal.App.2d 384, 386, 128 P.2d 785. The same rule must apply to possession of the probable instrument of a crime.

Appellant argues that the unlawful combination, the gist of the conspiracy count, is not established by anything but the testimony of the two alleged accomplices and that the corroborating evidence requires the testimony of the accomplices to give it direction to the conspiracy. Moreover the evidence as to the check protector on which it was "quite possible that the checks could have been made" could at most be a suspicious circumstance, and evidence which does not do more than cast a suspicion on the accused is insufficient corroboration.

[7-11] The corroborating evidence need not establish the actual commission of the offense, the corpus delicti. *People v. Mazola*, 99 Cal.App. 682, 685, 279 P. 211; *People v. Yeager*, 194 Cal. 452, 473, 229 P. 40, 49. In the latter case it is further said: "The corroborative evidence must tend in some slight degree, at least, to implicate the defendant. While it need not be strong, more is required by way of corroboration than a mere suspicion. It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight. It is not necessary to corroborate the accomplice by direct evidence. If the connection of the accused with the alleged crime may be inferred from the corroborating evidence in the case, it is sufficient." The law as stated is generally accepted. As we held before, the jury could reasonably find that the possession of the check protector and the circumstances relating thereto linked appellant sufficiently to the forgeries; the actual agreement, combination, may then be proved by the testimony of the accomplices. The link with the specific forgeries connected appellant inferentially with the conspiracy also. It cannot be said that because of the use of the words "quite possible" by the witness LaTulipe, the corroborating evidence could as a matter of law have no more convincing force than a suspicion. The weight of the five points of similarity testified to by said witness in connection with the further circumstances was a matter of fact for the jury, not to be disturbed by us.

People v. Lafrenz, 134 Cal.App. 687, 26 P.2d 317, on which appellant mainly relies in this connection is not in point. In that case all corroborating evidence relied on in this case, to wit, the proof of specific crimes committed by defendant's alleged co-conspirators and defendant's link to those specific crimes was totally absent.

[12, 13] The attempt of Henry Rekula to retract his former testimony that the check, People's Exhibit 2, was one of the Moore Machinery Company checks which appellant gave him at their first meeting

and the testimony of Eileen Rekula which placed the date on which appellant brought Charles E. Hires Company checks earlier than the burglary at that company and earlier than the time testified to by her husband only caused conflicts in the evidence to be solved by the jury. Even if the jury had accepted the retraction of Henry Rekula and on that ground eliminated his entrance of the premises of Benatars as an overt act of the conspiracy in which appellant took part, the conspiracy conviction could stand. "No more than proof of a single alleged overt act by one of the conspirators is necessary to support the verdict." *People v. Garrison*, 80 Cal.App.2d 458, 463, 181 P.2d 738, 740.

On the above grounds there was no error in denying appellant's motions for a new trial and in arrest of judgment.

The purported appeal from the order denying the motion in arrest of judgment is dismissed. The judgment and the order denying the motion for a new trial are affirmed.

GOODELL, and DOOLING, JJ., concur.



103 Cal.App.2d 832

KAYNOR et al. v. FISCH.

Civ. 17781.

District Court of Appeal, Second District,
Division 3, California.

April 27, 1951.

Hearing Denied June 25, 1951.

Eugene S. Kaynor and another sued Saul Fisch for a declaration of rights and to quiet title to an easement in a right of way over defendant's ranch. John O. Saniger and wife intervened as plaintiffs. From a judgment of the Superior Court, Los Angeles County, A. W. Ashburn, J., for original plaintiffs and intervenors, defendant appealed. The District Court of Appeal, Wood, J., held that the evidence supported the trial court's findings that plaintiffs acquired an easement by implied grant and necessity over a portion of defend-

ant's ranch for the widths shown by plats of surveys in evidence.

Judgment affirmed.

1. Appeal and error ⇐1009(1)

In action to quiet title to easement in right of way over defendant's ranch, width of existing road or easement over ranch when defendant conveyed to plaintiffs another ranch, for benefit of which easement had existed for many years, was fact question for determination by trial court. Civ.Code, § 1104.

2. Easements ⇐17(1)

Whether grantees of ranch acquired easement by implication in road over another ranch still owned by grantor under his deed to them depends on all circumstances and parties' intention when conveyance was made. Civ.Code, § 1104.

3. Appeal and error ⇐1009(1)

Whether parties to deed intended that grantees should acquire easement in road between ranch conveyed and boulevard over another ranch still owned by grantor was fact question for determination by trial court in grantees' action to quiet title to such easement. Civ.Code, § 1104.

4. Easements ⇐36(3)

In action to quiet title to easement in right of way over defendant's ranch between boulevard and another ranch conveyed to plaintiffs by defendant, evidence supported trial court's findings that plaintiffs acquired easement by implied grant and necessity over certain portion of defendant's ranch for widths shown by plats of surveys introduced in evidence by plaintiffs. Civ.Code, § 1104.

5. Easements ⇐17(1)

An easement or right of way, used for many years by various persons, including owner of two ranches, over ranch between them, was appurtenant to ranch which such owner subsequently conveyed to others and sufficient connection between such ranch and ranch retained by grantor, so as to entitle grantees to right of way by necessity over intermediate ranch to and from road, leading to boulevard over retained ranch, though such ranch and ranch conveyed were not adjoining parcels of land. Civ.Code, § 1104.

Harry J. Miller, Los Angeles, for appellant.

Martin & Bowker, Tujunga, for respondents.

WOOD, Justice.

Action for declaration of rights and to quiet title to an easement. Judgment was in favor of the plaintiffs and the intervenors. Defendant appeals from the judgment.

Appellant asserts in part that the court erred in granting a wider right of way over defendant's ranch than the road which existed when defendant sold land to plaintiffs; that the court erred in enlarging the easement from a right of way for ingress and egress to include "all road purposes"; and that since there was a more convenient means of ingress and egress an easement over defendant's ranch was not necessary, and that no grant of easement by implication arose.

In 1931 defendant Fisch purchased the west half of lot 72 of tract 102 in Los Angeles County. The front or south line of lot 72 adjoins Foothill Boulevard. The lot is rectangular and extends northerly about 727 feet. In 1936 defendant Fisch purchased a parcel of land which adjoins the northeast corner of said lot 72 (but it does not adjoin the west half of that lot), and in 1945 he sold said parcel to plaintiffs Kaynor. Thereafter, the Kaynors sold a portion of that property to the intervenors, Mr. and Mrs. Saniger. The first parcel of land purchased by defendant will be referred to as the Fisch ranch, and the second parcel will be referred to as the Kaynor ranch.

Since 1913 there had been an unpaved road upon the Fisch ranch along the west line thereof, extending from Foothill Boulevard to the north line. A ranch known as the Ferree ranch adjoins said lot 72 on the north. Along the south line of the Ferree ranch there was an unpaved road which was a continuation of the road that was on the Fisch ranch. That road adjoined a road that extended across the Kaynor ranch and upon lands to the north of the Kaynor ranch. In other words,

there was a continuous open road from Foothill Boulevard to the lands north of the Kaynor ranch, which road extended north across the Fisch ranch along the west line thereof, and then east across the Ferree ranch along the south line thereof, and then across the Kaynor ranch. After defendant purchased the second parcel of land (the Kaynor ranch) in 1936, he used the road on the Ferree ranch and the road on the Fisch ranch to go from the Kaynor ranch to Foothill Boulevard and to return from that boulevard to the Kaynor ranch. On March 31, 1948, Mr. and Mrs. Ferree, who owned the land adjoining the Fisch ranch on the north, by a deed of easement granted to plaintiffs an easement for ingress and egress within the south 20 feet of the Ferree ranch. (This action was filed on November 5, 1947.)

Plaintiffs alleged in their fourth amended complaint, in part, that at the time defendant sold the Kaynor ranch to plaintiffs, the plaintiffs had "no access from" said property to a public highway; and they still have no access to a public highway; that they are entitled to a private way of necessity over defendant's land to Foothill Boulevard; that there is a private road along the westerly 20 feet of the Fisch ranch. In the second cause of action therein, they alleged that plaintiffs are the owners and entitled to possession of a right of way over and through the westerly 20 feet of the Fisch ranch "as appurtenant to" the Kaynor ranch; that defendant claims an interest in and to said easement and right of way adversely to the plaintiffs. In the third cause of action plaintiffs alleged that about April 1, 1945, defendant offered to sell the Kaynor ranch to plaintiffs together with an easement for all road purposes over the westerly 20 feet of the Fisch ranch for the sum of \$10,500; that plaintiffs orally accepted said offer; that plaintiffs paid said consideration, and on April 13, 1945, defendant conveyed the Kaynor ranch to plaintiffs; that during negotiations regarding the sale the defendant told plaintiffs that an easement over defendant's land would be included in the property sold to plaintiffs; that until August 1, 1947, plaintiffs believed

that they had acquired said easement; that the failure to include said easement in the deed was due to the fraud of defendant in omitting the easement from the deed. In the fourth cause of action plaintiffs alleged that by mutual mistake of plaintiffs and defendant the deed omitted a provision conveying said easement. In a fifth cause of action it was alleged that said mistake was brought about by the failure of plaintiffs and defendant to advise the scrivener, who prepared the deed, to include therein a provision conveying said easement.

In 1913 the person who owned the land which adjoins the Kaynor ranch on the north and the person who then owned the Kaynor ranch made a road, with the consent of the person who then owned the Fisch ranch, on the Fisch ranch along the west line of the ranch from the north line to the south line or Foothill Boulevard. A witness, called by plaintiffs, who is the son of the person who owned the land north of the Kaynor ranch, testified that in 1913 he resided on the land north of the Kaynor ranch; that his mother still resides there; that he saw the road above referred to "staked out" and that it was made the width of two hayracks (with bales of hay on them) or 24 feet, and the road was straight; that the road was used to gain access to the land where he resided, and that it has been used continuously for such purpose since 1913; that at the present time the road is not 24 feet wide, the road "varies in width" and "isn't a straight line width"; when automobiles pass each other, it is necessary to "pull off on parts of the road that are not bare"; in order for automobiles to pass, it is necessary that one of them go upon plowed ground on the east side of the road and that the other one go upon hard surface and weeds on the west side.

There was evidence (plaintiffs' Exhibits 6 and 9A—plats of surveys) showing (1) that the easterly edge of the traveled portion of the road for a distance of 510 feet north from Foothill Boulevard was approximately 18 feet from the westerly line of the Fisch ranch; (2) that the easterly edge of said traveled portion of the road

for the next 50 feet was approximately 17 feet from the said westerly line; (3) the easterly edge of the traveled portion for the next 40 feet was various distances from said westerly line, ranging from a maximum of approximately 17 feet to a minimum of 11 feet; (4) the easterly edge for the next 112 feet was various distances from said westerly line, ranging from a maximum of approximately 15 feet to a minimum of 11 feet; (5) the easterly edge for the last 16 feet (being at the turn in the road) was various distances from said westerly line, ranging from a minimum of approximately 15 feet to a maximum of 26 feet. The trial judge, with the consent and in the presence of counsel for the parties, made an inspection of the premises.

The court found, among other things, that at the time of the sale of the Kaynor ranch to plaintiffs that ranch did not front upon a public street, and there was no means of ingress or egress thereto or therefrom except over the Fisch ranch; that on the date of said sale to plaintiffs, and for more than 30 years prior thereto, there existed a road (particularly described in another finding) over the westerly portion of the Fisch ranch running from Foothill Boulevard to the north line of the ranch, and thence running across the Ferree ranch within the south 20 feet of that ranch; that defendant owned the Fisch ranch and the Kaynor ranch for more than 8 years prior to April 13, 1945, and used the road, referred to in the findings, continuously to gain access to the Kaynor ranch, and said road was the only means of ingress and egress to and from the Kaynor ranch, and connected the Fisch ranch and the Kaynor ranch; that said road was open, obvious and necessary for the use of the Kaynor ranch and on April 13, 1945, and prior thereto, was used obviously and permanently by defendant for the benefit of the Kaynor ranch; that the plaintiffs, and the intervenors Mr. and Mrs. Saniger, own and hold an easement for ingress and egress over the Ferree ranch within the south 20 feet thereof; that said easement joins and connects the Fisch ranch with the Kaynor ranch; that

by the deed from defendant to plaintiff(s) there was conveyed to plaintiff(s), and said plaintiff(s) acquired, an easement by implied grant and by necessity over the westerly portion of the Fisch ranch (which portion is particularly described in the findings by metes and bounds, including measurements by degrees and minutes). The said westerly portion, so described in the findings, extended along the west line of the Fisch ranch from the south line of the ranch to the north line thereof, and easterly from the west line to the easterly edge of the traveled portion of the road, as shown by plaintiffs' exhibits 6 and 9A (which exhibits are hereinabove referred to), and which easterly edge of the road is particularly defined and described hereinabove in referring to said exhibits.

The court further found that defendant was not guilty of fraud in connection with his agreement with plaintiffs; that the Kaynor ranch does not adjoin the Fisch ranch; that defendant has not interfered with plaintiffs' use of the road; that defendant did not represent that an easement or right of way over the entire westerly 20 feet of the Fisch ranch would be included in the property sold to plaintiffs; that defendant Fisch did not represent that an easement was included in the description of the property set forth in the deed; that the failure to include description of the road in the deed was not the result of any mistake on the part of plaintiff(s) and defendant.

The judgment provided that the plaintiffs and intervenors are the owners and holders of an easement for ingress and egress and all road purposes over said westerly portion of the Fisch ranch (which westerly portion is designated hereinabove by reference to the findings and certain exhibits).

[1-4] Appellant contends, as above indicated, that the court erred in finding that by the deed from defendant to plaintiffs made in April, 1945, conveying the Kaynor ranch, the plaintiffs acquired "an easement by implied grant and necessity over more than the existing road"; and that the "court should have restricted the

easement, if any, to the description of the road which existed on the Fisch ranch in April, 1945, when Fisch transferred the Kaynor-Saniger ranch to the respondents, Kaynor, and should not have allowed the wider right of way sought by the respondents." The evidence shows that there is, and has been for more than 30 years, a road along the westerly line of the Fisch ranch, which road is, and was during said time, used by various persons, who were owners of ranches north of the Fisch ranch, as the only means of ingress and egress to and from their ranches. Also, the evidence shows that the defendant, during the 8 years he owned the Kaynor ranch, used said road and the road along the south portion of the Ferree ranch in going from the Kaynor ranch to Foothill Boulevard and in going from the boulevard to the ranch. Also, the evidence shows that the Kaynors, at the time of trial and during the 3½ years they owned the Kaynor ranch prior to the trial, were and had been using said roads in going from the ranch to the boulevard and from the boulevard to the ranch. It is clear that, at the time defendant conveyed the Kaynor ranch to plaintiffs, there was and had been for many years an easement over the road on the westerly portion of the Fisch ranch for the benefit of the Kaynor ranch. The question as to the width of the existing road or easement over the Fisch ranch was one of fact for determination of the trial court. There was evidence that the main traveled portion of the road was not in a straight line, and also that more space than the main traveled portion was required in order for automobiles to pass on that road. The easterly edge of the main traveled portion of the road was shown by a survey which was made by a licensed surveyor. The evidence was ample to support the findings of the court regarding the width of the easement. Whether plaintiffs acquired an easement by implication over the Fisch ranch by the deed from defendant to them depended upon all the circumstances and the intention of the parties at the time the conveyance was made. Section 1104 of the Civil Code provides: "A transfer of

real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." In *Fristoe v. Drapreau*, 35 Cal.2d 5, at page 9, 215 P.2d 729, at page 732, it was said: "Section 1104 [Civ.Code], which relates to the creation of easements by implied grant, must be read with section 806 of the Civil Code, which defines the extent of all servitudes, and also in the light of the common law rules governing easements by implication. Section 806 provides that 'the extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired.' * * * When the grant is implied, its terms must be inferred from all of the circumstances of the case. The effect of section 806 is to establish intent as the criterion, and this is in accord with the rationale of the rules governing easements by implication." It was also said in that case, 35 Cal.2d at page 10, 215 P.2d at page 732: "[I]n determining the intent of the parties as to the extent of the grantee's rights, we are of the opinion that consideration must be given not only to the actual uses being made at the time of the severance, but also to such uses as the facts and circumstances show were within the reasonable contemplation of the parties at the time of the conveyance." It is reasonably to be inferred that defendant intended to convey a right to use the road over the westerly portion of his ranch and that the plaintiffs reasonably expected to take and hold that right. The question as to the intent of the parties with reference to the easement was one of fact for the determination of the trial court. The evidence was sufficient to support the findings that the plaintiffs

acquired an easement by implied grant and by necessity over said westerly portion of the Fisch ranch.

[5] Although the Kaynor ranch and the Fisch ranch were not adjoining parcels of land, the easement or right of way over the Ferree ranch, from the Kaynor ranch to the Fisch ranch, which had been used many years by various persons including the defendant, was appurtenant to the Kaynor ranch and was, under the circumstances here, a sufficient connection between the Kaynor ranch and the Fisch ranch. In *Leonard v. Leonard*, 2 Allen, Mass., 543, a grantor had conveyed two lots of land referred to therein as lots A and B to different persons (plaintiff and defendant). Only lot A fronted on a highway, and another lot referred to as lot C (owned by a stranger) was between lots A and B. There was a road which extended from the highway across lots A and C to lot B, and the road had been used many years by the grantor of lots A and B. The question therein was whether the owner of lot B (defendant) had an easement over lot A (owned by plaintiff). In that case it was said: "It follows that, by conveying to him [defendant] lot B, the easement over lot C passed as appurtenant, and a right of way by necessity passed by the grant over lot A. In other words, there was appurtenant to the land granted to the defendant a right of way to other land of the grantor, and there being no access to the highway except by the way appurtenant and by passing over the land of the grantor, a right of way by necessity was conveyed over lot A. In legal effect, the rights of the parties were the same as if the lots A and B adjoined each other, instead of being separated by lot C, over which the right of way by prescription existed."

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

In re RONAYNE'S ESTATE.

ADAY et al. v. RONAYNE.

Civ. 18315.

District Court of Appeal, Second District,
Division 3, California.

April 27, 1951.

Rehearing Denied May 15, 1951.

Hearing Denied June 25, 1951.

Proceeding in the matter of the estate of Rose Cook Ronayne, also known as Sarah Ann Ronayne and by other names, wherein Norah Bangs Aday filed a petition for probate of will as a lost will, and George B. Ronayne filed a contest to which Norah Bangs Aday filed an answer. The Superior Court of Los Angeles County, Orlando H. Rhodes, J., rendered a decree admitting the will to probate as a lost will, and George B. Ronayne appealed. The Bank of America, the Children's Hospital Society of Los Angeles and Norah Bangs Aday were the respondents. The District Court of Appeal, Vallée, J., held that the evidence warranted probate of lost will on ground that will was not revoked by testatrix during her lifetime and that will was in existence at her death.

Decree affirmed.

1. Wills ⇨220

A person who is named as executor in a will and who is not a beneficiary or an heir of the testator may resist a contest of the will before probate. Probate Code, §§ 370, 371.

2. Wills ⇨290

Where it is shown that a will cannot be found after death of testator and when last seen or known to exist the will was in his possession, rebuttable inferences arise that the will was destroyed by the testator and that the act of destruction was done *animo revocandi*.

3. Wills ⇨386

The weight to be accorded to evidence and function of reviewing court are the same in a will contest as in any other civil case, and reviewing court must resolve every reasonable doubt as to sufficiency of evidence to sustain findings in favor of findings.

4. Wills ⇨290, 296

Where will contestant alleged that lost will was revoked by testatrix in her

lifetime, proponent could endeavor to establish that testatrix had not destroyed the will, and evidence was admissible to show a state of mind of testatrix consistent only with the will being unrevoked and potentially operative.

5. Wills ⇨297(4)

Declarations of testator may be shown for the purpose of overcoming the inference that a will has been destroyed *animo revocandi*.

6. Wills ⇨296

Where husband contested will which was sought to be probated as a lost will, evidence that testatrix for several years contemplated a certain disposition of her property and that when she disposed of that property by the will her mental attitude was precisely the same as it had been during the previous years and that after she made such disposition her mind remained in the same state practically until her death, supplemented by the consistency of her mental attitude toward the beneficiaries and toward husband who was left only a small amount, was admissible to rebut the inference of revocation.

7. Wills ⇨384

In will contest, the refusal to admit contestant's evidence which should have been admitted as tending to offset some of the evidence of proponent was not prejudicial where the evidence involved matters fully shown by other evidence and related to a minor issue.

8. Wills ⇨310

In husband's contest of lost will the probate of which was sought by executrix, determination whether contestant was surviving husband and heir of decedent and whether husband made a property settlement agreement which barred his interest under the will was not necessary, where executrix expressly abandoned her contention that a property settlement agreement had been made and the court found the will was not revoked.

9. Wills ⇨305

Evidence warranted probate of lost will on ground that will was not revoked

by testatrix during her lifetime and that will was in existence at her death.

Merrill L. Granger, Santa Monica, for appellant.

Gandy & Cockins, Santa Monica, for respondent.

VALLÉE, Justice

Appeal from a decree admitting a document to probate as a lost will after a contest.

Rose S. Cook Ronayne made a will on May 22, 1947. She died June 5, 1949, leaving surviving her husband George B. Ronayne whom she had married on November 7, 1940. The will named Norah Bangs Aday as executrix. The estimated value of the estate is \$18,500.

Norah Bangs Aday petitioned for probate of the will of May 22, 1947, as a lost will, alleging that since the death of Mrs. Ronayne she had made, and caused to be made, "diligent search and inquiry thereof and has not and cannot ascertain the whereabouts thereof." Before probate, George B. Ronayne filed a contest alleging that the will was revoked in its entirety during the lifetime of Mrs. Ronayne and that she died intestate. A citation issued directed to all the devisees, legatees, and heirs. It was served on all of them. None of them answered. Norah Bangs Aday, who was not a devisee, legatee, or heir, filed an answer.

The contest was tried by the court without a jury. At the close of respondent's evidence the court ordered that the default of the devisees, legatees, and heirs be entered. Contestant then moved to strike the answer of Norah Bangs Aday to the contest and all of the evidence introduced by her on the contest, on the ground that she was not a person interested and therefore not entitled to resist the contest. The motion was denied. Findings of fact were made and a decree entered admitting the will of May 22, 1947, to probate as a lost will. The surviving husband appeals.

Contestant's—appellant's—first specification of error is that the court erred in not striking respondent's answer to the contest and all of her evidence on the contest. He argues that she is not a devisee, legatee, or an heir; that therefore she is not an interested person and not entitled to resist the contest.

The question to be decided is whether a person named as executrix in a will, who is not a beneficiary or an heir of the testator, may resist a contest of the will before probate.

Probate Code section 370 provides that "Any person interested" may contest a will before probate, and that upon the filing of written grounds of opposition to the probate "a citation shall be issued directed to the heirs of the decedent and to all persons interested in the will, including minors and incompetents, wherever residing, directing them to plead to the contest within thirty days after service of the citation, which shall be made personally or by publication in the manner provided by law for the service of summons in civil actions." It also provides that any person so served may demur to the contest and that "If the demurrer is overruled, *the petitioner* and others interested, within ten days after the receipt of written notice thereof, may jointly or separately answer the contest." (*Italics added.*)

Probate Code section 371 provides: "On the trial [of a contest before probate], the contestant is plaintiff and the petitioner is defendant."

In *Re Estate of Hite*, 155 Cal. 448, at page 455, 101 P. 448, at page 450, the court declared: "The statute nowhere requires the executor named in the will, who has petitioned for its probate, to resist the claim of one filing written grounds of opposition thereto. He may or may not, at his option, become a party to the contest by demurring or answering the opposition. See section 1312, Code Civ.Proc. [now Prob.Code, § 371]." And in *Re Estate of Higgins*, 158 Cal. 355, 358, 111 P. 8, 9, "While he [the executor]

undoubtedly had the legal right under our statute to defend the will [before probate] in his capacity as executor (Code Civ. Proc. §§ 1299 [now Prob.Code, § 323], 1312 [now Prob.Code, § 371]; [In re] Estate of Hite, 155 Cal. 448, [101 P. 448]), if such defense was solely for his own benefit as a devisee and legatee and could not operate beneficially as to any other person interested in the estate, he must bear the costs and charges of maintaining it." See to the same effect In re Estate of Webster, 43 Cal.App.2d 6, 20, 110 P.2d 81, 111 P.2d 355; In re Estate of Pryor, 51 Cal.App.2d 735, 736, 125 P.2d 511.

[1] We conclude that a person named as executor in a will, who is not a beneficiary or an heir of the testator, may resist a contest of the will before probate.

The second specification of error is that the findings are not supported by the evidence. The court found that Mrs. Ronayne executed her last will on May 22, 1947, that it was never revoked, and that it was in existence at the time of her death.

[2] The rule is uniform that where it is shown that a will cannot be found after the death of the testator and when last seen or known to exist it was in his possession, two inferences arise: (1) that the will was destroyed by the testator, and (2) that the act of destruction was done *animo revocandi*. In re Estate of Bristol, 23 Cal.2d 221, 224, 143 P.2d 689; In re Estate of Arbuckle, 98 Cal.App.2d 562, 566, 220 P.2d 950; Anno. 3 A.L.R.2d 952. The inferences thus stated, sometimes referred to as a conclusion of law, are rebuttable. In re Estate of Bristol, supra; In re Estate of Moramarco, 86 Cal.App.2d 326, 334, 194 P.2d 740. In the present case, contestant rested on these inferences. The will of Mrs. Ronayne could not be found after her death; and when last seen and known to exist, it was in her possession.

The making of the will on May 22, 1947, is not disputed. On its execution it was handed to Mrs. Ronayne by the attorney who drew it. He retained a copy which was introduced in evidence. Mrs. Ronayne died on Sunday, June 5, 1949. It was her

custom to keep "a lot" of papers around the house and move them from one place to another. On the Friday preceding her death she stated that the will was in the house but she was not sure where. On the previous Tuesday she referred to her will and to the fact that she had mislaid it. Two other wills—one made in 1945 and another in 1946—were received in evidence. Contestant argues that the declarations of the previous Friday and Tuesday have no probative force because she did not specify to which will she referred. The court was warranted in inferring that she was referring to the last will she made—that of May 22, 1947.

Mrs. Ronayne made a will on October 3, 1945, bequeathing legacies of at least \$15,000, in which she gave contestant only \$500, and in which she said that the reason she was leaving him this "small amount" was because she felt she had given him sufficient sums during their married life "to adequately compensate him for the small amount of love and affection I have ever received from him." She made a will on July 16, 1946, bequeathing legacies of at least \$11,000, in which she gave contestant \$100, and again said that she had received a small amount of love and affection from him. The will of 1947 also left contestant \$100, and said that her reason for leaving him this "small amount" was that she had amply provided for him during her lifetime. The wills of 1945, 1946, and 1947 show a consistent testamentary plan and an intention to die testate. There is much evidence that Mrs. Ronayne received unkind and harsh treatment from contestant. The evidence showed a complete lack of love and affection on her part for contestant. Before a complete search of Mrs. Ronayne's house could be made for a will, contestant took possession and thereafter no further search was possible.

[3] The weight to be accorded to the evidence and the function of a reviewing court are the same in a will contest as in any other civil case. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. It is our duty to resolve every reasonable

doubt as to the sufficiency of the evidence to sustain the findings in favor of the findings. We think it apparent that the evidence in the present case was sufficient to overcome the inference of revocation and to support the findings. See *In re Estate of Moramarco*, 86 Cal.App.2d 326, 338, 194 P.2d 740; *In re Estate of Reid*, 79 Cal.App.2d 34, 179 P.2d 353; *In re Estate of Dean*, 62 Cal.App.2d 418, 144 P.2d 849.

The third specification is that the court erred in numerous rulings on evidence. The court, over the objection of contestant, admitted the following evidence offered by respondent: the will made October 3, 1945; the will made July 16, 1946; a deed to Mrs. Ronayne and her former husband; testimony of the attorney who drew the 1947 will concerning what Mrs. Ronayne had said to him as her reason for leaving only \$100 to her husband, and to the effect that he had had conversations with her about getting a divorce and about some joint tenancy property; testimony of the attorney as to his time sheets showing when Mrs. Ronayne had consulted with him (this evidence was received solely for the purpose of fixing dates); testimony of a witness as to a conversation with Mrs. Ronayne in which the latter made uncomplimentary remarks about contestant; testimony of a witness as to a conversation she had with contestant after the death of Mrs. Ronayne in which the witness gave her conclusion as to what Mr. Ronayne meant by what he said; numerous letters written by Mrs. Ronayne to various persons in which she exhibited distrust of, and animosity to, Mr. Ronayne. The court excluded evidence, Exhibit X, offered by contestant for the purpose of showing that he had contributed money to Mrs. Ronayne.

[4,5] Contestant having alleged that the will of 1947 was revoked by Mrs. Ronayne during her lifetime, it was proper for respondent to endeavor to establish that she had not destroyed the will. Evidence was admissible to show a state of mind of Mrs. Ronayne consistent only with the will being unrevoked and potentially

operative. The weight of authority is to the effect that declarations of the testator may be shown for the purpose of overcoming the inference that a will has been destroyed *animo revocandi*. *In re Estate of Boyer*, 67 Cal.App.2d 83, 87, 153 P.2d 793; *In re Estate of Thompson*, 44 Cal. App.2d 774, 776, 112 P.2d 937; Anno. 3 A.L.R.2d 960; cf. *In re Estate of Bristol*, 23 Cal.2d 221, 143 P.2d 689.

[6,7] The best evidence, if not the only evidence, that can be produced to rebut the inference of revocation, is that the testatrix for several years contemplated a certain disposition of her property; that when she disposed of that property by the will of 1947 her mental attitude was precisely the same that it had been during those previous years; and that after she made such disposition her mind remained in the same state practically until her death, supplemented by the consistency of her mental attitude toward her husband and the beneficiaries named in her will. While Exhibit X should have been admitted as tending to offset some of the evidence of respondent, we cannot say, in the light of the entire record, that the error was prejudicial. The matters shown by that exhibit, we think, were fully shown by other evidence and related to a minor issue. We find no prejudicial error in the admission or exclusion of evidence.

[8] The fourth specification of error is that the court failed to find on material issues: (a) Was contestant the surviving husband and heir of decedent, and (b) Did decedent and contestant make a property settlement agreement which barred his interest under the will? As the court found that the will was not revoked, it was not necessary, in this proceeding, to determine whether contestant is or is not the surviving husband and heir of decedent. The findings state that respondent expressly abandoned her contention that a property settlement agreement had been made.

[9] The evidence shows strong and unvarying adherence by the testatrix to her plan for the disposition of her estate, which had obtained for several years prior

to her death, both as to the beneficiaries thereof and the bounty they would receive. There is no scintilla of evidence or inference therefrom, other than the inferences the law raises, that the will of 1947 was revoked. The evidence and the inferences from it point to only one conclusion—that the will of 1947 was not revoked by the testatrix during her lifetime and that it was in existence at her death. We find no prejudicial error in the record.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; TRAYNOR, J., dissenting.



103 Cal.App.2d 865

LUNNY v. LABRUCHERIE et al.

No. 14563.

District Court of Appeal, First District,
Division 1, California.

April 28, 1951.

Hearing Denied June 25, 1951.

Action by Joseph Lunny against Frank Labrucherie and Marco Massella for damages for nondelivery of dairy cattle and equipment and for rental. The Superior Court, in and for the County of Marin, Edward I. Butler, J., entered judgment awarding plaintiff part of recovery asked for and plaintiff and defendant Labrucherie appealed. The District Court of Appeal, Wood, J., held that evidence was insufficient to sustain finding that there had been loss of livestock during period alleged.

Judgment modified and affirmed.

1. Sales $\S$ 459, 467

Where agreement for sale of dairy business provided buyer was to make cash down payment with remainder to be paid in installments, that title was to be retained by seller until price was paid in full, and that seller was to remain on farm and supervise its operation until he was paid in full, but possession was to be given to buyer and proceeds of sales and expenses of

operation were to be paid by buyer, there was conditional sales contract which passed risk of loss of goods involved to buyer at time of delivery of premises to buyer, even though yet under supervision of seller. Civ.Code, $\S$ 1742(a).

2. Sales $\S$ 467

Where goods are sold upon conditional sales contract risk of loss is upon buyer from time of delivery of such goods. Civ.Code, $\S$ 1742(a).

3. Sales $\S$ 467

Where conditional sales agreement required seller to supervise operation of dairy farm after delivery of same to buyer and until seller was paid in full, and it was alleged that livestock was missing at time seller was paid in full, seller was not liable for loss, in absence of agreement to assume such obligation or finding that seller proximately caused such loss by some willful or negligent act, or failure to act.

4. Sales $\S$ 481

In action by buyer under conditional sales contract against seller of dairy business for value of cattle which were allegedly lost while business was still under supervision of seller, evidence was insufficient to show that there had been loss of cattle during period alleged.

Guy A. Ciocca, San Rafael, for appellants.

Freitas, Keating & Freitas, San Rafael, for respondent.

FRED B. WOOD, Justice.

Defendant Labrucherie appeals from that portion of a judgment which decreed that plaintiff recover from Labrucherie \$5,200 as damages for nondelivery of dairy cattle and equipment, and \$350 for rental. Plaintiff appeals from the entire judgment, which, in addition to awarding plaintiff recovery of the \$5,550 mentioned, denied him recovery of other items of damage which he claimed against both defendants. For the sake of convenience, we will refer to defendant Labrucherie as the appellant, and plaintiff Lunny as the respondent. The parties have so designated

themselves in their briefs and have discussed defendant's appeal to the virtual exclusion of plaintiff's.

In September, 1947, negotiations between the parties resulted in the sale of his dairy business, livestock and equipment by appellant to respondent for \$50,000, \$15,000 payable in cash and the remainder in installments. By its terms appellant sold all the livestock and equipment described in an attached inventory, retaining title until payment of the purchase price in full. He agreed to supervise the operation of the ranch until all sums due him were fully paid, such operations to be conducted in a most economical and farmerlike manner so as to obtain the most efficient and profitable results, he to consult with respondent "as required" and "to devote such time as is necessary to execute the purpose hereinabove set forth" but to receive no compensation for his services. He was to have "full authority to hire and discharge employees employed in the said dairy business" and to be "responsible for the safety and well-being of said dairy herd while the same is under his supervision and care." Particularly significant was the provision that appellant would "turn over the possession of said property on the 1st day of November, 1947," to respondent, "all income thereafter to be paid to" and "all operation expense to be paid by" respondent, and "the proceeds from the sale of calves, cows, equipment or any of the property herein mentioned and the proceeds received from the sale of livestock as the natural increase of the herd shall belong to and be paid to" respondent, coupled with the requirement that appellant make no "commitments for the sale of any of the property described herein or the purchase of any further property for the account of" respondent "without first having advised and consulted with and obtained the consent so to do" of respondent.

The fact that appellant delivered the livestock and equipment on November 1, 1947, pursuant to the agreement, is not questioned, and is not in issue. The complaint alleged, the answer admitted, and the court accordingly found that appellant and respondent executed the agreement on No-

vember 1, 1947, and on that day entered into the performance of the obligations respectively assumed by them pursuant to the agreement.

From November 1, 1947, until sometime in March, 1948, when his health failed him for a time, appellant was at the ranch nearly every day performing his work of supervision, going to the ranch in the morning and returning to his home at the end of the day. He spoke to respondent about his illness, and respondent told him to stay at home as long as he wanted and to go to the ranch whenever he felt like it. He was ill for three or four months, during which period he was at the ranch two or three times a week. It appears, also, that on November 1, 1947, with the express approval of appellant and as contemplated by the parties, respondent employed defendant Massella as ranch foreman to conduct dairy operations and farming operations at the ranch under the supervision and direction of appellant, who was to have full charge of the operation of the ranch.

On July 9, 1948, respondent paid appellant in full the remainder of the purchase price and accrued interest.

A few months later, respondent brought this action, alleging (1) that on or about July 1, 1948, respondent paid the remainder of the purchase price and appellant purportedly delivered the property described in the inventory, but that certain of the livestock and some of the personal property described in the inventory attached to the agreement of November 1, 1947, were missing, (2) that he had sustained damages as result of diminished proceeds from the sale of milk during the period November, 1947, to July, 1948, because of the missing dairy stock, (3) other items of damage because of alleged failure of appellant properly to perform his obligations as supervisor of dairy operations, and (4) overdue and unpaid rental in the sum of \$350 for the month of October, 1947. The trial court found that respondent paid appellant the remainder of the purchase price on July 9, 1948; that appellant delivered to respondent physical custody, possession and

control of the livestock and equipment, but that such delivery was short of the inventory listing in that there were missing 10 cows and 15 heifers valued at \$200 each, and miscellaneous items of personal property of the aggregate value of \$200; and that appellant was indebted to respondent for rent in the sum of \$350 for October, 1947. The court found for the defendants and against the plaintiff in respect to all other items of damage alleged in the complaint.

The issues upon these appeals narrow down to (1) the legal responsibility, if any, of appellant for the alleged loss of dairy cattle and equipment during the period November 1, 1947, to July 9, 1948, and (2) the sufficiency of the evidence to sustain the finding of loss of dairy cattle during that period. The finding against respondent on the other items of damage is supported by substantial evidence and the finding in his favor as to rent due in the amount of \$350 is supported by undisputed evidence.

In view of the facts pleaded and proved, we find no basis for holding appellant legally responsible to respondent for the livestock and equipment allegedly missing on July 9, 1948.

[1,2] The agreement of November 1, 1947, was a conditional sales contract pursuant to which the goods were delivered to the buyer, the seller retaining legal title merely to secure performance by the buyer of his obligations under the contract. In such a case the goods are at the risk of the buyer from the time of such delivery. Civ.Code, § 1742, subd. (a); *Beaudry v. Peterson*, 50 Cal.App.2d 478, 482-484, 123 P.2d 108, 124 P.2d 637.

[3] Legal responsibility for loss occurring after November 1, 1947, must be found, if at all, in those provisions of the agreement which conferred upon appellant certain supervisory functions over respondent's ranch operations. Those provisions certainly did not make appellant an insurer. Liability, if any, must be predicated upon some willful or negligent act, or failure to act, which proximately caused the asserted loss. None such was alleged or proven.

The complaint pleaded merely a failure in July, 1948, to deliver all the property that the inventory called for in November, 1947. When on the witness stand, respondent was asked: "With reference to the thirty-two milking cows which you claim are out of the string, the nineteen heifers, and the personal property which you claim is missing, do you know of your own knowledge that Mr. Labrucherie and Mr. Massella actually took any of those items?" He responded: "I have never made such a claim, that Mr. Labrucherie or Mr. Massella took them. I say they are missing. I am short an amount of cattle and equipment and milk proceeds." Appellant's attorney then asked respondent if he contended that defendants caused the cattle and personal property "to be taken for their own benefit by anyone else." Respondent's attorney objected, in these words: "I don't think that is within the scope of the case. The fact that they are missing—I don't think we have to account for them ourselves or—." Thereupon, appellant's attorney re-framed the question, as follows: "Do you contend that either Mr. Labrucherie or Mr. Massella had anyone else, for their own benefit, take those items off the ranch." Respondent's attorney objected to this question "on the grounds it is incompetent, irrelevant and immaterial and not within the issues of the case." The court, in effect, sustained the objection, saying: "It has been answered, more or less. He has said what he knows about it, that the inventory showed a certain number of cattle, and the check at the end showed they were not there. No report of how they were missing, whether through death or being driven off or otherwise. He has no knowledge of it, he said. They were in there when he paid the money. That is his statement." Thus, it is clear that respondent tried the case consistently with the theory reflected by his complaint, a theory that appellant was under an obligation to account to respondent (whenever the latter might pay the balance of the purchase price) for every item of property which appellant sold and delivered to respondent on the 1st of November, 1947, and if any such item were missing to exculpate him-

self by accounting for its loss (such as the sale of a cow and receipt by respondent of the sale price) or by paying respondent the money value of the lost item. That is not the obligation of a conditional seller who has delivered possession of the goods to the buyer. Nor it is an obligation that can be spelled out of any other portion of the agreement of November 1, 1947.

Respondent offers three reasons why the rule enunciated in *Beaudry v. Peterson*, supra, 50 Cal.App.2d 478, 123 P.2d 108, 124 P.2d 637, should not apply. First, he says this rule does not apply where the loss or destruction is caused by the fault of the seller. But, as we have seen, he neither pleaded nor proved fault of the seller in respect to the assertedly missing cattle and equipment.

As his second reason, he advances the theory that by the agreement of sale appellant "acquired supervision, control, and a measure of possession of the personal property and expressly assumed the risk of its loss or destruction." In support of that statement, respondent merely cites the agreement and section 1742 of the Civil Code, without analysis or discussion. We find in the agreement no assumption of any such obligation upon the part of appellant.

Respondent's third reason is that the agreement created a fiduciary relationship "which would charge appellant with the loss or destruction of the property even if he had not contractually assumed the risk thereof." He cites *Kinert v. Wright*, 81 Cal.App.2d 919, 185 P.2d 364. In the *Kinert* case, the respondent had represented to appellants that he could purchase for them a certain parcel of land for \$1200, knowing he could get it for less. They engaged him as their agent and advanced the money. He purchased the desired property and an adjoining parcel for less than \$1200, and unsuccessfully sought to retain the balance of the money and the adjoining parcel for his own use. Obviously, that case bears no similarity whatsoever to the instant case.

[4] In respect to the missing cattle, the court found that on July 9, 1948, the herd consisted of 220 milk cows, 26 bred heifers, 29 yearlings, and 35 calves. The

inventory of November 1, 1947, listed 190 milk cows, 20 heifers in calf, 30 bred heifers, and 45 yearlings. In the interim, according to respondent's own testimony, 4 cows died, and 4 cows and 2 heifers were sold. During that period no animals were purchased. Thus, it appears that a herd of 285 cows, heifers and yearlings in November (reduced by the 4 animals that died and the 6 which were sold) was a herd of 275 cows, heifers and yearlings in July, exclusive of the 35 calves which concededly were a natural increase. That evidence does not support a finding that 10 cows and 15 heifers, or any cows or heifers, delivered to respondent in November, were missing from the herd in July. Respondent seeks to justify the finding upon the theory that the 50 heifers which in November were with calf or had been bred should have calved and become milk cows, thus increasing the number of milk cows to 240 in July. He also contends that a considerable number of the animals that were yearlings in November would have become heifers, bred or with calf, by July. That is pure speculation, and calls for an increase in number from 275 to 300 (of cows, heifers and yearlings), without any increment from outside sources and without taking account of the 4 animals that died and the 6 that were sold, to sustain a putative loss of 25 cows and heifers. That, upon its face, is without support in the evidence. Besides, several experts testified that the condition of the herd in July, as to the numbers in the several classifications of animals, was a normal development for a herd such as this, over an eight or eight and a half months period.

The judgment in favor of Massella is affirmed. On the appeal of Lunny and on the appeal of Labrucherie, the findings, conclusions and judgment are modified to provide that Lunny is entitled to recover from Labrucherie the sum of \$350, with interest, and no more. As so modified, the judgment is affirmed, Labrucherie to recover his costs on these appeals.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, TRAYNOR, and SCHAUER, JJ., dissenting.

103 Cal.App.2d 826

PALAZUELOS v. PALAZUELOS.

Civ. 18171.

District Court of Appeal, Second District,
Division 2, California.

April 27, 1951.

Suit for divorce by Delphina Palazuelos against Adolfo Palazuelos. The Superior Court of Ventura County, Wm. A. Freeman, J., granted an interlocutory decree of divorce to plaintiff and from portion of judgment setting aside to her as community property realty standing of record in the names of plaintiff and defendant as joint tenants, defendant appealed. The District Court of Appeal, Wilson, J., held that evidence was admissible to establish that realty was community property, though it had been acquired under a deed creating a joint tenancy.

Judgment affirmed.

1. Evidence ⇐426

Evidence is admissible to establish that real property is community property though it was acquired under a deed that in form ordinarily creates a tenancy in common or a joint tenancy.

2. Divorce ⇐249(3)

Realty purchased by husband and wife with their earnings during marriage was properly awarded to wife as community property in her suit for divorce, where wife did not understand the meaning of the term "joint tenancy" when property was acquired and did not intend that earnings of herself and husband during marriage should be used to purchase the property in their names as joint tenants.

3. Divorce ⇐203

Erroneous description of realty in wife's complaint seeking a divorce and division of community property was immaterial, where court found that the property acquired by parties was the same as the property described in complaint as amended during trial.

WILSON, Justice.

The only question involved on this appeal is whether the court erred in setting aside to plaintiff as community property certain real property which stood of record in the names of plaintiff and defendant as joint tenants. The court granted an interlocutory decree of divorce to plaintiff. Defendant has appealed only from that portion of the judgment decreeing that joint tenancy property of the parties was community property and awarding it to plaintiff.

The deed whereby the property was acquired recites that it was conveyed to the parties "as joint tenants." There is evidence to the effect that it was purchased with funds acquired by the parties during their married life. Plaintiff testified that she did not know the meaning of the term "joint tenancy" while defendant testified that the escrow agent who handled the transaction whereby they acquired the property explained the significance of the term to her.

[1,2] The court found that plaintiff in fact did not understand the meaning of the term and did not intend that the earnings of herself and defendant acquired during their married life should be used to purchase the property in their names as joint tenants. It is the rule that evidence may be admitted to establish that real property is community property although it has been acquired under a deed that in form ordinarily creates a tenancy in common or a joint tenancy. *Wood v. Wood*, 81 Cal.App. 2d 727, 728-729, 185 P.2d 53. The cases cited by defendant, *Tomaier v. Tomaier*, 23 Cal.2d 754, 146 P.2d 905, *Cox v. Cox*, 82 Cal.App.2d 867, 187 P.2d 23, and *Watson v. Peyton*, 10 Cal.2d 156, 73 P.2d 906, are readily distinguishable. In both the *Tomaier* and *Cox* cases the rule announced in the *Wood* case is recognized, but in those cases there was ample evidence to show that it was the intention of the parties that the property be held in joint tenancy as recited in the respective deeds. In *Watson v. Peyton* the wife requested in writing the execution of the joint tenancy deed

Charles F. Kromm, Oxnard, for appellant.

Neil D. Heily, Oxnard, for respondent.

and the court stated that she could not defeat her act by a hidden intention not disclosed to the other party at the time of the transaction. Such circumstances did not exist in the instant case.

[3] Defendant attempts to make a point of the fact that the complaint described the property as being on West Seventh Street in Oxnard whereas it was actually on East Seventh Street. The court found that the property acquired by the parties was the same as that described in plaintiff's complaint as her pleading was amended during the trial to conform to the proof.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



104 Cal.App.2d 23

PEOPLE v. WIXSON.

Cr. 4570.

District Court of Appeal, Second District,
Division 1, California.

May 1, 1951.

Donald Festus Wixson was convicted in Superior Court of Los Angeles County, Clement D. Nye, J., of forgery, and he appealed. The District Court of Appeal, held that evidence was sufficient to sustain conviction.

Judgment affirmed.

I. Criminal law ⚡641(1)

Where bartender who had cashed \$50 check to which signature had allegedly been forged by defendant had voluntarily testified that he had cashed check and that he had given defendant \$30 for it, and defendant argued on appeal that facts indicated guilty knowledge by bartender and that defendant had been denied fair trial by negligence of counsel in waiving right to further cross examination waiving of further cross examination was not error.

Pen.Code, § 686,; U.S.C.A.Const.Amend. 6.

2. Forgery ⚡44(1)

Evidence sustained conviction for forgery.

Zeman & Hertzberg and Harrison W. Hertzberg, all of Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Donald D. Stoker, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment.

Defendant was charged with three counts of forgery. A jury was waived and, "It was stipulated that the testimony received at the preliminary hearing shall be received in evidence". The defendant testified in person at the trial.

The three checks involved, which were American Express checks, belonged to Richard Mays who was intoxicated when the checks were missed. Mays testified: "A. I missed these checks the next morning.

"Q. When was that? A. I mean, I missed the checks that night, rather.

"Q. When is that? A. When he taken them off of me. That was on April the 8th.

"Q. April the 8th, this year? A. Somewhere around 11:00 o'clock at night. I can't be positive.

"Q. Now, when you say he took them off of you, who was that? A. Well, I can't be positive.

"Q. Do you see that person in the court room today? A. I see one that resembles him.

"Q. Will you point him out to us? A. That is him.

"Q. You are pointing to a man seated at the end of the counsel table, this man here? You nodded towards some person. Where is he? A. This one here.

"Q. You are pointing now to this person? A. It resembles him, yes sir.

"Q. That is the defendant. * * *".
The checks were for \$50 each.

Victor Grotticelli, a bartender at a bar frequented by defendant cashed all three checks. With regard to the first check, referring to defendant, the bartender testified:

"Q. Have you seen this defendant before? A. Yes, sir.

"Q. Did he cash that check with you? A. Yes, sir.

"Q. What did you give him for that check? A. I gave him \$30.00 on that check.

"Q. When and where did that take place? A. That took place on May the 8th.

"Q. At Frank's Cafe? A. Frank's Cafe. That is right."

The witness further testified that the other two checks were cashed the next day by defendant.

The defendant testified in person, admitted frequenting the bar on the days in question but denied all knowledge of the checks.

It is appellant's contention that the witness Grotticelli was an accomplice and that the evidence did not amount to the required corroboration; that "The evidence taken as a whole is insufficient to sustain the conviction" and, that "Defendant was denied a fair trial due to the negligence of counsel in waiving his right to further cross-examination and submitting the case on the transcript of the preliminary hearing when said transcript of the testimony therein presented a prima facie defense to the crime. In such case defendant was denied due process of law within the 6th amendment of the Constitution of the United States, and Section 686 of California Penal Code".

[1] Appellant argues that the fact that the bartender gave defendant only \$30 for one of the checks was evidence of guilty knowledge and that the failure of defendant's counsel to further cross-examine the witness on this subject, in effect, denied the defendant a fair trial. It is at once obvious that other reasons might account

for the incident which are not necessarily related to guilty knowledge. It is significant that the witness did not conceal the incident but voluntarily revealed it. It does not appear that further cross-examination would have altered the situation.

[2] The trial court's conclusions are supported by the record and the evidence is sufficient to support the judgment. It is therefore affirmed.

WHITE, P. J., and DRAPEAU, J.,
concur.



103 Cal.App.2d 848

CAMPBELL v. CAMPBELL.

Civ. 17932.

District Court of Appeal, Second District,
Division 3, California.

April 27, 1951.

Milton Campbell brought action against Violet Campbell for exclusive control of their children. The wife filed a cross-complaint for divorce. The Superior Court of Los Angeles County, Philbrick McCoy, Judge assigned, entered judgment awarding care, custody and control of children to husband with right in wife to have them in her care at certain specified times, and denied divorce, and the wife appealed from that part of judgment relating to custody of children. The District Court of Appeal, Vallée, J., held that award of custody to husband was not an abuse of discretion under the evidence.

Affirmed.

I. Divorce ⇨ 291, 294

Even if husband's complaint in action for custody of children failed to state a cause of action, custody of children was made an issue by wife's cross-complaint for divorce and answer thereto, and trial court had power to make such order for care, custody and control of children as it deemed necessary or proper, though it denied divorce. Civ.Code, § 199.

2. Parent and child $\S$ 2(3.3)

In husband's action for custody of children, award of custody to husband was not an abuse of discretion under evidence showing that wife was an unfit person to have their custody, though husband was a working man. Civ.Code, $\S$ 199.

3. Infants $\S$ 19

In proceeding where custody of minor children is involved, trial court has a large measure of discretion and is not constrained by the complaint, since paramount consideration is welfare of the children, and its determination will not be disturbed in absence of clear showing of abuse.

4. Parent and child $\S$ 2(4)

In husband's action for custody of children on ground that wife was an unfit person for their custody, denial of wife's motion to produce children in court was not an abuse of discretion, especially where court was satisfied from photographs and other evidence that youngest child was child of husband and wife. Civ. Code, $\S$ 199.

John R. Sahanow, Hollywood, Morris Lavine, Los Angeles, for appellant.

Harry C. Allen, Huntington Park, for respondent.

VALLÉE, Justice.

Appeal by defendant wife from a judgment for plaintiff husband in an action for exclusive control of the children of the marriage. Defendant filed a cross-complaint for a divorce which was denied. No question is raised as to the propriety of the judgment insofar as it denied defendant a divorce.

The action was brought under the provisions of Civil Code, section 199. The parties were married August 9, 1936. They separated in June, 1949. They have three minor children aged 10, 8, and 4, respectively. The complaint alleged that for more than three years defendant "has

habitually resorted and committed adultery with another man; that for more than ten days last past she has consistently insisted that Janice Eileen Campbell was the child of said other man and not the child of this plaintiff; that by reason of the foregoing defendant is an unfit person to have custody of said minor children"; that plaintiff is a fit and proper person to have the care, custody, and control of the children; that he is able-bodied and well able to provide for them. The answer denied generally the allegations of the complaint. The cross-complaint prayed for a divorce and custody of the children. It alleged cruelty; that cross-complainant (defendant) is a fit and proper person to have custody of the children, and that cross-defendant (plaintiff) is not. The answer thereto denied the allegations of the cross-complaint and alleged that cross-complainant had informed cross-defendant that she had committed adultery with one Scholer and that Scholer was the father of the youngest child and that "by reason of the fact that she habitually frequented beer parlors until one and two o'clock A. M., and used violence and abusive language to the said minor children she is entirely unfit to have their custody, or the custody of any of them."

The court found that all of the allegations of the complaint were true and that all of the allegations of the cross-complaint, to which we have referred, were untrue. The judgment awarded the care, custody, and control of the children to plaintiff with the right in defendant to have them in her care at certain specified times. Defendant appeals.

[1] Defendant claims that the complaint does not state facts sufficient to constitute a cause of action. We think it does, but it is not necessary to decide the question for the reason that custody of the children was expressly made an issue by the cross-complaint and the answer thereto and the court had power, even though it denied defendant a divorce, to make such order for the care, custody, and control of the children as seemed to it necessary

or proper. *Jacobs v. Jacobs*, 68 Cal.App. 725, 731, 230 P. 209; *Priest v. Priest*, 90 Cal.App.2d 185, 202 P.2d 561.

It is urged that the court abused its discretion in awarding custody of the children to plaintiff in that it was not shown that defendant was an unfit person to have their custody. The claim is untenable. There was evidence that while living with plaintiff, defendant committed adultery with Scholer over a period of some six years; after the parties separated Scholer stayed at her apartment until late hours of the night on many occasions; she made numerous trips with him and on some of them took the youngest child with them; she taught the youngest child to call Scholer "Daddy"; she told plaintiff that Scholer was the father of the youngest child; when Scholer's wife pleaded with defendant to give him up she told her, "I will do as I damn please"; she spent nearly every day and many evenings in a cocktail bar until 12:00 or 1:00 a. m.; she used vile and profane language to and in the presence of the children; plaintiff's mother, who lived in the home, took care of the children for 6 or 7 years prior to the commencement of the action. Defendant testified that while living with plaintiff she had committed adultery with Scholer over a period of some 6 years; in her opinion Scholer was the father of the youngest child; prior to the time plaintiff learned of defendant's association with Scholer he (plaintiff) had been a good husband and provider; and that plaintiff's mother took good care of the children. In the cross-complaint defendant alleged that there were three children of the marriage, naming the youngest child; at the trial she amended to allege that there were two—the two oldest.

[2, 3] We think it patent that the court did not abuse its discretion in awarding custody of the children to plaintiff. In a proceeding where the custody of minor

children is involved the paramount consideration is the welfare of the children; and the court is not constrained by the complaint. It has a large measure of discretion; and in the absence of a clear showing of abuse, its determination will not be disturbed on appeal. *Runsvold v. Runsvold*, 61 Cal.App.2d 731, 733, 143 P.2d 746. The facts in the present case are quite similar to those in *Bush v. Bush*, 72 Cal.App.2d 487, 164 P.2d 774, in which it was held that the trial court had not abused its discretion in awarding custody of a child of tender years to the father. Defendant argues that because plaintiff is a working man, the effect of the judgment is to give custody of the children to his mother. The judgment awards custody to plaintiff, not to his mother. If it is necessary that his mother care for the children while he is working, defendant cannot complain—she brought about her loss of their custody and was perfectly satisfied for a long period of time to allow plaintiff's mother to care for them. As we have said, she testified that plaintiff's mother took good care of them.

[4] During the trial defendant made a motion for an order that the children be produced in court. The motion was denied. Error is claimed. We find no abuse of discretion in not requiring that the children be produced in court where their parents were engaged in an acrimonious struggle for their custody. If the purpose of the motion was so that the court could see the youngest child and compare her appearance with the older children and with plaintiff, no purpose would have been served. Photographs of the children were in evidence. The court was satisfied from the photographs and other evidence that the youngest child was the child of plaintiff and defendant.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

103 Cal.App.2d 792

In re RAPHAEL'S ESTATE.

RAPHAEL v. GREENE et al.

Civ. 14607.

District Court of Appeal, First District,
Division 2, California.

April 26, 1951.

Rehearing Denied May 26, 1951.

Hearing Denied June 18, 1951.

Proceeding in the matter of the estate of Raymond Theodore Raphael, deceased husband of Bertha Rado Raphael, wherein Ray M. Greene and John Barton O'Brien, attorneys for the widow of deceased, moved for an order approving a contingent fee contract entered into between movants and the widow whereunder the attorneys were entitled to 50% of the widow's share of any property of the estate of decedent which was not inventoried by the administrator of the estate of decedent which movants succeeded in having included in the estate, and to 50% of the additional one-half of the inventoried property the widow would receive if it was established that it was community and not separate property of decedent. The Superior Court in and for the City and County of San Francisco, T. I. Fitzpatrick, J., entered orders adverse to the widow and she appealed. The District Court of Appeal, Dooling, J., held, inter alia, that evidence sustained finding that the contingent fee contract was not obtained as a result of the exercise by the attorneys of fraud, duress or undue influence.

Order in accordance with opinion.

1. Courts ⇨202(5)

Evidence would be viewed in most favorable light to support findings of probate judge, drawing every reasonable inference in their favor which evidence would support. Probate Code, § 1020.1.

2. Attorney and client ⇨147

A contingent fee contract whereunder attorneys for widow of decedent were entitled to 50% of widow's share of any property of estate of decedent not inventoried by administrator of estate which attorneys succeeded in having included in estate, and to 50% of additional one-half of inventoried property widow would receive if it was established that it was community and not separate property of decedent, was burden-

ed with rebuttable presumption of overreaching on part of attorneys.

3. Attorney and client ⇨166(2)

Evidence sustained finding that a contingent fee contract entered into between widow of decedent and attorneys representing widow, whereunder attorneys were entitled to 50% of widow's share of any property of estate of decedent which attorneys succeeded in having included in estate, and to 50% of additional one-half of inventoried property widow would receive if it was established that it was community and not separate property of decedent, was not obtained by attorneys as result of exercise by attorneys of fraud, duress or undue influence. Probate Code, § 1020.1.

4. Attorney and client ⇨147

A contingent fee contract, since it involves a gamble on the result of litigation, may properly provide for a larger compensation than would otherwise be reasonable.

5. Attorney and client ⇨166(2)

Evidence sustained finding that fee provided for by contingent fee contract entered into between widow of a decedent and attorneys representing widow of a decedent, whereunder attorneys were entitled to 50% of widow's share of any property of estate of decedent not inventoried by administrator of estate which attorneys succeeded in having included in estate, and to 50% of additional one-half of inventoried property which widow would receive if it was established that it was community and not separate property of decedent, was equitable and reasonable.

6. Attorney and client ⇨134(2)

An attorney employed on a contingent fee basis and discharged without cause may recover the full compensation called for by his contracts.

7. Attorney and client ⇨166(4)

Evidence sustained finding that attorneys who had successfully represented widow of a decedent under a contingent fee contract whereunder attorneys were entitled to a specified percentage of widow's share of any property of estate of decedent

not inventoried by administrator of estate which attorneys succeeded in having included in estate, and to specified percentage of additional one-half of inventoried property widow would receive if it was established that it was community and not separate property, were discharged pending appeal by administrator without cause, and attorneys were entitled to recover full compensation called for by contract.

8. Interest $\hookrightarrow$ 39(1)

Where contingent fee contract entered into between widow of a decedent and attorneys, whereunder attorneys who successfully represented widow were entitled to specified percentage of widow's share of any property of estate of decedent not inventoried by administrator of estate which attorneys succeeded in having included in estate, and to specified percentage of additional one-half of inventoried property widow would receive if it was established that it was community and not separate property of decedent, called for payment of contingent fee forthwith upon its receipt at time of distribution of estate, interest before distribution would not be allowed.

Holbrook & Tarr, W. Sumner Holbrook, Jr., Clyde P. Harrell, Jr. and Francis H. O'Neill, Los Angeles, Edmund Nelson, Los Angeles, of counsel, for appellant.

Ray M. Greene, John Barton O'Brien, San Francisco, Herbert Chamberlin, San Francisco, of counsel, in pro. per.

DOOLING, Justice.

Bertha Rado Raphael, appellant, is the widow of Raymond Theodore Raphael who died intestate. The decedent's estate consisted entirely of property inherited from his parents and the increase thereof. His legal heirs were a brother and his widow, the appellant. The widow waived her right to administer and the brother was appointed administrator.

The widow being dissatisfied both with the amount of the estate as accounted for and the administrator's claim that it was

all the separate property of the decedent employed respondent Greene to represent her. She assigned Greene \$1,000 of her interest in the estate as a retainer fee. Greene testified that at that time he told appellant that the total fee to be charged would have to be agreed upon later after he found out how much work was involved.

The administrator filed an inventory of property with an appraised value of \$104,000, all of which was described as separate property. Greene proposed to appellant that respondent O'Brien be associated with him and that they would handle her case on a contingent fee basis of 50% of her share of any property not inventoried which they succeeded in having included in the estate and 50% of the additional one-half of the inventoried property which she would receive if it was established that it was community and not separate property. A contract so providing was drawn by respondents and executed.

Thereafter respondents succeeded in obtaining an adjudication from the probate court that all of the inventoried property was community property and this adjudication was affirmed on appeal. In re Estate of Raphael, 91 Cal.App.2d 931, 206 P.2d 391. After this adjudication and pending the appeal appellant herein discharged respondents and substituted her present counsel in their stead.

Thereafter respondents, proceeding under Probate Code section 1020.1, moved the probate court for an order approving their contingent fee contract and allowing them the compensation therein provided for. After a trial the probate court found that the contingent fee agreement was "in all respects and particulars just, fair and valid" and "was not obtained by duress, fraud or undue influence"; that appellant had without cause discharged respondents as her attorneys; that the reasonable value of their services to the time of their discharge was \$25,000; and determined that respondents were entitled to have \$25,000 distributed to them from the assets of the estate with interest at 7% from the date of the order, December 6, 1949. From this order,

and from orders denying her motion for new trial and motion to vacate the order of December 6, 1949 appeals have been taken.

Appellant claims on appeal that the findings that the contingent fee contract was not obtained by fraud, duress and undue influence; that the contingent fee agreed upon was equitable and reasonable; and that respondents were discharged without cause, are all contrary to the evidence.

[1] In weighing these claims we must view the evidence in the most favorable light to support the probate court's findings drawing every reasonable inference in their favor which the evidence will support. Probate Code sec. 1020.1 lays the duty of determining whether "the fees, charges or consideration paid by any * * * heir * * * is grossly unreasonable" and whether "any such assignment, transfer (or), agreement * * * was obtained by duress, fraud or undue influence" upon the probate judge and we cannot substitute our judgment for his on the weight and effect of the evidence. *In re Estate of McPherson*, 94 Cal.App.2d 906, 212 P.2d 41.

Respondent Greene testified that the contingent fee contract was several times explained to appellant before she signed it. "I told her that under the inventory * * all of the estate was listed as the separate property of her husband; that from a legal standpoint one-half of the estate went to her brother-in-law and the other half went to her; that our job would be to prove * * * that all of the estate was community property * * * that all of the community property would go to the surviving spouse. * * * She was certain of recovering one-half of \$104,000. That would be \$52,000. The contract was explained to her that everything over * * * \$52,000 would be one-half to her. If she got nothing but the \$52,000, all she would owe * * would be the \$1000, the retainer fee * *. She expressed herself as being very pleased, because she had no money to advance for attorneys' fees and costs. If she lost she would owe us nothing but the thousand. If she won she would be able to pay the 50% increase."

[2, 3] Appellant flatly contradicted this testimony, her version being that she signed the contract without reading it or understanding its terms on the representation of respondents that it was a paper respondents wanted her to sign for their files. The probate judge chose to believe respondents and disbelieve appellant. Conceding that the contract was burdened with a presumption of over-reaching that presumption is rebuttable, *In re Estate of Phillipi*, 76 Cal. App.2d 100, 172 P.2d 377, and the trial court's finding that there was no fraud, duress or undue influence is amply supported.

[4, 5] The finding that the fee provided for was equitable and reasonable is likewise supported. A contingent fee contract, since it involves a gamble on the result, may properly provide for a larger compensation than would otherwise be reasonable. *Goldstone v. The State Bar of California*, 214 Cal. 490, 498, 6 P.2d 513, 80 A.L.R. 701. Contingent fees of 50% have been upheld in this state and by many other courts. *Hoffman v. Vallejo*, 45 Cal. 564; *Swanson v. Hempstead*, 64 Cal.App.2d 681, 149 P.2d 404; *Hardman v. Brown*, 153 Wash. 85, 279 P. 91; *Savic v. Kramlich*, 52 Idaho 156, 12 P.2d 260; *In re Fitzsimons*, 174 N.Y. 15, 66 N.E. 554; *Morehouse v. Brooklyn Heights R. Co.*, 123 App.Div. 680, 108 N.Y.S. 152, affirmed 195 N.Y. 537, 88 N.E. 1126; *In re Merrill's Estate*, 165 Misc. 295, 300 N.Y.S. 1142; *In re Levine's Estate*, 154 Misc. 700, 278 N.Y.S. 36; *In re Carney*, 93 Misc. 600, 158 N.Y.S. 585; *Friedman v. Mindlin*, 91 Misc. 473, 155 N.Y.S. 295; *Moyers v. City of Memphis*, 135 Tenn. 263, 186 S.W. 105; *Etsel v. Duncan*, 112 Md. 346, 76 A. 493; *Dreiband v. Candler*, 166 Mich. 49, 131 N.W. 129; *Elk Valley Coal Mining Co. v. Willis & Meredith*, 149 Ky. 449, 149 S.W. 894; *Lipscomb v. Adams*, 193 Mo. 530, 91 S.W. 1046.

Research, investigation and consultations of many weeks were involved and the outcome hinged on persuading the trial court that admittedly separate property had been transmuted to community property by oral agreement. *In re Estate of Raphael*, supra, 91 Cal.App.2d 931, 206 P.2d 391. The

case had to be won in the trial court since the result hung on conflicting testimony and inferences. The same judge heard both matters. He was in the best possible position to appraise the quality of the services performed and the extent of the risk involved in staking the fee on the hazard of success. To his mind the gamble was fraught with uncertainty as was indicated by the following remarks made by him during the course of the hearing: "It was a close question. It was one of those questions that if I had been reversed, I would not have been surprised."

Hind sight leads counsel for appellant to minimize the extent and value of the services, but if the trial judge had decided the "close question" the other way they would doubtless be arguing as strenuously that respondents having lost must accept the consequences of having wagered their fee on the contingency of success.

Counsel for appellant suggest several reasons why the finding that the discharge of respondents was without cause is not supported by the evidence. Respondents demanded and received from appellant three payments of \$100 each and requested others. Respondent Greene testified that he performed other legal services for appellant outside of the estate and that these payments were to compensate for those services. Difficulties arose when appellant insisted on associating her present counsel about the fee which they were to receive and over the advancement for costs incurred. There was testimony that respondents threatened to withdraw from the case unless an additional payment or some new arrangement was made. Greene testified: "That is absolutely erroneous. When she saddled me with these other personal matters, the two pieces of litigation, I told her if she wanted me, or expected me not to make any additional charges for those services, that she would have to pay something on the thousand dollar retainer. * * * I told her if she wanted to hire Mr. Harrell that it was perfectly all right, but that she would have to make arrangements for his fees and costs * * * I would have been glad to have Mr. Harrell's

firm, but we never got together on the fees, costs and expenses."

The probate judge evidently accepted this version, and that is an end to the question on appeal.

Finally there was testimony that Greene called his client "psychopathic" and "screw". Greene's version is that appellant wrongfully accused him of entering her safe deposit box and taking some of her papers. He admits some heated language as a result. The trial judge was in the best position to assay the testimony and appraise the conduct of the parties. A reading of the entire transcript satisfies us that the findings in the particulars discussed find ample evidentiary support.

[6,7] Under those findings the order fixing the fee at \$25,000 (less than the contingent contract calls for) is immune from attack on appeal. An attorney employed on a contingent fee basis, discharged without cause, may recover the full compensation called for by his contract. *Denio v. City of Huntington Beach*, 22 Cal.2d 580, 591, 140 P.2d 392, 149 A.L.R. 320; *Salopek v. Schoemann*, 20 Cal.2d 150, 153, 124 P.2d 21; *Zurich General Accident & Liability Ins. Co., Ltd., v. Kinsler*, 12 Cal.2d 98, 100-101, 81 P.2d 913.

Appellant also attacks the finding that the services performed to the date of discharge were of the reasonable value of \$25,000 and points out that the theory of recovery under the contract is inconsistent with a recovery of reasonable value. We find no necessity of inquiring into these questions for the reason that the order is fully supported by the findings which resulted in the approval of the contingent fee contract. Under those findings respondents were entitled to \$26,000, 50% of \$52,000. The appellant is in no position to complain of an error of the court which resulted only to the disadvantage of respondents.

[8] The contract calls for the payment of the contingent fee "forthwith upon its receipt at the time of the distribution of the estate." We can find no justification for the allowance of interest before distribution.

The order approving the contingent fee contract is modified by striking therefrom the provision for interest and as so modified it is affirmed. The order refusing to vacate is affirmed. The appeal from the order denying a new trial is dismissed. Respondents will recover costs on appeal.

SCHOTTKY, Justice pro tem., concurs.



104 Cal.App.2d 26

PEOPLE v. WEINRICH.

Cr. 4576.

District Court of Appeal, Second District,
Division 3, California.

May 1, 1951.

Phil Weinrich was convicted in the Superior Court of Los Angeles County, William M. Byrne, J., of violation of statute dealing with lewd and lascivious conduct against a child under 14 years of age, and he appealed. The District Court of Appeal, Wood, J., held that evidence was sufficient to sustain conviction.

Judgment of conviction and order denying motion for new trial affirmed.

Infants ⇌ 20

Evidence was sufficient to sustain conviction under statute dealing with lewd and lascivious conduct against a child under 14 years of age. Pen.Code, § 288.

Walter L. Gordon, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was charged with violation of section 288 of the Penal Code. In a trial by jury, he was convicted. Probation was granted. He appeals from the order denying his motion for a new trial.

Appellant contends that the evidence is insufficient to support the judgment. His argument is that there are "discrepancies, inconsistencies and improbable statements" in the testimony of the prosecutrix, a 9-year-old girl. The basis for the argument is that she first testified that defendant touched a certain part of her body when she had her right foot on the running board of an automobile, and thereafter she testified that he touched a different part of her body when her right foot was on the ground. In *People v. Slobodion*, 31 Cal.2d 555, 191 P.2d 1, wherein one charge was the violation of said section 288, the prosecutrix, a 6-year-old girl, made inaccurate statements as to the number of days in a week, the month when the incident occurred, the size of the defendant, and whether defendant wore a necktie. The appellant therein asserted that the evidence was insufficient in that the testimony of the prosecutrix was vague and contradictory. The following statement of the court in that case, 31 Cal.2d at page 558, 191 P.2d at page 3, is applicable here: "In all its important phases, the prosecutrix's story is coherent and consistent. Her version of the incident remained unimpeached in all its essentials on cross-examination." In the present case the prosecutrix related facts which were sufficient to prove that defendant violated said section 288. No useful purpose would be served by reciting the testimony in detail. Factual issues were presented for determination of the trial court. The evidence was sufficient to support the judgment.

The order denying the motion for a new trial is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

103 Cal.App.2d 799

PEOPLE v. PEEPLES.

Cr. 2709.

District Court of Appeal, First District,
Division 2, California.

April 26, 1951.

Hearing Denied May 24, 1951.

Charles Peeples was convicted in the Superior Court in and for the City and County of San Francisco, William T. Sweigert, J., of burglary, and from such judgment and from an order denying a new trial, he appealed. The District Court of Appeal, Dooling, J., held that evidence was sufficient to sustain conviction.

Judgment and order affirmed.

1. Burglary $\S$ 41(1)

Evidence was sufficient to sustain defendant's conviction for burglary.

2. Criminal law $\S$ 566

It is not necessary for a witness to observe features of person charged with crime in order to identify him, as there may well be other physical characteristics that are sufficient for identification.

3. Criminal law $\S$ 1159(4, 5)

In criminal prosecution, strength or weakness of identification, incompatibility of and discrepancies in testimony, and uncertainties of witnesses in giving their testimony are matters solely for observation and consideration of jurors in first instance, and for consideration of trial court on motion for new trial.

4. Burglary $\S$ 41(6)

Finding defendant and another both breathing heavily and perspiring just off of alley near scene of crime, apparently in hiding, dressed similarly to two men seen by witness to flee from vicinity of burglarized premises, was sufficient evidence to support finding by jury, that defendant was one of perpetrators of burglary.

5. Criminal law $\S$ 1169(5)

In prosecution for burglary, admission of testimony that one of two women, who did not appear as witnesses, and who were not more definitely identified, stated that suspects ran up certain street and that she

did not believe either one of two men came out, in answer to question by investigating officer chasing suspects, if error, was not prejudicial, especially when instruction was given cautioning jury that conversation was given merely for purpose of showing that statement was made at certain time and place.

Alfred J. Hennessy, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of California, David K. Lener, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

The appellant and one Ponzi were charged with the offense of burglary and convicted. Appellant alone appeals.

Appellant contends that the evidence is insufficient to support the verdict and that the introduction of certain evidence was prejudicially erroneous.

The following is a brief summary of the facts:

The Monarch Pharmacy is situated at 1201 Sutter Street in San Francisco, on the southwest corner of Sutter and Polk. Foster's restaurant is situated diagonally across the street on the northeast corner. At about 1:45 or 1:50 a. m. of the morning of April 15, 1950, Stanley J. Sheehan was standing in front of Foster's restaurant with a friend when he heard a burglar alarm go off at the drug store. He saw Special Officer Haley drive up in his car and peer through the front door of the drug store, and then go around to the side or rear entrance. He then heard and saw glass from the front door of the drug store fly outward onto the sidewalk, immediately thereafter two men came out the front entrance of the drug store and ran west up Sutter Street to the corner of Van Ness, where they turned in a southerly direction. The lights of Foster's restaurant were on, as well as various street lights in the immediate vicinity. Witness Sheehan testified that it was fairly light and that he could see the two

men. Sheehan described the clothing the men wore, appellant a sport jacket with brown and white checks, Ponzi a light tan overcoat. Officer Haley reappeared at the front of the drug store and Sheehan and his friend ran across the street and spoke to him. The three then went through an alley to Van Ness. They saw two women in a car. One of the women asked if they were looking for two men who had run up a nearby alley. The three proceeded up the alley. Officer Haley found appellant standing inside a toilet in the back of an apartment building. Ponzi was found lying in the shadow of a brick wall under a ladder in the rear of the apartment house. Both Ponzi and appellant were breathing heavily and perspiring. Sheehan identified the men by their clothing as the two who had come out of the drug store.

Officer Rothschild testified that appellant, upon being asked by Officer Smith at the police station "why they were in the place when the alarm went off", replied that he did not hear the alarm because he was in the basement and it rang quite softly.

[1] There was much more testimony, and conflicts in the testimony. Since however appellant's main argument appears to be that the evidence is insufficient to support the verdict in that there was a failure of identification, we believe the above references to the evidence to be more than sufficient to support the judgment.

[2] "It is not necessary for a witness to observe the features of a person charged with crime in order to identify him. There may well be other physical characteristics that are sufficient for identification * * *." *People v. Coley*, 61 Cal.App.2d 810, 813, 143 P.2d 755, 757, *People v. Hawker*, 80 Cal.App.2d 945, 950-951, 183 P.2d 354.

[3] "The strength or weakness of the identification, the incompatibility of and

discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial." *People v. Farrington*, 213 Cal. 459, 463, 2 P.2d 814, 815; *People v. Harsch*, 44 Cal.App.2d 572, 575, 112 P.2d 654.

[4] The finding of the two men off a nearby alley, apparently in hiding, dressed similarly to the two seen by Sheehan to flee from the drug store, both breathing heavily and perspiring, is sufficient to support the finding of identity by the jury.

[5] Over objection that it was hearsay the court permitted testimony that the two women, who did not appear as witnesses and were not more definitely identified, asked Officer Haley and those with him if they were looking for two men and, when answered in the affirmative, one of them said: "They ran up Hemlock Street and I don't believe either one of the two have come out."

The court cautioned the jury: "Ladies and gentlemen of the jury, I'll allow the conversation to be given for the limited purpose, not for the purpose of showing the truth of what these ladies said to these men, but merely for the purpose of showing that a statement was made to them at that time and place."

If it was error to admit this evidence, a question we need not decide, we do not find that under all the circumstances of the case, including the cautionary instruction which accompanied it, any prejudice can have resulted therefrom to appellant.

Judgment and order denying a new trial affirmed.

NOURSE, P. J. and GOODELL, J., concur.

Ex parte McINTURFF.

Cr. 2257.

District Court of Appeal, Third District,
California.

May 1, 1951.

Hearing Granted May 31, 1951.*

Robert C. McInturff filed an application for a writ of habeas corpus. The Superior Court, Sacramento County, Raymond T. Coughlin, J., discharged petitioner from his incarceration in the state prison at Represa and the People appealed. The District Court of Appeal, Adams, P. J., held that the provision of the section of the Welfare and Institutions Code stating that until January 1, 1946, specified persons convicted of a public offense should be committed to the Youth Authority, were mandatory.

Order affirmed.

I. Infants ☞69

The provisions of section of Welfare and Institutions Code that until January 1, 1946, specified persons convicted of a public offense should be committed to the Youth Authority, were mandatory. Welfare and Institutions Code, § 1731.5.

2. Habeas corpus ☞30(3), 111(1)

Where defendant convicted of robbery was improperly sentenced to state prison rather than committed to Youth Authority in accordance with provision of Welfare and Institutions Code stating that until January 1, 1946, specified persons convicted of a public offense should be committed to Youth Authority, so that commitment and imprisonment were invalid, and defendant remained in state prison until he was more than 25 years of age, so that Youth Authority had no jurisdiction over defendant, defendant's discharge was properly ordered in habeas corpus proceedings, and defendant was properly not sent back to trial court to have trial court correct its error and commit defendant to Youth Authority. Welfare and Institutions Code, § 1731.5.

O. A. Kistle, Public Defender, Thomas W. Olson, Jr., Asst. Public Defender, Sacramento, for respondent.

ADAMS, Presiding Justice.

This is an appeal by the People from an order of the Superior Court of Sacramento County, in a habeas corpus proceeding, discharging McInturff from his incarceration in the state prison at Represa.

The facts are not disputed. On March 22, 1943, McInturff, then eighteen years of age, entered a plea of guilty to an information filed in the Los Angeles County Superior Court charging him with robbery, which the court found to be of the first degree. The defendant was represented by a deputy public defender who suggested to the court that owing to defendant's youth he should be committed to the Youth Authority, in accordance with the provisions of Section 1731.5 of the Welfare and Institutions Code. The court declined to so order, and sentenced defendant to state prison for the term prescribed by law, to wit: not less than five years. Pen.Code, sec. 213. No appeal or other action to effect his release was taken by defendant until he filed his petition for a writ of habeas corpus on or about July 21, 1950. In the meantime he had reached and passed his 26th birthday.

[1] That the trial court of Los Angeles County erred in refusing to commit defendant to the Youth Authority is clear from the provisions of section 1731.5 of the Welfare and Institutions Code which were mandatory. See *People v. Ralph*, 24 Cal.2d 575, 577, 150 P.2d 401, *In re Rugland*, 80 Cal.App.2d 316, 317, 181 P.2d 923, and *People v. Walker*, 82 Cal.App.2d 196, 200, 185 P.2d 842. Had defendant been committed to the Youth Authority he would have been discharged on arriving at the age of 25 years unless that Authority had filed a petition to the trial court alleging that, in its opinion, his unrestrained freedom would be dangerous to the public. See sections 1771 and 1780 of the Welfare and Institutions Code.

[2] Since petitioner was not so committed and he is now over the age of 25

Edmund G. Brown, Atty. Gen., Gail A. Strader, Deputy Atty. Gen., for appellant.

* Subsequent opinion 236 P.2d 574.

years, the Youth Authority has no jurisdiction over him. To send him back to the Los Angeles Superior Court to have it correct its error and commit defendant to the Youth Authority would therefore be an idle act; and the original commitment to state prison having been invalid, his further restraint by the institution is likewise invalid. It follows that the Superior Court of Sacramento County properly ordered his discharge from custody, and its order so doing is hereby affirmed.

VAN DYKE, J., and DEIRUP, Justice pro tem., concur.



103 Cal.App.2d 818

MARTINELLI et al. v. GABRIEL et al.
Civ. 14609.

District Court of Appeal, First District,
Division 1, California.
April 27, 1951.

Rehearing Denied May 26, 1951.

Hearing Denied June 25, 1951.

Action by Jennie S. Martinelli, executrix of estate of Attilio Martinelli, deceased, and others against J. P. Gabriel and another to reform a deed. The Superior Court in and for the County of Marin, Edward I. Butler, J., entered a judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Peters, P. J., held that the evidence sustained finding of trial court that both the parties understood, intended and agreed that the physical boundary should control, and that the deed based upon the survey was not in accordance with the mutual understanding of the parties.

Affirmed.

1. Equity ⚡6

In absence of fraud or knowledge on part of the other party, there can be no relief in equity against a unilateral mistake.

2. Reformation of Instruments ⚡45(1)

In an action for reformation of an instrument upon ground of mutual mistake,

the burden is on the person alleging mutual mistake to establish it by clear and convincing evidence.

3. Reformation of Instruments ⚡19(1)

If mistake is mutual, the court has power to reform contract to make it express the true intent of the parties. Civ. Code, § 3399.

4. Reformation of Instruments ⚡45(5)

In action to reform a deed on ground of mutual mistake, the evidence sustained finding of trial court to the effect that the parties went over the property and determined where the boundaries were to be located without regard to distances, that both parties understood, intended and agreed that the physical boundaries should control, and that the deed based upon the survey was not in accordance with the understanding of the parties, and therefore there was a mutual mistake entitling parties to a reformation of deed. Civ. Code, § 3399.

5. Reformation of Instruments ⚡17(1)

The fact that a party seeking reformation of a deed has read the instrument and knows its contents does not prevent a court from finding that it was executed under a mistake.

6. Frauds, statute of ⚡158(2)

Reformation of Instruments ⚡44

In an action to reform a contract, parol evidence is admissible to show that the writing through mistake does not express the intention of the parties, and does not contain the real contract, and this is true notwithstanding that the instrument evidences a contract, which, by the statute of frauds, is required to be in writing. Code Civ. Proc. § 1856.

7. Appeal and error ⚡173(2)

In action to reform a deed, where the issue of repayment of the taxes on land in question was not raised in defendants' answer or mentioned in the trial, and no evidence at all was shown as to how the taxes should be allocated, issue of payment of taxes could not be raised for the first time on appeal.

Joseph A. Brown, San Francisco, for appellants.

Gardiner & Riede, San Rafael, for respondents.

PETERS, Presiding Justice.

This is an action to reform a deed, on the ground of mutual mistake, to make it provide that the northwesterly boundary of a piece of property purchased by defendants from the plaintiffs should be 63 feet in length instead of 65 as set forth in the deed, and that the southeasterly boundary should be 92 feet instead of 94. The trial court reformed the deed as requested and defendants appeal.

Prior to 1945 plaintiffs owned a large rectangular piece of property consisting of four lots fronting on Main Street, in Inverness, Marin County. The lots were contiguous and were designated as lots 3, 4, 5 and 6. Near the front of lots 5 and 6 was constructed a lodge known as "Hunter's Lodge." Near the rear of these two lots was a residence which for some years had been leased to and occupied by defendants. The rear entrances of these two buildings were back to back, and quite close together. Separating the rear of the house and the rear of the lodge was an old fence running parallel to Main Street and crossing lots 6, 5 and part of lot 4. Admittedly, this fence had been on the property for many years, and admittedly it was located 63 feet from the property line of Main Street. Toward the rear of lot 3 was a large oak tree, and a few feet in front of this tree was the rear wall of a cabin.

In October of 1945 defendants purchased from plaintiffs the front portions of these four lots, including the portions on which the lodge and cabin were located. The rear boundary of the area purchased is irregular. The description contained in the deed was based on a survey made and description furnished by one McDaniel, a civil engineer, employed by plaintiffs. This deed described the rear boundary of lots 6, 5 and part of 4 as running parallel to Main Street and 65 feet therefrom, and the rear boundary of lot 3 and the balance of

4 as running parallel to Main Street and 94 feet therefrom. Neither party then knew that the surveyor had made a two-foot error, and that these distances should have been 63 and 92 feet respectively. Defendants went into possession of the property and, thereafter, paid taxes on the lots as described in the deed. Plaintiffs retained the rear portions of the four lots.

In January of 1948 "Hunter's Lodge" burned down, and defendants wanted to rebuild. They were informed by the planning commission that the new building would have to be set back a minimum of 20 feet from Main Street. With the building that defendants wanted to construct this would leave very little distance from the rear of the new building to the rear of the old residence located on the property retained by plaintiffs. Under these circumstances the parties, in February, 1948, first discovered that the fence dividing lots 6, 5 and part of 4 was 63 feet from Main Street, and that, if the fence was the proper boundary, those lots were only 63 feet in length instead of 65. If the true boundary was as described in the deed it would adversely affect the usability of the portions of the lots retained by plaintiffs. While this dispute remained unsettled, in March of 1950, a second dispute arose over the rear boundary of lot 3 and the balance of lot 4. The deed described this portion of the area as extending 94 feet from the property line of Main Street. If this was the proper distance it would include a portion of the oak tree heretofore mentioned. In 1949 the plaintiffs had constructed a fence along what they considered to be the back boundary of this area. This fence was constructed between the oak tree and the rear wall of the cabin heretofore mentioned, and resulted in the oak tree being on the property retained by plaintiffs. This fence was about 92 feet from the line of Main Street. Defendants, until this dispute arose, made no objection to the construction and location of this fence.

Plaintiffs offered evidence to the effect that before the purchase, and before the deed was executed, they and Mr. Gabriel went onto the property and mutually agreed

that the old fence should constitute the rear boundary of the lots it crossed, and that the rear boundary for the balance of the area should run between the rear of the cabin and the oak tree on lot 3. Defendants contradicted this evidence. The trial court found that prior to the execution of the deed the parties orally agreed that the existing fence should constitute the rear boundary of the lots it crossed; that plaintiffs employed an engineer to make a survey and to prepare a proper description of the property for use in the deed; that when the deed, containing this description, was executed, both the buyers and sellers intended and believed that the description fixed the boundary along the existing fence line; that the descriptions of 65 and 94 feet are incorrect, and that the correct distances are 63 and 92 feet; that both parties intended to incorporate the correct distances in the deed, and believed that this had been done; that the deed fails to state the real agreement of the parties; that there was a mutual mistake of fact concerning the exact distances of the two lines in question; that the engineer discovered the cause and extent of his error in reference to the 65-63 foot line in February, 1948, and his 94-92 foot error in March of 1950, and informed the parties of these facts on those dates; that defendants have paid all the taxes on the property as described in the deed since October 8, 1945, but the defendants have never been in possession of the two-foot strip in dispute. Based on these findings the court, on the ground of mutual mistake, ordered the deed reformed to set forth the 63 foot and 92 foot boundaries.

The finding that there was a mutual mistake of fact is amply supported by substantial, clear and convincing evidence. Defendants had lived in the rear residence for several years prior to October 8, 1945, the date of their purchase, and so, of course, knew of the physical characteristics of the property, including the existence and location of the fence. Jennie Martinelli, one of the plaintiffs (her husband was ill and did not appear at the trial, and has since died), testified that prior to the pur-

chase she went over the property with Mr. Gabriel, one of the defendants, and that he agreed upon the location of the dividing line; that in particular she told him, and he agreed, that the oak tree on the rear of lot 3 should be on the property retained by plaintiffs, and that the boundary should go between the oak tree and the rear of the cabin located on that lot; that as to the rear boundary of lots 6, 5 and part of 4 the boundary, she testified, and it was agreed, should be along the line of the existing fence; that it was never contemplated that the defendants should get any area beyond the fence.

The error that has caused this dispute was made by McDaniel, who was hired by the plaintiffs to make the survey. It was he who gave the description of the two boundaries as being 65 feet and 94 feet, respectively, from Main Street. He prepared a plat plan containing these descriptions, and admittedly a copy of this plat plan was furnished to defendants, and admittedly the deed was prepared from the description there set forth.

McDaniel testified that he was hired by plaintiffs to survey the property in August or September of 1945; that he went upon the property and talked to plaintiffs, to Gabriel, and to Griesse, a brother of Jennie Martinelli, about where the dividing line should be located; that the old wire fence was designated by all the parties, including Gabriel, as the rear boundary of lots 6, 5 and part of lot 4; that he ran his survey line along and from this fence in the presence of Gabriel and the other parties; that he started his survey from about where the fence ends in lot 4, having been instructed by Gabriel and the others to start at that point; that he ran his line along the fence to the line of Inverness Way which was to constitute the northwesterly boundary of lot 6; that he placed a marker at this point and then ran a line along Inverness Way to where it intersected Main Street, where he also placed a marker; that Gabriel was present and saw him place these markers. Along the property line of Main Street there was a hedge. This made it inconvenient for him to run his survey

directly along this line, so he made an offset two feet out into the street and made his survey along this offset line two feet from and parallel to the true line. He intended, of course, to deduct this two-foot offset in making his final calculations, but inadvertently failed to do so. Thus, the distance of 65 feet is the distance from the fence to this offset line, and this same error in calculation accounts for the 94-foot distance in the deed, which should be 92 feet.

The testimony of Jennie Martinelli and McDaniel was corroborated by the brother of Jennie, George Griese. He testified that before plaintiffs and defendants entered into their agreement he went on the property with Gabriel and laid out the boundaries with him. He was emphatic that he told Gabriel, and that Gabriel agreed, that the oak tree was to be on the property retained by plaintiffs, and that the old fence should be the other rear boundary.

McDaniel discovered his error in reference to the 63-65 foot boundary dispute in February, 1948, at which time he talked to the interested parties, took measurements from his markers still on the premises and discovered and reported his error. Gabriel at this time told him that the old fence was intended to be the rear boundary in that area. At this time he was accompanied by an assistant who corroborated much of McDaniel's testimony as to what occurred on this date. In reference to the 94-92 foot dispute, McDaniel testified that he did not check this figure until March, 1950, when he discovered, in the presence of the counsel for defendants, that the same two-foot error had crept into this computation.

Gabriel contradicted most of this evidence. He denied going upon the property and agreeing with Jennie Martinelli, Griese and McDaniel that the oak tree should remain on the property retained by plaintiffs, or that the old fence should constitute the boundary. In fact, he denied ever seeing or discussing boundaries with McDaniel before the deal was completed. He testified that he relied solely on the plat plan prepared by McDaniel which contained the erroneous descriptions. These conflicts were for the trial court.

[1-3] Appellants' main argument seems to be that the mistake was a unilateral one. They urge that the surveyor was the employee of plaintiffs and that it was his error that caused the wrong descriptions to be inserted in the deed. It is the law that, in the absence of fraud or knowledge on the part of the other party, there can be no relief in equity against a unilateral mistake. *Miller v. Lantz*, 9 Cal.2d 544, 71 P.2d 585; *Baines v. Zuieback*, 84 Cal.App.2d 483, 191 P.2d 67. It is also true that the burden is on the person alleging mutual mistake to establish it by clear and convincing evidence. *Taff v. Atlas Assur. Co.*, 58 Cal. App.2d 696, 137 P.2d 483. But it is equally clear that if the mistake is mutual the court has power to reform the contract to make it express the true intent of the parties. Section 3399 of the Civil Code provides: "When, through fraud or a mutual mistake of the parties, * * * a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

[4] The evidence supports the finding that there was here a mutual mistake within the meaning of that code section. The evidence believed by the trial court is to the effect that the contracting parties went over the property and determined where the boundaries were to be located without regard to distances. The trial court found, and the finding is amply supported, that both parties understood, intended and agreed that the physical boundaries should control. The deed, based upon the survey, was not in accordance with the understanding of the parties. That this constitutes a mutual mistake entitling the parties to a reformation is too clear to require extended comment.

In *Home & Farm Co. v. Freitas*, 153 Cal. 680, 96 P. 308, the parties orally agreed upon the land to be sold, and the seller prepared a deed. The map used as the basis for the descriptions in the deed had a false line. The deed was therefore

not in accordance with the understanding and intent of the parties. It was held that it should be reformed. In so holding, the Court stated 153 Cal. at page 685, 96 P. at page 310: "In emphasizing the fact that the defendant obtained more than the exact acreage which he had contracted to purchase, we are not unmindful of the principle that a description of land in a deed by metes and bounds conveys the legal title to all of the land embraced within such boundaries, regardless of the acreage which may be specified in the deed; but nevertheless it is true that such a description does not preclude a court of equity from reforming such a deed so as to express the true intent of the parties. [Citing authorities.] The court's finding of the mistake and of its mutuality is well supported and will not be disturbed. Where a defendant in such an action is seeking to hold more than he is justly entitled to, and where the very issue in the action is the mutuality of the mistake, the trial court is compelled to decide upon conflicting evidence, and, if a mere denial of the defendant that he was mistaken is to suffice, it must result in every case that where such denial is made the plaintiff must fail of relief. Such, as has been above shown, however, is not the law." See, also, *Breen v. Donnelly*, 74 Cal. 301, 15 P. 845.

[5] Appellants make substantially the same argument in another form. They point out that respondents knew of the distances set forth in the deed and plat, presented the plat and deed to appellants, and that they relied upon the descriptions there set forth. It is argued that this should constitute an estoppel. If the mere fact that a person seeking to reform a deed knew of the written description were to constitute a bar to reformation, there never could be a reformation where the mistake was contained in a written document, which the party seeking relief has read. That is not the law. The fact that the party seeking relief has read the instrument and knows its contents does not prevent a court from finding that it was executed under a mistake. *Tomas v. Vaughn*, 63 Cal.App.2d

188, 146 P.2d 499; *Tieso v. Tieso*, 67 Cal. App.2d 872, 155 P.2d 659; *Engbrecht v. Shelton*, 69 Cal.App.2d 151, 158 P.2d 570.

[6] Equally untenable is the contention of appellants that all prior negotiations of the parties became merged in the written instrument, and that parol evidence was not admissible to vary the terms of the written instrument. Aside from the fact that no objection was made to the admissibility of this evidence so that the question of admissibility was, therefore, waived, *Palm v. Smither*, 52 Cal.App.2d 500, 126 P.2d 428, it is well settled that "In an action to reform a contract, parol evidence is admissible to show that the writing through mistake does not express the intention of the parties, and does not contain the real contract. And this is true notwithstanding the fact that the instrument evidences a contract, which, by the statute of frauds, is required to be in writing." 10 Cal.Jur. p. 936, § 202, where many cases are cited and relied upon; see, particularly, *McNew v. Rench*, 79 Cal.App.2d 644, 180 P.2d 410; *Oatman v. Niemeyer*, 207 Cal. 424, 278 P. 1043; § 1856, Code of Civ.Proc.

[7] The last contention of appellants is equally without merit. It is urged that respondents are asking in an equitable proceeding that the two-foot strip be returned to them when they have not offered to reimburse the appellants *pro tanto* for the taxes paid by them on the two-foot strip. The evidence as to the payment of taxes came into the case in support of appellants' then theory that they had title to the strip by adverse possession, a point now abandoned. The issue of repayment, *pro tanto*, of the taxes was not raised in appellants' answer or mentioned in the trial. It is a completely new theory first raised on appeal. No evidence at all as to how the taxes should be allocated was offered. Under such circumstances the point cannot now be raised.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

103 Cal.App.2d 859

In re ADOPTION OF PITCHER.**PITCHER v. PARRISH et ux.****Civ. 4316.****District Court of Appeal, Fourth District,
California.****April 27, 1951.**

Proceeding in the matter of the adoption of Baby Boy Pitcher, a minor, wherein Stuart L. Parrish and wife filed petition for adoption of the child. Thereafter, Joyce Pitcher, by her guardian ad litem, Mae Pitcher, filed petition for permission to withdraw her written consent to adoption. The Superior Court, Kern County, W. L. Bradshaw, J., entered order denying petition for withdrawal of consent, and Joyce Pitcher appealed. The District Court of Appeal, Griffin, J., held that denial of petition for withdrawal of consent was not an abuse of discretion under the evidence.

Order affirmed.

1. Adoption ☞7, 13

Where minor unwed mother petitioned to withdraw her written consent to adoption, which consent contained clause that she understood that consent could not be withdrawn except with court approval, question whether consent was obtained under mistake, fraud or undue influence, and questions of the reasonableness of her application and of child's best interest and welfare, were for trial court. Civ. Code, §§ 226, 226a, 1578.

2. Adoption ☞7

Denial of minor unwed mother's petition to withdraw written consent to adoption, which consent contained clause that she understood consent could not be withdrawn except with court approval, was not an abuse of discretion under the evidence. Civ. Code, §§ 226, 226a, 1578.

3. Trial ☞388(2)

In a special proceeding created by statute, no written findings are necessary.

4. Adoption ☞13

Where minor unwed mother filed petition, in adoption proceeding, to withdraw her written consent to adoption and court

denied petition by minute order, specific written findings were not required, since adoption proceeding is a special proceeding created by statute. Civ. Code, §§ 200, 226, 226a; Code Civ. Proc. §§ 23, 632.

West, Vizzard, Howden & Baker and James Vizzard all of Bakersfield, for appellant.

Burum, Young & Wooldridge, Bakersfield, for respondents.

GRIFFIN, Justice.

Petitioner, Stuart L. Parrish, and his wife, filed a petition for adoption of Baby Boy Pitcher on December 22, 1949. The child was born to Joyce Pitcher on December 20, 1949. The unwed mother was 16 years of age at the time. She and her mother had known a Dr. Moore, and during appellant's pregnancy they went to him with their problem. They asked for his opinion as to what should be done, and particularly in reference to the child after its birth. It apparently was agreed by all that adoption, in some good home, was the best thing for all parties concerned.

About December 1st petitioners found out about appellant's desire and after the child's birth they took the child, with the apparent consent of all parties, and later started adoption proceedings. On January 30, 1950, a representative of the State Department of Social Welfare saw appellant relative to obtaining the usual background information and to see about obtaining the written consent of appellant to the adoption. After some private discussion with her the agent told appellant to wait a while and think it over carefully before giving her written consent. The agent returned in March, 1950, and, after some further consultation, appellant signed the written consent. It was, at that time, the opinion of that department, the mother of appellant, her sister, and the probation officer, that the adoption by petitioners was for the best interests of all parties concerned. The appellant was living in a modest home with her mother, who was employed as an assistant cook in a school

cafeteria. Appellant attended high school in a small community near Bakersfield.

The form of written consent reads in part as follows: "I, the undersigned, being the mother of the above-named minor child, and entitled to the sole custody of the said child, according to Section 200 of the Civil Code, do hereby give my full and free consent to the adoption of said child by _____, the petitioners herein, it being fully understood by me that with the signing of this document my consent may not be withdrawn except with court approval."

On April 19, 1950, appellant, through her mother, as her duly appointed guardian ad litem, petitioned the court for permission to withdraw her consent to the adoption on the claimed ground that she was embarrassed and confused at the time of giving her consent and that she was assured by the representative of the Social Welfare Department that she could withdraw her consent by merely writing a letter of withdrawal to the judge of the court in which the adoption proceeding was pending; that she is now able to furnish care for the child, either in the home of her mother or in the home of her married sister, and that would be for the best interest of the child.

The Social Welfare Department filed its written report reciting the facts generally as related, and found that the minor child was receiving good care in the home of petitioner, a young medical doctor, and his wife, who have cared for the child since its birth. Petitioners built a nursery room for the child and completely equipped it with modern equipment. They took out a \$2,000 endowment policy for its education. Appellant and her mother were permitted to visit with the child on occasions. The grandmother was pleased with the advantages that petitioners' home would have to offer the child. No objection is made in this respect. The report further recites that the mother of appellant now feels that greater consideration should have been given to appellant's feelings toward her child, and that she and appellant's sister would be now willing to aid her in planning for the child's care. The grandmother offered to quit her employment and receive State aid,

or in the alternative, appellant and her child would live with appellant's married sister. The Social Welfare Department ultimately recommended that the court approve the withdrawal of appellant's consent.

In support of the petition to withdraw, appellant testified generally that she was confused and finally signed the consent at the suggestion of her mother, the doctor and others, and that she believed that all she had to do to withdraw it was to write to the judge and so state, and that the court would automatically withdraw it for her and return the baby to her.

The attending doctor testified that it was generally understood by all, during appellant's pregnancy, that the child would be let out for adoption at its birth; that he never heard of any contrary feeling on the part of appellant until about the time the consent was signed. The Social Welfare representative who secured appellant's signature to the consent testified generally that she was of the impression that it was agreeable at that time to both appellant and her mother that appellant sign the consent; that she had previously suggested that she consider it further before signing it; that she did not insist that appellant sign it but she did tell her that "if she signed the consent and wished to withdraw it she could do so by petitioning the Court and offering a suitable plan for the child. At that time there seemed to be no plan other than boarding care for the child, a foster home placement, which her mother and I both felt was not good for the child. Also during that interview she had decided, found out that there was no possibility of a marriage with the (putative) father"; that when appellant wrote to the department at a later date, she suggested that appellant retain an attorney to represent her. She then testified that "* * * we never take a consent against the wishes of the mother". Other testimony, both pro and con, on the subject was received. At the conclusion of the hearing the court made a minute entry as follows: "The above entitled cause having been heretofore heard and submitted to the court for consideration

and decision, now, after due consideration and being fully advised in both the law and the premises, hereby ORDERS that the petition for withdrawal of consent to adoption is hereby denied."

Appellant appeals from this order and contends first that the order should be reversed because there never was a valid consent given to the adoption due to the tender years of appellant, due to undue influence exercised upon her, and due to fraud and her mistake, citing sec. 1578, Civ.Code; *In re Cattalini*, 72 Cal.App.2d 662, 669, 165 P.2d 250; and *In re Adoption of McDonnell*, 77 Cal.App.2d 805, 812, 176 P.2d 778.

Sec. 226 of the Civil Code provides in part that: "A parent who is a minor shall have the right to sign a consent for the adoption of his or her child and such consent shall not be subject to revocation upon such parent reaching his or her majority."

Section 226a then provides: "Once given, consent of the natural parents to the adoption of the child by the person or persons to whose adoption of the child the consent was given, may not be withdrawn except with court approval."

Notwithstanding appellant's testimony, the very document signed by appellant contains the clause: "* * * it being fully understood by me that with the signing of this document my consent may not be withdrawn except with court approval." It is argued in this connection that under the language of section 226a that "If the court finds that withdrawal of the consent to adoption is reasonable in view of all the circumstances, and that withdrawal of the consent will be for the best interests of the child, the court *shall* approve the withdrawal of the consent", it is mandatory for the court to approve withdrawal of the consent under the circumstances here established.

[1,2] After hearing the evidence the court was justified in concluding that appellant knew or should have known that she could withdraw the consent signed by her only upon offering a suitable plan for the child and obtaining court approval of the withdrawal. The question as to wheth-

er the consent was obtained under mistake, fraud or undue influence, as well as the question of the reasonableness of the application for the order sought and the questions of the child's best interest and welfare were all factual questions for the trial court to determine. A mere reading of the evidence produced shows that no abuse of discretion appears in the court's ruling. *In re Adoption of a Minor*, 79 U.S.App.D.C. 191, 144 F.2d 644, 156 A.L.R. 1001; *Lee v. Thomas*, 297 Ky. 858, 181 S.W.2d 457; *Matter of Bewley*, 167 Cal. 8, 10, 138 P. 689; *In re Adoption of Berth*, 79 Cal.App.2d 221, 179 P.2d 572; *In re Guardianship of Peterson*, 64 Cal.App.2d 473, 149 P.2d 65; *Taber v. Taber*, 209 Cal. 755, 756, 290 P. 36. The cases relied upon by appellant were considered in *Re Barents*, 99 Cal. App.2d 748, 222 P.2d 488, where the court reached the conclusion that they were no longer controlling in the light of the legislative amendments.

Next, appellant complains because the trial court disposed of the issue by a minute order and failed to make specific written findings on the questions involved. She cites sec. 632, C.C.P. and also relies upon a quoted part of sec. 226a, Civil Code, reading: "If the court *finds* that withdrawal of the consent to adoption is reasonable in view of all the circumstances, and that withdrawal of the consent will be for the best interests of the child, the court shall approve the withdrawal of the consent * * *". It should be here noted that the section continues to read: "otherwise the court shall withhold its approval."

"Any order of the court granting or withholding approval of a withdrawal of a consent to an adoption may be appealed from in the same manner as an order of the juvenile court declaring any person to be a ward of the juvenile court."

[3] A proceeding for adoption is a special proceeding. Sec. 23, Code Civ.Proc.; *Wells v. Zenz*, 83 Cal.App. 137, 256 P. 484; *In re McGrew*, 183 Cal. 177, 190 P. 804. In a special proceeding created by statute no written findings are necessary. *In re Peterson*, 56 Cal.App.2d 791, 133 P.2d

831. A petition to withdraw consent filed in an adoption proceeding would, of necessity, be of the same character.

[4] In *Carpenter v. Pacific Mutual Life Insurance Company*, 10 Cal.2d 307, 74 P.2d 761, it was held that findings are held as necessary only where a statute so provides. It is true that section 226a, *supra*, contains language indicating that the court is to make a determination of fact as to whether or not the withdrawal of consent is rea-

sonable. The mere fact that the word "find" is used in that section cannot be construed to mean that the court must make a positive written finding of such fact. We conclude that no written finding is required, particularly where the court *withholds* its approval of such withdrawal.

Order affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.

37 Cal.2d 127

FOOTE v. STATE BAR OF CALIFORNIA.

Sac. 6162.

Supreme Court of California, in Bank.

May 8, 1951.

An attorney was charged with professional misconduct in violation of the Business and Professions Code and the Board of Governors adopted the findings of the local committee and recommended suspension for nine months and the attorney brought a writ of review. The Supreme Court held that petitioner's conduct justified suspension.

Petitioner suspended from practice of law for period of nine months.

Attorney and client $\Rightarrow$ 58

Attorney's conduct justified suspension from practice of law for nine months. Business and Professions Code, §§ 6067, 6068, 6103, 6106.

E. R. Vaughn, Sacramento, for petitioner.

Jerold E. Weil, San Francisco, for respondent.

PER CURIAM.

Petitioner is charged with professional misconduct in violation of sections 6067, 6068, 6103, and 6106 of the Business and Professions Code.

The local administrative committee found that petitioner was employed to file a contest to the will of Kathryn Hunter and was paid \$100 therefor with the understanding that he would receive another \$100 on termination of the proceeding; that after the contest was filed petitioner communicated with the attorney of record in the probate proceeding and consulted from time to time with his clients; that on the date set for hearing of the contest petitioner in wilful violation of his oath and duties as an attorney, advised his clients that the hearing on the contest was continued; that without their knowledge or consent petitioner entered into and filed a stipulation of dismissal of the contest (without prejudice); that at no time was

petitioner authorized to file the dismissal and that after filing the dismissal petitioner wilfully and falsely led his clients to believe that the petition was on file and that a hearing on the contest would be held on a specified future date. The findings also show that petitioner's clients did not learn of the dismissal until after the probate proceedings had been completed, the estate distributed, and the time for contest or opposition to probate had expired. The local committee found that there were no mitigating circumstances and recommended a suspension of eighteen months. The Board of Governors adopted the findings of the local committee and recommended suspension for nine months.

The matter comes before this court on a petition for a writ of review. Petitioner contends, not that the evidence is insufficient to support the charges against him, but that it does not justify a suspension of nine months. He contends that there was no evidence that a contest would have been successful, and that even if it would have been his clients suffered no loss as their recovery would have been negligible. Whether or not a contest would have been successful is speculative and immaterial. Petitioner's opinion as to the possible outcome does not justify his numerous misrepresentations to his clients. Moreover, had a contest been successful, the recovery would not have been negligible. The net value of the estate was approximately \$1,934.00. The next of kin, nieces and nephews, numbered seven, two of whom were clients of petitioner. Each of petitioner's clients, therefore, would have recovered approximately \$276.00.

Even if petitioner's clients did not suffer loss by his misconduct, he would not avoid disciplinary action. *Lady v. State Bar*, 28 Cal.2d 497, 504, 170 P.2d 460; *Pickering v. State Bar*, 24 Cal.2d 141, 145, 148 P.2d 1; *Utz v. State Bar*, 21 Cal.2d 100, 105, 130 P.2d 377. Without authority of his clients petitioner dismissed the contest. Thereafter, he repeatedly misrepresented the status of the contest proceeding and kept his clients in ignorance of his unauthorized dismissal. When complainants on their

own initiative uncovered his deception, the opportunity to contest the will had passed. By his duplicity petitioner destroyed the claims of his clients, which he was engaged to protect and enforce. Such conduct involves moral turpitude and warrants the discipline recommended. *Stephens v. State Bar*, 19 Cal.2d 580, 122 P.2d 549; *Marsh v. State Bar*, 210 Cal. 303, 307, 291 P. 583.

Petitioner is suspended from the practice of law in this state for a period of nine months commencing thirty days after the filing of this order.



37 Cal.2d 34

PEOPLE v. NEWSON.

Cr. 5136.

Supreme Court of California, in Bank.

April 27, 1951.

Rehearing Denied May 24, 1951.

Jerry Newson was convicted in the Superior Court, Alameda County, Donald K. Quayle, J., of murder in the first degree and from the judgments and an order denying a new trial, an automatic appeal was taken. The District Court of Appeal, Edmonds, J., held that admitting over objection for the purpose of impeaching testimony of a witness for prosecution that she had seen no one in drugstore in which the homicides were committed, previous contradictory statements that she had seen defendant in prescription room in which the bodies were found was reversible error.

Judgment and order denying a new trial reversed.

Shenk, J., dissented.

1. Witnesses ⇨397

Proof of prior inconsistent statements of a witness admitted under statute for impeachment purposes can only be considered for the purpose of neutralizing and counteracting the effect of witness' statements at trial. Code Civ.Proc. § 2049.

2. Witnesses ⇨380(5), 382, 397

A party may under statute impeach his own witness by proof of prior statements inconsistent with his testimony only if such testimony was prejudicial and detrimental to party by whom witness was called, since otherwise the previous statements shown would stand out, not as offsetting contrary testimony already given, but as substantive evidence of a fact. Code Civ.Proc. § 2049.

3. Witnesses ⇨380(5), 383

Testimony of witness for prosecution that when she looked in drugstore on the night homicides were committed therein she saw no one was not adverse to the prosecution in prosecution for murder and hence was not subject to impeachment by proof of previous inconsistent statements made by witness at preliminary examination and to assistant district attorney that she had seen defendant in prescription room in which the bodies were found. Code Civ.Proc. § 2049.

4. Criminal law ⇨695(4)

Objection to testimony offered by the prosecution to impeach its own witness that impeachment upon the ground of surprise was improper because prosecution had shown no more than that the witness failed to testify as expected sufficiently stated ground of objection, in absence of showing that anyone was misled by the form of the objection. Code Civ.Proc. § 2049.

5. Criminal law ⇨1186(4)

A conviction may be affirmed despite erroneous admission of evidence only if, considering the entire record, such error did not prejudice defendant's rights. Const. art. 6, § 4½.

6. Criminal law ⇨1186(4)

If it cannot be said that, in absence of error complained of, a different verdict would have been improbable, the erroneous ruling constitutes a "miscarriage of justice" within meaning of Constitution and requires a reversal of conviction. Const. art. 6, § 4½.

See publication Words and Phrases, for other judicial constructions and definitions of "Miscarriage of Justice".

7. Criminal law ⇨1170½(6)

The prejudicial effect of erroneously admitting for impeachment purposes previous contradictory statements of a witness for prosecution was not, under circumstances of the case, cured by instruction given three weeks later as to purpose for which such statements could be considered. Code Civ.Proc. § 2049.

8. Criminal law ⇨1165(1)

When the case against a defendant is a close one, an error which would not otherwise be prejudicial may justify a new trial.

9. Criminal law ⇨1186(4)

In prosecution for murder, admitting over objection, for the purpose of impeaching testimony of witness for prosecution that she had seen no one in drug-store in which homicides were committed, previous contradictory statements of witness that she had seen defendant in prescription room in which the bodies were found, was reversible error, in view of failure to establish defendant's guilt so clearly that, in absence of the impeaching evidence, a different verdict would have been improbable. Code Civ.Proc. § 2049; Const. art. 6, § 4½.

10. Criminal law ⇨369(2)

A defendant cannot be required to defend himself against the charge of any crime other than that for which he is on trial, but evidence which is relevant in establishing guilt of the crime charged is admissible, though it tends to connect defendant with an offense not included in the charge.

11. Criminal law ⇨369(2)

The rule permitting introduction of evidence which is relevant in establishing guilt of the crime charged, though it tends to connect defendant with an offense not included in the charge, must be exercised with extreme caution, since the natural tendency of jury is to give excessive weight to a defendant's record of crime.

12. Criminal law ⇨369(2)

In prosecution for murder, only such evidence as to commission of a robbery

by defendant as tended to establish facts pertinent to proof of the murder charged was admissible, but exclusion of the circumstances surrounding the relevant facts should not go so far that jury will be unable to view the essential facts in their true perspective and thereby properly evaluate the weight of the evidence.

Edises & Treuhaft, Bertram Edises and Robert E. Treuhaft, Oakland, for appellant.

Fred N. Howser, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., J. Frank Coakley, Dist. Atty., Laurence E. Dayton, Asst. Dist. Atty., and John S. Cooper, Deputy Dist. Atty., Oakland, for respondent.

EDMONDS, Justice.

Jerry Newson was convicted of murdering Marjorie Wilson and Robert Savage. The jury found each of the crimes to be of the first degree and, pursuant to the verdicts, sentences of death were imposed. The principal ground relied upon as requiring reversal of the judgments and the order denying a new trial concerns the evidence identifying Newson as the person who committed the homicides.

Savage and Mrs. Wilson were found dead in a drug store. Each of them had been shot with a .45 caliber automatic pistol. The bullets entered the backs of the heads and emerged from the foreheads. The bullets and empty casings were recovered from the scene. Approximately \$600 was missing from the store's cash register. The bodies were lying on the floor behind a partition which extended across one end of the store to form a prescription room. At approximately the center of this partition there was a "prescription window" one foot, six inches high, and three feet, seven inches wide.

The bodies were discovered about midnight. The front door to the store was locked on the inside with the keys still in the lock. The murderer had escaped through a rear door by prying off a hasp.

Circumstances indicated that the victims, who were the pharmacist-manager and a sales girl, had been attacked while they were engaged in counting the day's receipts and closing the store for the night. Mrs. Wilson usually left about 9 p. m., which was the regular closing time.

The circumstances of the crime pointed to the killer as someone sufficiently well-known to the victims to be admitted, or permitted to remain, after the closing hour. However, it is equally possible that he secreted himself upon the premises until after the doors were locked. Newson was familiar with the store and well-known to Savage.

Three days after the homicides were committed, Newson was arrested and accused of having robbed the business office of a housing project in which he lived. A .45 caliber automatic pistol was used and \$1,275 taken. At first he denied that he had committed the robbery. In the course of his being questioned about it, although the drug store murders had not been mentioned, he asked the penalty for robbery and the penalty for a robbery in which someone was killed. When the question was answered, he admitted the housing project hold-up, but claimed that he had used a wooden gun which he threw in the estuary.

Two days after his arrest, Newson was questioned and a so-called lie detector was used. There is some conflict as to what occurred at that time. According to the testimony of Albert E. Riedel, a police officer, Newson freely consented to the interrogation.

Riedel told the jury that after asking several questions relating to the housing project robbery, he stood in front of Newson and said, "Now we know you used a real .45 in the Harbor Homes Project job, right?" Newson replied, "Yes". As Riedel related later conversations, he told Newson he would like to administer another test and question him about the drug store murders. Newson consented, and when the test was completed Riedel again walked around in front of Newson, drew up a chair and said, "I am very sorry

that you pulled that job at the drug store. I am very sorry. I would be very sorry for anyone that had gotten themselves into as much trouble as you did". Riedel and Newson sat for a while without speaking and again Riedel said he was very sorry for him. Newson then "looked over toward me and said, 'Yes, you are right, I killed them. I killed the two people in the drug store.' And then he turned and put his head in his arms so I could not see his face."

Other testimony by Riedel was that he then left his office to speak with some police officials. He returned about five minutes later and told Newson he would like to make another test and ask some questions concerning the whereabouts of the gun. After completing the test, Riedel walked around in front of Newson, who looked up and said, "Now, you know where the gun is." Riedel then told him he would make another report to the inspectors. Newson replied: "'Well, go ahead, go tell them if you want to, but I was just kidding.' I said, 'Wasn't it true?' I said, 'Kidding?' And he said, 'Yes, just kidding you,' and I said, 'O. K.' and walked out of the room."

As a witness in his own behalf Newson said that he submitted to the tests because of threats by Riedel to the effect that he could take the test or face the "hard boys" of the police department who would be "getting it the hard way". As he related the story of his examination at police headquarters, Riedel "asked me did I kill those people in the drug store and I asked him what he was talking about, and he said, 'You know very well what I am talking about,' and I said I didn't, and then he started the questioning over and over and stopped the machine and started it again and started questioning over and over. * * * he kept pounding his finger in my face and kept telling me I killed those people and I kept telling him I didn't. * * * After he couldn't get nothing out of me he stopped, and then he started up again and the same thing over and over. * * * Finally he made me mad and I said, 'All right, I killed somebody, does that make

you feel better?" And he turned red in the face and he turned around and shook his head and he walked out the door and after that there was a room full of reporters and different photographers."

After this questioning of Newson, and on the same day, a .45 caliber automatic pistol was found in the automobile owned by Newson's uncle. Newson identified it as the one he had used in the housing project robbery.

The record also includes the testimony of Inspector Riedel concerning a later conversation. At that time, said Riedel, while questioning him further about the gun, Newson said: "Why don't you ask where the money is?" Riedel asked, "All right, Jerry, where is the money?" Newson replied, "That is just as hot as the gun."

In a statement to the district attorney, Newson admitted being in the drug store the night of the murders, but claimed he was sent by Mrs. Wilson to buy some barbecued spare rib sandwiches and was on this errand at the time the murders were committed. Riedel testified that he was present at the time this statement was taken and questioned Newson as to the truth of the story. He said he asked, "* * * if you told me the truth about * * * [the sandwiches], you would admit again to me that you did the job at the drug store, is that right?" Newson did not reply, Riedel told the jury, but nodded his head in the affirmative.

At the trial, Newson declared that he did not go near the drug store on the night of the murders and had never been in the prescription room of the pharmacy. His testimony concerning his whereabouts when the homicides were committed was corroborated in essential respects by five witnesses.

A ballistics expert stated that, in his opinion, the gun recovered from the car of Newson's uncle was the one which fired the fatal shots. However, two criminologists of the police department, called as witnesses for the defense, told the jury that they were unable to determine, after about 10 days' continuous examination

and the comparison of 15 test bullets, whether it was the murder weapon.

Barbara Cruikshank, an acquaintance of Newson, was the principal witness for the prosecution. She said that on the night of the murders she passed the drug store at about 8:50 p. m. The store was open and she spoke to Savage and Mrs. Wilson. She then walked approximately one and one-half blocks to a cleaning establishment and asked for a woman employee. Her friend was not there, and she then stopped at a cab stand and talked with someone.

According to Miss Cruikshank, she then retraced her steps and approached the drug store. The district attorney asked her: "Now, as you went up to the front of the store at that time to what part did you go?" The reply was: "I refuse to answer that question." When asked why she would not reply, she said: "Because I do. I am in court now and this is the truth, everything I am saying, and I don't have to answer it if I don't want to." The trial judge remarked that he thought Miss Cruikshank should have counsel to advise her. She then said: "That is the reason I am in this today, all on account of what somebody said 'If you don't say this, you are going to get in jail. If you don't say this, you are going to go to jail.' Now they are trying to build me up that I was with the boy that killed him."

The following day Miss Cruikshank was recalled to the stand and stated that, on her return trip, as she approached the front door of the drug store, she looked in. The lights in the main portion of the store were on. She was asked: "Did you see anyone when you looked in the store at that time?" Miss Cruikshank said she did not, and was then asked if she looked in the direction of the window leading to the prescription room. Her reply was in the affirmative. The district attorney asked: "When you looked in the direction of the prescription window, state whether or not you saw anyone at all at that time?" Miss Cruikshank answered: "No, I didn't."

Over objection, the district attorney was permitted to impeach the witness by use of prior inconsistent statements. This evidence includes her testimony at the preliminary examination and two statements made to the assistant district attorney. At each of these times, as her testimony is shown by the record, when she looked through the glass panel of the door she saw someone in the prescription room. She also said in peering through the glass she struck her head against it and the person in the prescription room turned and faced her. She recognized that person as the defendant Newson.

Miss Cruikshank admitted the prior statements, but said that they were false and had been made because of threats to charge her as an accessory to the murders. She stated that the first of them was given during extensive questioning by the police who " * * * came and got me without my mother's permission and took me up—not to the City Hall, but to the garage there on 13th and Jefferson at 8:30 and I didn't get home until four o'clock Saturday morning".

The admissibility of the statements of Miss Cruikshank, which were presented to the jury as the basis for impeaching her testimony, is the principal question presented by the appeal. But Newson also contends that the jury was erroneously instructed in regard to the statements he made while undergoing the "lie detector" tests. These statements, he asserts, were treated by the court as confessions. He also complains of the admission of evidence concerning the housing project robbery.

In support of the motion for a new trial, it was charged that evidence in regard to the existence of an unidentified set of fingerprints upon a metal cash drawer found on the prescription counter near the victims was suppressed by the prosecution. This evidence, it was alleged, shows that they were not made by Newson and all other fingerprints found in the prescription room were identified as those of employees or other persons having legitimate business in that vicinity. These facts, according to the affidavit of counsel

for Newson, were not discovered until after the trial despite the use of due diligence. The assertedly prejudicial misconduct of a juror in reading false, inflammatory and improper newspaper accounts of the trial, and in violating the court's order regarding her duties, was also stated as a ground for a new trial.

The right of a party to impeach his own witness is the subject of extensive legal writing and has been considered in numerous decisions. Such impeachment generally was forbidden under the Roman law, as appears inferentially from the Code Justinian. English common law followed the same rule. 3 Wigmore, Evidence [3d ed. 1940], § 896 et seq.; *Crago v. State*, 28 Wyo. 215, 202 P. 1099. The first case in this country upon the subject is *State v. Norris*, 2 N.C. 429 [Reprint p. 556] in which the court held that the state may produce contradictory statements of its witness. However, in 1806, the doctrine was repudiated. *Sawrey v. Murrell*, 3 N.C. 397 [Reprint p. 459]. Since those early years, exceptions have been engrafted upon the rule to prevent injustice when a party who calls a witness is surprised or entrapped by one who gives adverse testimony.

[1] In 1872, the California Legislature enacted § 2049 of the Code of Civil Procedure, which provides: "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony * * *." However, the prior statements inconsistent with the witness' present testimony can only be considered for the purpose of neutralizing and counteracting the effect of his statements upon the trial.

[2] The purpose of the statute is to allow a party to wipe out, as nearly as possible, the evidence which has been given. Where a witness states no fact against the party calling him, there is nothing to counteract. The testimony which may be contradicted must be prejudicial and detrimental, otherwise the

previous statement shown would stand out, not as offsetting contrary testimony already given, but as substantive evidence of a fact.

In the case of *People v. Jacobs*, 49 Cal. 384, the prosecution endeavored to show that the defendant had made threats that he would commit the offense charged. The witness denied having heard such threats or that he had told one Dunton of hearing them. The trial court permitted the prosecution to impeach its witness by having Dunton testify that the witness had told him of such threats having been made by the defendant. Upon appeal, the conviction was reversed, this court saying: "* * * though the witness had failed to testify to all the prosecution expected or desired, he had not, as a witness for the prosecution, testified against the prosecution or to any matter advantageous to the prisoner." 49 Cal. at page 385.

The judgment was also reversed in *People v. Mitchell*, 94 Cal. 550, 29 P. 1106, for the reason, among others, that the prosecution had been permitted to impeach its own witness by the use of prior contradictory statements. "This was error. A witness, whichever party calls him, cannot be impeached unless he has given testimony against the impeaching party. This witness had not testified against the prosecution. He simply failed to testify to a fact which the district attorney thought he could prove by him. * * * The impeaching statements were evidently desired as evidence. If such testimony were admissible, it would be easy to manufacture evidence of that kind. If a witness merely fails to testify as expected, that does not authorize the party calling him to prove that the witness had elsewhere made the desired statements. It is only when he has given damaging testimony that he can be impeached." 94 Cal. at page 556, 29 P. at page 1108. To the same effect is *In re Kennedy's Estate*, 104 Cal. 429, 431-432, 38 P. 93.

In a prosecution for criminal libel, the defendant called a witness and asked him if he had not, upon certain occasions, stated that he had instituted the pros-

ecution of the defendant at the instance of others. The witness answered that he had made no such statement. Impeachment was not permitted. The ruling, said this court, was clearly right. "It was an attempt by a party to impeach his own witness, not because that witness had given hostile evidence which had taken him by surprise, but because he did not admit what was sought to be elicited from him." *People v. Crespi*, 115 Cal. 50, 55, 46 P. 863, 865.

People v. Godwin, 123 Cal. 374, 55 P. 1059, was an appeal from a judgment of conviction for seduction of a female of previous chaste character, under a promise of marriage. The defendant called one St. Clair who, in answer to a direct question, testified that he had never had intercourse with the prosecutrix. St. Clair was then asked if he had not, at certain times, made statements to the contrary. Objections were sustained to these questions and upon appeal this court held: "The action of the trial court has full support in the law. It is only when the witness gives hostile evidence that a party may impeach him by showing contradictory statements made at other times. The answer of the witness being 'No,' the evidence was purely of a negative character. It was neither favorable to one side nor the other, and, if the witness had been impeached, the case before the jury would have assumed no different aspect." 123 Cal. at page 375, 55 P. at page 1060.

The testimony challenged in *People v. Creeks*, 141 Cal. 529, 75 P. 101, was quite similar to that in the present case. Highly important evidence against Creeks related to tracks leading to and from the place of homicide, which were apparently made by shoes similar to those found in the defendant's room. The defendant's mother, called as a witness by the prosecution, testified: "I could not tell you what shoes he had on when he went hunting. I cannot swear positively what shoes he had on." She was then asked whether, at the preliminary hearing, she testified that her son was wearing the shoes in question when he left home. She replied

that she had so testified, adding, "But it was a mistake, for I didn't notice them on his feet after dinner." She also admitted having told the coroner that her son wore the shoes during the whole day of the homicide. In reversing the judgment, the court stated: "The evidence thus elicited over the objection was incompetent for any purpose. * * * The testimony was sought to be elicited solely for the purpose of getting before the jury statements made by the mother on a prior occasion, tending to make out the case of the people. Where a witness called by a party has simply failed to testify to all that party expected or desired, but has not given testimony *against* him, it is not permissible for the party calling him to prove that such witness had previously made statements which, if sworn to at the trial, would tend to make out his case." 141 Cal. at pages 531, 532, 75 P. at page 102.

Another case where evidence, much the same as that admitted against Newson, was considered is *People v. De Witt*, 68 Cal. 584, 10 P. 212. Vincent, a witness called by the prosecution, was asked whom he had seen watching the house where the homicide was allegedly committed by the defendant. Vincent answered: "I saw some person standing at a distance, but I could not recognize him at the time, and I can't make any statement about who the party was." The court stated that the trial judge " * * * erred in permitting witnesses to testify to statements made by the witness Vincent, that he saw the defendant near the house where the alleged homicide was committed on the night of the homicide." 68 Cal. at pages 587, 588, 10 P. at pages 213.

[3] The testimony of Barbara Cruikshank falls directly within the rule applied in these cases. It was in no way damaging to the prosecution's case. In substance, she testified that she passed the drug store, looked through the glass panel of the closed door, and saw no one. She did not say that Newson was not there, nor did she say that no one was in the store. The exact time at which Miss Cruikshank

looked in the store is not shown by the record. She said that she first passed the store at 8:50 p. m., when she was on her way to a cleaning establishment approximately one and one-half blocks away. There is no evidence as to how long she stayed at the cleaning shop or at the cab stand near by. She testified that some time later, when she again passed the drug store and looked in, she did not see anyone. As stated in *People v. Godwin*, supra, " * * * the evidence was purely of a negative character. It was neither favorable to one side nor the other * * *." Her testimony was not adverse to the prosecution. There was nothing to be neutralized or counteracted, and accordingly no basis for impeachment.

[4] The attorney general contends that the defendant is precluded from claiming this error because of failure to object upon the specific ground that the testimony was not adverse. Although counsel did not present his objection as precisely as it might have been stated, he placed it upon the ground " * * * that the basis for cross examination of your own witness and trying to impeach a witness that you brought into court and vouched for *is surprise and not merely the fact that perhaps the witness does not say exactly what you expect her to say.*" (Emphasis added.) It does not appear that the form of the objection misled any one. In substance, counsel urged that impeachment upon the ground of surprise was improper because the prosecution had shown no more than that the witness failed to testify as expected.

[5,6] To affirm the judgment of the trial court, despite the admission of the impeaching statements, this court must determine that, considering the entire record, the error did not prejudice the defendant's rights. Const. art. VI, § 4½. If it cannot be said that, in the absence of the error complained of, a different verdict would have been improbable, the erroneous ruling constitutes a miscarriage of justice, within the meaning of the constitutional provision. *People v. Hamilton*,

33 Cal.2d 45, 51, 198 P.2d 873; *People v. Rogers*, 22 Cal.2d 787, 807, 141 P.2d 722; *People v. Putnam*, 20 Cal.2d 885, 892, 129 P.2d 367.

There were no eyewitnesses to the homicides of which Newson was convicted. The only physical evidence connecting him with them is the gun found in his uncle's car and the bullets and empty casings recovered from the prescription room. Although one ballistics expert was of the opinion that the fatal shots were fired from this gun, two other criminologists found it impossible to make a positive identification of them. Newson's conviction of the housing project robbery was received to show his prior possession of the alleged murder weapon and, the attorney general contends, to prove that he "was motivated by an intention to obtain funds by armed robbery" and "his additional motive to use violence if necessary to escape identification and apprehension." Newson's alleged confession was immediately repudiated and denied at the trial.

The evidence concerning the circumstances under which the statements were made is highly conflicting, and the truth and genuineness of them was a major issue before the jury. Although Newson was shown to have been in the vicinity of the drug store on the night of the homicides, he denied that he was in the store or had even entered the prescription room. There is no substantive evidence to the contrary. Barbara Cruikshank's testimony at the trial did not place Newson in the store or prescription room.

At the close of Barbara Cruikshank's direct examination, the attorney for Newson asked that the court then admonish the jury that the statements "do not in themselves constitute testimony but are merely used for the purpose of impeaching present testimony". The court refused to do so, saying, "That is the general law on the subject and it will be covered by instruction when the case goes to the jury and the Court instructs as to the law applicable." Nearly three weeks later, the court charged the jury: "In respect to any attempt to impeach a witness by showing

that on some former occasion he made a statement or statements that are contradictory of his testimony here, you are instructed that the evidence of any such contradictory statement is not received for the purpose of proving the truth of what then was said, but only for the purpose of testing the credibility of the witness; you are permitted to consider said evidence only for that reason * * *."

[7] Under the circumstances shown by the record, it cannot reasonably be concluded that the prejudicial effect of erroneously admitting the impeaching statements was cured by the court's instructions. Although the jury was charged that the evidence as to Miss Cruikshank's prior statements could be considered solely for the purpose of impeachment, she did not give any testimony which needed to be counteracted or neutralized. "Hence the only purpose that could be subserved by reading into the record the previous statements made, and the only effect that this could have, would be to cause these statements, which were hearsay, to appear to the jury as substantive evidence, the highly prejudicial effect of which is clear." *Crago v. State*, supra, 28 Wyo. at page 229, 202 P. at page 1104. Her statements " * * * must have operated with telling effect upon the jury." *People v. Creeks*, supra, 141 Cal. at page 533, 75 P. at page 103; cf. *People v. Flores*, 37 Cal. App.2d 282, 99 P.2d 326.

[8,9] When the case against a defendant is a close one, an error which otherwise would not be prejudicial may justify a new trial. *People v. Zemanavasky*, 20 Cal.2d 56, 62, 123 P.2d 478. Considering the entire record with particular attention to the nature of Newson's statements when questioned, the evidence concerning the means by which they were obtained and the presentation to the jury of all the details of the housing project robbery, Newson's guilt was not so clearly established that, in the absence of the impeaching evidence, a different verdict would have been improbable.

In addition to the evidence offered for purposes of impeachment, other testimony

was also improperly received. Over objections, witnesses were allowed to recount the details in regard to Newson's commission of the robbery at the Harbor Homes Housing Project. The testimony was offered upon the theory that it shows his prior possession of "the same kind and caliber of weapon" as used to commit the homicides, his motive to obtain funds by armed robbery and, if necessary, to escape identification and apprehension by resort to violence. The evidence as to the careful planning and execution of the housing project robbery is said to further indicate a common scheme and plan to commit such crimes. The attorney general also argues that Newson's statements concerning the details of that robbery show his "own inner personal knowledge of his guilt of both the Harbor Homes robbery and the murders with which we are here concerned"; that is, "Newson's consciousness of his own guilt of the murders".

For these purposes, the housing project robbery was re-enacted before the jury in minute detail. Testimony was given tending to prove how Newson planned the robbery and stole two pieces of clothesline with which to tie the office employees. It was shown how he placed the implements of crime in a brown bag, donned a mask and put on gloves. An employee of the housing project recounted Newson's entrance to the business office by climbing over a glass partition, told how he tied members of the staff, described his every act and related each statement made by him during the robbery. In addition to stating that Newson used a pistol "of the same kind and caliber" as the murder weapon, a witness was permitted to tell when and how he loaded the pistol, at whom he pointed it, and to recount all of his remarks and threats concerning its use.

[10, 11] "A defendant in a criminal action cannot be required to defend himself against the charge of any crime other than that for which he is on trial, but this rule does not exclude evidence which incidentally discloses the commission of another offense. Evidence which is relevant in establishing guilt of the crime charged is

admissible notwithstanding the fact that it tends to connect the accused with an offense not included in the charge." *People v. Dabb*, 32 Cal.2d 491, 499, 197 P.2d 1, 5; *People v. Peete*, 28 Cal.2d 306, 314-315, 169 P.2d 924. But this rule must be exercised with extreme caution for the natural tendency of the jury is to give excessive weight to a defendant's vicious record of crime. For this reason, it has been said: "The relevancy of evidence that proves crimes other than that charged must, of course, be examined with care, due to the prejudicial nature of all such evidence, and it should not be admitted simply on the showing that some part of that transaction is relevant to the case. *The possibility of severing relevant from irrelevant portions should, in every case, be considered, thereby protecting the defendant against reference to other crimes where it has no tendency to establish facts pertinent to the proof of the crime charged.*" *People v. Dabb*, supra, 32 Cal.2d at page 500, 197 P.2d at page 6. (Emphasis added.)

[12] Tested by these principles, much of the evidence concerning the housing project robbery is not relevant to the homicides of which Newson was convicted. Upon a new trial, careful consideration should be given to this evidence and all of it excluded which does not comply with the legal requirements. However, the exclusion of circumstances surrounding the relevant facts cannot go so far that the jury is " * * * unable to view the essential facts in their true perspective and thereby properly evaluate the weight of the evidence." *People v. Dabb*, supra, 32 Cal.2d at page 500, 197 P.2d at page 6.

The judgment and the order denying a new trial are reversed.

GIBSON, C. J., and CARTER, TRAYNOR and SCHAUER, JJ., concur.

SPENCE, J., concurs in the judgment.

SHENK, Justice (dissenting).

The evidence introduced by the prosecution to impeach the testimony of its witness Barbara Cruikshank was properly admitted. At the preliminary hearing she

unequivocally stated that as she passed the store someone was in the lighted prescription room, that that person had turned towards her, and that that person was Jerry Newson. At the trial she testified that she had looked in the store but had seen no one. The prosecution was thus taken by surprise. Her testimony at the trial was not purely negative in character as it would have been had she testified that she did not know whether anyone was in the store because she had not looked. Such testimony constituted an affirmative declaration that there was no one in the store visible to her. Since it was the contention of the prosecution that the homicides had been committed at the time she had theretofore stated that she had seen the defendant in the store her subsequent testimony was certainly damaging and subject to impeachment.

The majority opinion incorrectly infers that there was a delay in instructing the jury as to the proper use of the impeaching evidence. When counsel for the defendant asked that the jury be informed that the prior contradictory statements did not constitute present testimony but could only be employed to impeach present testimony, the court declared that the law was as stated in that request. A formal instruction to the same effect was later given. The jury was thus twice informed as to the limited effect of the impeaching testimony. The jury was specifically told, " * * * you are instructed that the evidence of any such contradictory statement is not received for the purpose of proving the truth of what was then said, but only for the purpose of testing the credibility of the witness; you are permitted to consider said evidence only for that reason. * * * " The impeaching evidence was admitted solely to cast doubt on the veracity of the witness' present testimony which was contrary to her previous statements that she had seen no one in the store when she peered into it at the time the murders were claimed by the prosecution to have been committed. That the jury so considered the evidence is the only reasonable assumption. Its admission was not error.

Having declared that error was committed, the majority opinion then concludes that a miscarriage of justice has resulted if it cannot be shown that a different verdict was improbable. The language of the constitutional provision itself should govern. It provides that no judgment shall be set aside "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." That provision clearly calls for a realistic appraisal of the entire record on a case-by-case basis to determine whether in the presence of error a miscarriage of justice has occurred. Here there was no error. Even if there were the record makes it clear that no miscarriage of justice has resulted from the judgment of conviction.

The defendant's presence at the scene of the crime at the probable time of its commission was sufficiently established by the evidence. Independent witnesses testified that the defendant was in the immediate vicinity about 8:40 P. M. on the night in question. Barbara Cruikshank, the witness whose hostility to the prosecution was apparent, testified that she had spoken to the victims about 8:50 P. M. and that at about 9:00 P. M. the defendant's car was parked next to the door later identified as that from which the murderer's exit was made. It was shown that it was the regular habit of the slain sales-girl to leave the store about 9:00 P. M., the usual closing time. An expert testified that the gun used by the defendant in the housing project robbery, and one to which he had access, was the lethal weapon.

The majority opinion concedes that evidence of the housing project robbery was admissible to show the defendant's ownership of a gun of the same caliber as that used in the homicides. It cannot rightly be said that proof of certain details of that robbery were improperly admitted. Those details were not of such a nature as to increase the danger of prejudice beyond that created by the admittedly competent proof of the commission of that crime.

The defendant's own statements and conduct at various times subsequent to his arrest definitely establish his guilt. At the trial he offered an entirely different explanation of his whereabouts at the time of the crime than that twice given to investigating officers. His change in position occurred after his original "alibi" had been exploded. His explanation was that he had been confused when he gave the first version yet it was one he chose to tell a second time after a steak dinner and a good night's sleep. The witnesses on whom he relied to establish the second version were impeached as to statements indicating that Newson had been with them in the period around 9:00 P. M.

At a time when the defendant was being questioned only in regard to the housing project robbery and before the drug store crime had been mentioned he asked what the penalty was for robbery. On being informed of the penalty in such cases he inquired as to the penalty imposed if someone was killed in a robbery. When informed that in that case the penalty was death or life imprisonment, he hesitated and then confessed to the housing project robbery.

The defendant was given several "lie detector" tests to which he offered no objection. He was told that one test was designed to reveal whether he had used a real gun in the housing project robbery. At its conclusion an officer told him that they thus knew that he had used a real gun and the defendant then for the first time conceded this fact. He was told that the next test would determine whether he had committed the drug store crime. The officer testified: "After that test was completed I walked around in front of the defendant again * * * and I said to him, 'I am very sorry that you pulled that job at the drug store.' He was sitting at the * * * desk * * * and when I said that, he put his head forward so that he cradled his head in his arm and we sat there for a short while looking at each other, and I said to him again, 'I am very sorry.

I would be very sorry for anyone that had gotten themselves into as much trouble as you did', and he kept sitting there and not saying anything, and we just sat there for a little while and then I said to him again I was very sorry for him, I would be sorry for anyone that got into as much difficulty as he apparently had gotten into, and then he looked over toward me and said, 'Yes, you are right, I killed them. I killed the two people in the drug store.' And then he turned and put his head in his arms so I could not see his face. * * * I sat there for a while and he continued to put his head in his arms across the top of the desk, and after a short while I said to him, 'Do you care to talk about it' and he shook his head, so we waited a little while longer and I said: 'How did you get into the store?' and he said, 'They let me in the front door.' Then I said, 'How did you get out of the store', and he said, 'I went out the back door.' I said, 'How did you do that?' and he said that was very easy and he put his hands together like that (indicating) and made a motion up." In view of the evidence of the defendant's admission that he had committed the murders the jury was justified in rejecting his later explanation that throughout his interrogation he was merely "kidding."

The defendant was asked by an officer if his later inability to reconcile an inconsistency in his alibi explanation was not due to the fact that he would thus again admit he had committed the drug store crime. The defendant looked around the room and then slowly nodded his head in the affirmative. The defendant informed a fellow prisoner that he had spent the evening of the drug store murders with a girl named Cruikshank who knew what had happened and knew how to keep her mouth shut.

There is abundant evidence in the record to establish the defendant's guilt. He had a full and fair trial and the judgment of conviction should be affirmed.

Rehearing denied; SHENK, J., dissenting.

FREEDMAN v. RECTOR, WARDENS & VESTRYMEN OF ST. MATHIAS PARISH et al.
L. A. 21344.

Supreme Court of California.

April 27, 1951.

Rehearing Denied May 24, 1951.

Action by B. M. Freedman against The Rector, Wardens & Vestrymen of St. Mathias Parish of Los Angeles, a religious organization, and others, for specific performance of a contract for the sale of realty or for damages. The Superior Court, Los Angeles County, George Francis, J., assigned by the Chairman of the Judicial Council, rendered a judgment for the defendant named, and the plaintiff appealed. The Supreme Court, Traynor, J., held that plaintiff was entitled to recover the amount of his down payment in excess of defendant's expenses following plaintiff's breach.

Judgment reversed in part, and affirmed in part.

For prior opinion, see 224 P.2d 481.

Schauer, J., dissented in part.

1. Vendor and purchaser ⇨145, 185

Where purchaser has reasonable time to perform after certain date under terms of escrow instructions, his repudiation of contract of purchase of realty on that date, if acted upon by vendor before retraction, would excuse performance on vendor's part and make purchaser's repudiation a total breach of contract. Civ. Code, § 1440.

2. Vendor and purchaser ⇨128

Where purchaser paid stated sum down on deposit agreement on October 8th and agreed to pay balance into escrow within 30 days, and both parties signed escrow instructions a few days later which provided that property should be free of encumbrances except covenants, easements of record, etc., and on November 28 purchaser repudiated contract and claimed that vendor had failed to clear title because of existence of water and power department easement, subsequent letter on December 19 agreeing to perform contract if easement were removed claimed a condition which purchaser had no right to impose, and hence was not a withdrawal of his earlier repudiation.

3. Specific performance ⇨100

Where purchaser of realty repudiated contract and demanded return of deposit, and vendor before effective withdrawal of repudiation cancelled escrow and sold property to third party, and purchaser then indicated his willingness to purchase property, purchaser was not entitled to specific performance of the contract.

4. Vendor and purchaser ⇨335

Under the statute providing that party who incurs forfeiture by reason of failure to comply with terms of obligation may be relieved upon making full compensation to the other party except in case of willful breach of duty, purchaser of realty was entitled to recover part of his down payment in excess of vendor's expenses in connection with contract if purchaser's breach was neither wilful, fraudulent, nor grossly negligent. Civ. Code, § 3275.

5. Vendor and purchaser ⇨335

Where purchaser breaches contract for sale of land and thereafter seeks to recover part of down payment, damage provisions of the Civil Code, and policy of law against penalties and forfeitures, provide basis for relief independent of that provided by the statute granting relief in case of forfeitures except in event of grossly negligent, wilful or fraudulent breach of duty. Civ. Code, § 3275.

6. Damages ⇨80(1)

A penalty need not take form of stipulated fixed sum, but any provision by which money or property would be forfeited without regard to actual damage suffered would be an unenforceable penalty. Civ. Code, §§ 1670, 1671, 3294.

7. Damages ⇨89(2)

Statute providing for recovery of exemplary damages for breach of obligation not arising from contract where defendant has been guilty of oppression, fraud or malice, express or implied states policy of the law against allowance of exemplary damages for breach of contract regardless of nature of breach. Civ. Code, § 3294.

8. Damages ⇨117

If penalty is to be imposed for breach of contract, it should bear some rational relationship to its purpose.

9. Vendor and purchaser Ⓒ335

Where purchaser repudiated contract and sought recovery of down payment, and denial of part restitution would result in imposition of punitive damages, purchaser was entitled to relief under the statute providing that neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case. Civ. Code, § 3369.

10. Damages Ⓒ81

Where purchaser of realty repudiated contract, and property was sold to third party for \$2,000 more than original price, and commission of \$900.00 was retained by broker from \$2,000 down payment, provision of contract that on purchaser's default vendor could retain down payment could not be enforced as a valid clause for liquidated damages.

11. Damages Ⓒ81

Although provision in contract that on purchaser's default vendor can retain down payment as liquidated damages is presumptively valid, if down payment is reasonable in amount and evidence establishes that it would not be impracticable or extremely difficult to fix actual damages, provision may not be enforced.

12. Appeal and error Ⓒ1178(6)

Where trial court erroneously concluded that purchaser of realty could recover no part of his down payment after breach and no finding was made as to fraction that accrued to net benefit of vendor, appellate court would direct a new trial limited to that issue.

Blase A. Bonpane and L. H. Phillips, Los Angeles, for appellant.

Steiner A. Larsen, Los Angeles, for respondent.

TRAYNOR, Justice.

On October 8, 1947 plaintiff signed a deposit agreement with Clarence Urban, a real estate broker, for the purchase of two lots owned by defendant. He paid \$2,000 down and agreed to pay the balance of \$16,000 into escrow within thirty days.

Both parties signed the escrow instructions a few days later. Although the deposit agreement was ambiguous with respect to title requirements, the escrow instructions provided that the property should be free of encumbrances except "covenants, conditions, restrictions, reservations, rights, rights of way, [and] easements * * * now of record." There was evidence that at the time plaintiff signed the escrow instructions he was informed of all covenants and easements affecting the property, but he took the position thereafter that he was under no obligation to purchase the property until the title had been cleared. On November 20th the escrow agent informed plaintiff that the title was clear except for an easement held by the Water and Power Department across the rear five feet of one of the lots. This easement was abandoned the following April. On November 28th plaintiff wrote defendant and the escrow agent repudiating the contract and demanding the return of his deposit. He stated that the property had been misrepresented to him and that defendant had failed to clear the title as required by the contract. On December 19th plaintiff wrote defendant that he would take title and pay the balance of the purchase price as soon as the easement had been cleared. Defendant, however, on December 27th cancelled the escrow and thereafter sold the property to a third party for \$20,000. Early in January plaintiff indicated his willingness to purchase the property and shortly thereafter brought this suit for specific performance. The trial court entered judgment for defendant and plaintiff appeals.

[1] Plaintiff's main contention is that the contract was still in effect when he sought to perform in January after defendant had cancelled the escrow and arranged for the sale of the property to a third party. He bases this contention on the theory that time was not of the essence of the contract and that therefore defendant could not terminate his rights under it without giving him notice to perform within a reasonable time after the closing date, November 10th, fixed in the escrow instructions. This contention over-

looks the fact, however, that plaintiff unconditionally repudiated the contract by his letters of November 28th. Even if it is assumed that under the terms of the escrow instructions plaintiff had a reasonable time to perform after November 28th, his repudiation on that date if acted upon by defendant before it was retracted, would excuse performance on defendant's part and make plaintiff's repudiation a total breach of contract. *Gold Min. & Water Co. v. Swinerton*, 23 Cal.2d 19, 29, 142 P.2d 22; see *Restatement, Contracts* §§ 280, 318, 319; *Civil Code*, § 1440.

[2,3] Although plaintiff made various oral proposals to continue with the purchase on terms other than those provided in the contract, he did not unconditionally withdraw his repudiation until after defendant, in reliance thereon, had sold the property to another. Plaintiff's letter of December 19th expressed willingness to perform the contract only after the easement held by the Water and Power Department had been abandoned. The escrow instructions provided, however, that the title should be subject to easements of record. There was evidence that plaintiff read the instructions and was informed of the easement at the time he signed them. Since his letter of December 19th contained a condition with respect to the clearance of the easement that he had no right to impose, it did not constitute a withdrawal of the earlier repudiation. *Steelduct v. Henger-Seltzer Co.*, 26 Cal.2d 634, 646, 160 P.2d 804; *Alderson v. Houston*, 154 Cal. 1, 14, 96 P. 884. Accordingly, the judgment must be affirmed insofar as it denies plaintiff specific performance or damages for breach of contract.

[4] The question remains whether plaintiff is entitled to the return of any part of his down payment. Since defendant resold the property for \$2,000 more than plaintiff had agreed to pay for it, it is clear that defendant suffered no damage as a result of plaintiff's breach. If defendant is allowed to retain the amount of the down payment in excess of its expenses in connection with the contract it will be enriched and plaintiff will suffer a penalty in excess of any damages he caused.

Under our recent holdings in *Barkis v. Scott*, 34 Cal.2d 116, 208 P.2d 367, and *Baffa v. Johnson*, 35 Cal.2d 36, 216 P.2d 13, plaintiff could recover that excess under section 3275 of the Civil Code, if his breach was neither wilful, fraudulent, nor grossly negligent. The trial court found, however, on substantial evidence, that plaintiff's breach was wilful. It is necessary to consider, therefore, the question left open in the Baffa case, namely, whether a vendee under such circumstances may recover the excess of his part payment over the damage he caused the vendor.

[5] As was pointed out in the Baffa case, if the right to restitution rests solely on the provisions of section 3275, a vendee who has been guilty of a wilful default must be denied relief. We have concluded, however, that the damage provisions of the Civil Code together with the policy of the law against penalties and forfeitures provide an alternative basis for relief independent of section 3275.

"Few questions in the law have given rise to more discussion and difference of opinion than that concerning the right of one who has materially broken his contract without legal excuse to recover for such benefits as he may have conferred on the other party by part performance * * *. A satisfactory solution is not easy, for two fundamental legal policies seem here to come in conflict. On the one hand, it seems a violation of the terms of a contract to allow a plaintiff in default to recover—to allow a party to stop when he pleases and sell his part performance at a value fixed by the jury to the defendant who has agreed only to pay for full performance. On the other hand, to deny recovery often gives the defendant more than fair compensation for the injury he has sustained and imposes a forfeiture on the plaintiff. The mores of the time and place will often determine which policy will be followed. But the second of these opposing policies has steadily increased in favor in recent years." (5 *Williston on Contracts* [Rev. ed.] § 1473, p. 4118.)

In adopting a rule allowing restitution to the defaulting vendee the Supreme Court of Utah stated:

"The vital question to be determined is: What is the correct measure of damages in a case of this kind? Shall we apply the rule of compensatory damages, or is it a case in which punitive damages should be allowed? Upon what principle can punitive damages or damages in excess of compensation for the injury done be justified in the case at bar? These are questions that appeal both to the judgment and conscience of the court. * * *

"The rule contended for by respondent, carried to its logical sequence, would forfeit every dollar paid by appellant and still leave respondent in possession of the land even if appellants had paid the last installment but one, and then defaulted. In answer to this, it may be said that such is not the case at bar. But where are we going to draw the line?" *Malmberg v. Baugh*, 62 Utah 331, 340, 345, 218 P. 975, 978; see also, *McCormick on Damages*, § 153, p. 616; *Corbin, The Right of a Defaulting Vendee to the Restitution of Installments Paid*, 40 *Yale L.J.* 1013.

The failure of courts adopting a contrary viewpoint to recognize that they are permitting unjustifiable penalties for breach of contract has led to the comment that "The law, while looking with righteous abhorrence on forfeitures, and washing its hands of their enforcement, after the manner of Pontius Pilate, yet has been reluctant to intervene with affirmative relief or to formulate any consistent principle condemning the validity of cut-throat provisions which in their essence involve forfeitures. Although the law will not assist in the vivisection of the victim, it will often permit the creditor to keep his pound of flesh if he can carve it for himself." (*Ballantine, Forfeiture for Breach of Contract*, 5 *Minn.L.Rev.* 329, 341.)

1. "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."
2. "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation,

[6-8] To permit what are in effect punitive damages merely because a party has partially performed his contract before his breach is inconsistent both with section 3294¹ of the Civil Code limiting the right to exemplary damages and sections 1670² and 1671³ dealing with liquidated damages. "A penalty need not take the form of a stipulated fixed sum; any provision by which money or property would be forfeited without regard to the actual damage suffered would be an unenforceable penalty." *Ebbert v. Mercantile Trust Co.*, 213 Cal. 496, 499, 2 P.2d 776, 777. Such penalties cannot reasonably be justified as punishment for one who willfully breaches his contract. Not only does section 3294 of the Civil Code express the policy of the law against the allowance of exemplary damages for breach of contract regardless of the nature of the breach, *Chelini v. Nieri*, 32 Cal.2d 480, 486, 196 P.2d 915, but if a penalty were to be imposed it should bear some rational relationship to its purpose. A penalty equal to the net benefits conferred by part performance bears no such relationship. It not only fails to take into consideration the degree of culpability, but its severity increases as the seriousness of the breach decreases. Thus a vendee who breaches his contract before he has benefited the vendor by part performance suffers no penalty, whereas one who has almost completely performed his contract suffers the maximum penalty.

Moreover, to deny the remedy of restitution because a breach is wilful would create an anomalous situation when considered with section 3369 of the Civil Code. That section provides that "Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case * * *", and precludes the

is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

3. "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

court from quieting the vendor's title unless he refunds the excess of the part payments over the damage caused by the vendee's breach. *Baffa v. Johnson*, 35 Cal. 2d 36, 39, 216 P.2d 13; *Barkis v. Scott*, 34 Cal.2d 116, 121, 208 P.2d 367, and cases cited. Unless the same rule is adopted when the vendee seeks restitution, the rights of the parties under identical fact situations will turn on the chance of which one first seeks the aid of the court.

[9] In *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, the court stated that on the vendee's default the vendor could stand on his contract and retain both the land and any payments that had been made. That statement was made without reference to sections 3275, 3294, and 3369 of the Civil Code. It is probable that these code sections were not invoked in the *Glock* case and similar cases because the vendee was unable to prove that the vendor's retention of both the land and payments would result in the imposition of punitive damages. See *Barkis v. Scott*, supra, 34 Cal.2d 116, 121, 208 P.2d 367. In the present case, however, denial of restitution would result in the imposition of punitive damages, and the foregoing sections may therefore be invoked.

[10, 11] The provision of the contract providing that on plaintiff's default defendant could retain the down payment cannot be enforced as a valid clause providing for liquidated damages. Although such a provision in a contract for the sale of real property is presumptively valid, if the down payment is reasonable in amount, *Wright v. Rodgers*, 198 Cal. 137, 142-143, 243 P. 866; Civil Code, § 3387, when as in this case the evidence establishes that it would not "be impracticable or extremely difficult to fix the actual damage", Civil Code, § 1671, such a provision may not be enforced as one for liquidated damages. Civil Code, § 1670; *Wright v. Rodgers*, supra, 198 Cal. 137, 144, 243 P. 866; see also, *Petrovich v. City of Arcadia*, 36 Cal.2d 78, 222 P.2d 231.

[12] Since a commission of \$900 was retained by the broker from the down payment it is clear that defendant received from plaintiff at most \$1,100. Defendant contends, however, that there were other expenses incurred in connection with the escrow that reduced the amount of the down payment received. Since the trial court erroneously concluded that plaintiff could recover no part of his down payment, no finding was made as to the fraction that accrued to the net benefit of defendant. Accordingly, a new trial limited to that issue is appropriate. See, *Brewer v. Second Baptist Church*, 32 Cal.2d 791, 801, 197 P.2d 713.

The judgment is reversed insofar as it denies plaintiff restitution of any part of his down payment and the trial court is directed to retry the issue of the amount thereof to which he is entitled. In all other respects the judgment is affirmed. Each party is to bear his own costs on this appeal.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and SPENCE, JJ., concur.

SCHAUER, Justice.

I would affirm the judgment in its entirety.

Rehearing denied; SCHAUER, J., dissenting.



37 Cal.2d 110

In re SPRAGUE.
L. A. 21677.

Supreme Court of California.
May 8, 1951.

Hearing Denied June 7, 1951.

Elizabeth Sprague filed application for writ of error coram nobis to set aside adjudication committing her to state hospital for treatment for alleged mental illness. The Superior Court, San Bernardino County, Martin J. Coughlin, J., entered an order denying the petition, and the petitioner appealed. The Supreme Court, Shenk, J., held that the proper remedies of petitioner asserting that court proceeding to commit petitioner to

state hospital for treatment for mental illness did not constitute a trial on merits of her mental condition, but that purported trial proceeded on assumed facts and conditions which did not exist and that facts existed which without any fault or negligence on her part were not presented to the court at trial and which if presented, would have resulted in a verdict in her favor, were by motion for new trial or by appeal from the judgment entered in 1941 in such proceeding, and were not by application for writ of error coram nobis filed in 1947.

Order affirmed.

Prior opinion, 220 P.2d 28.

1. Judgment ⇨334

Delay in seeking writ of error coram nobis is sufficient ground for denial of writ.

2. Courts ⇨212

Where superior court judge who sustained demurrer to original petition in coram nobis proceeding participated in the decision on the appeal to District Court of Appeal, a hearing in the Supreme Court was granted.

3. Judgment ⇨334

The truth or falsity of the testimony before the court is not a matter which can be relitigated through the office of writ of error coram nobis, at least in the absence of a deprivation of the legal rights of the petitioner through extrinsic causes.

4. Insane persons ⇨49

Mere mistake or negligence of petitioner or her attorney in procurement of evidence or witnesses on the trial of proceeding to commit petitioner to state hospital for treatment for alleged mental illness and failure to then obtain medical diagnosis concerning petitioner's real condition were not "extrinsic causes" within rule that truth or falsity of testimony before court cannot be relitigated through office of writ of error coram nobis in absence of deprivation of legal rights of petitioner through "extrinsic causes". Welfare and Institutions Code §§ 5040, 5041.

See publication Words and Phrases, for other judicial constructions and definitions of "Extrinsic Causes".

5. Insane persons ⇨49

The proper remedies of petitioner asserting that court proceeding to commit

petitioner to state hospital for treatment for mental illness did not constitute a trial on merits of her mental condition, but that purported trial proceeded on assumed facts and conditions which did not exist and that facts existed which without any fault or negligence on her part were not presented to the court at trial and which if presented would have resulted in a verdict in her favor, were by motion for new trial or by appeal from the judgment entered in 1941 in such proceeding and were not by application for writ of error coram nobis filed in 1947. Welfare and Institutions Code, §§ 5040, 5041.

Elizabeth Sprague, in pro. per.

Jerome B. Kavanaugh, Dist. Atty. and Theo. G. Krumm, Chief Deputy Dist. Atty., San Bernardino, for respondent.

SHENK, Justice.

This is an appeal from an order denying the petitioner's application for the writ of error coram nobis.

On July 22, 1941, a petition was filed in the superior court in and for the county of San Bernardino alleging that the petitioner herein was mentally ill and in need of supervision, care and treatment. Upon her demand the matter was tried before a jury which on August 1st returned a verdict that she was insane. She was committed to the State Hospital at Patton. She was represented at the trial by counsel appointed by the court. There was no motion for a new trial and no appeal was taken from the judgment entered on the jury's verdict. On April 1, 1943, the petitioner was released on parole and on May 27, 1943, she was discharged as recovered.

The petitioner's declared concern since her discharge has been to have the asserted erroneous verdict and judgment expunged from the record in order to clear her name for the sake of herself and her children and because of its alleged adverse effect on her earning power.

The application for the writ was filed in October 1947. In explanation of the delay in making the application the petitioner shows the following: She was unable to obtain counsel or prepare the peti-

tion during her period of treatment in the hospital. After her discharge she sought and obtained employment in accountancy and office management, in which she had had years of training and experience, in order to support herself and her two daughters. From September 1943 to March 1944 she was concerned with securing a divorce from her husband in the Florida courts where they had lived for some time and had had a daughter born to them in 1939. Other delays were caused by her financial inability to employ counsel and by the necessity for study in the personal preparation of her application and the supporting documentary material.

[1] Delay in seeking the writ of error coram nobis has been held to be sufficient ground for denial. See *People v. Lumbley*, 8 Cal.2d 752, 68 P.2d 354; *People v. Vernon*, 9 Cal.App.2d 138, 49 P.2d 326; *People v. Harincar*, 49 Cal.App.2d 594, 121 P.2d 751. But in view of the fact that the trial court entertained the application on the merits, this court will consider the merits on the appeal.

The petitioner was represented by an attorney on the filing of the original petition herein. A demurrer was sustained with leave to amend, and the petitioner personally prepared and filed an amendment and a supplement to the amendment. A trial on the issues tendered by the pleadings was had on October 25, 1948, at which the petitioner was represented by counsel. After judgment she prosecuted her appeal in propria persona, preparing and filing two briefs and a petition for hearing in this court, and presented her oral argument in person.

[2] A hearing in this court after decision of the District Court of Appeal, Fourth Appellate District, was granted for the reason that Justice Stanley Mussell, who as a judge of the superior court sustained the demurrer to the original petition in this proceeding, participated in the decision on the appeal to the District Court of Appeal. See *Knouse v. Nimocks*, 8 Cal. 2d 482, 66 P.2d 438. This court, in resolving the contentions on the appeal, has given full consideration to the entire record.

The application for the writ was based on the petitioner's claim that the court proceeding on August 1, 1941, did not constitute a trial on the merits of her mental condition but that the purported trial proceeded on assumed facts and conditions which did not exist and that facts existed which, without any fault or negligence on her part, were not presented to the court at the trial and which if presented would have resulted in a verdict in her favor. See *People v. Gilbert*, 25 Cal.2d 422, 442, 154 P.2d 657; *People v. Mendez*, 28 Cal. 2d 686, 688, 171 P.2d 425; *People v. Tuthill*, 32 Cal.2d 819, 821, 198 P.2d 505; *People v. Adamson*, 34 Cal.2d 320, 326-327, 210 P.2d 13. It is therefore contended that the order denying the writ is erroneous because the oral and documentary evidence supports the grounds for issuance of the writ as matter of law.

The petitioner's sixteen year old daughter, born of her first marriage, was not produced as a witness at the trial in 1941. It is claimed that, although the petitioner did not know her then whereabouts, she could have been located through an uncle and that, if she had been produced in accordance with the petitioner's request, her testimony would have proved the facts which are now presented. The record also includes the results of subsequent examinations and treatments of the petitioner's condition which it is claimed bear on the facts.

The record contains voluminous documentary data which is explanatory of the background leading to the events involved in the 1941 proceeding. It is offered as revealing the actual as distinguished from the alleged assumed facts and conditions in 1941. It is unnecessary to include here a recital of all the factual data. It is sufficient to say that the apparent ground of the verdict in 1941 was that the petitioner was suffering from hallucinations and delusions of a persecutory nature and required hospital treatment. It appears that the petitioner's story told at that time was considered by the examining doctors as delusionary, as fantastic because non-existent in fact. No investigation was then made of the truth of her story nor was

there an examination of the petitioner's physical condition, and the reason for her sensations of suffocation causing collapse into unconsciousness was not discovered.

The present record discloses the marital history of the Spragues and the basis in fact for the petitioner's seeking seclusion together with her older daughter at the time of the events in July 1941. After her discharge from the hospital in 1943 the petitioner underwent physical examinations, received diagnoses of adrenal cortical insufficiency and paroxysmal tachycardia, and benefited from treatment for those disorders. On two occasions subsequent to her discharge, when she felt she needed treatment and could not afford private medication, she applied voluntarily for admission to the state hospital and remained there for a short period on each occasion. In August 1948 she procured a jury trial on the issue of her mental condition. At that trial the older daughter testified and substantiated the facts now presented. The jury rendered a verdict that the petitioner was "sane at the present time."

The older daughter also testified on the trial in the present proceeding and disclosed the reasons for not attending the hearing in 1941. It is now clear that the petitioner's story which in 1941 was assumed to be delusionary had factual support; that the petitioner's basic disturbance, determined about July 1944, was and is a heart condition which does not require confinement in an institution for successful treatment, and that mental depression resulting from the disorder is also corrected by treatment of the physical condition which responds favorably to administration of adrenal cortical substance and desoxycorticosterone. In the record are doctors' certificates dated in 1947 to the effect that had they known the facts shown by the documentary evidence they would have considered as logical, consecutive, plausible, and not delusionary, the story which was the basis of their testimony in 1941; and that the cause of the petitioner's disturbance was the heart condition. The record shows that while receiving treatment at the

state hospital the petitioner required very little or no supervision; that she was a cooperative patient; that she was never considered to have been harmful to herself, to other persons, or to property; that she was not placed under any restraint but voluntarily undertook the performance of duties; that in the hospital, where she was called "Sunshine" by the other patients, she admittedly found rest and peace, and that her condition would continue to improve with treatment. The petitioner's employment history shows her to be a person of unusual competence in her chosen field of accountancy, and that she never lost a position because of the 1941 proceeding except on two occasions when she voluntarily reported to her employer the facts of her previous treatment and her concern about correcting the record.

Section 5040 of the Welfare and Institutions Code defines "Mentally ill persons" as persons who are of such mental condition that without supervision, treatment, care or restraint they would be or might be dangerous to themselves or to the persons or property of others. Section 5041 states that "insane persons" means mentally ill persons who have been adjudicated by a court to be so psychotic as to be dangerous to themselves or to the person or property of others and are found to be in need of supervision, treatment, care and restraint.

It may be assumed that if the presently known facts had been introduced in evidence at the 1941 hearing they would have shown that the petitioner was not a person to be included within either of those definitions. But that is a far different consideration from that which controls the question whether the relief asked may be granted in the present proceeding. On the hearing in this court the petitioner graciously accepted the oral suggestion from the Bench that possibly she had mistaken her remedy.

[3, 4] The briefs of the petitioner and her presentation on the hearing show that she is familiar with the history and the office of the writ of error coram nobis as declared in previous decisions, and there is no necessity to reiterate them here. See

People v. Mooney, 178 Cal. 525, 174 P. 325; **People v. Reid**, 195 Cal. 249, 254 et seq., 232 P. 457, 36 A.L.R. 1435 and cases cited; **People v. Schwarz**, 201 Cal. 309, 314-315, 257 P. 71; **People v. Egan**, 73 Cal.App.2d 894, 899, 167 P.2d 253. As disclosed in those and other cases the truth or falsity of the testimony before the court is not a matter which can be relitigated through the office of this writ, at least in the absence of a deprivation of the legal rights of the petitioner through extrinsic causes. Mere mistake or negligence of herself or her attorney in the procurement of evidence or witnesses on the 1941 trial is not such a cause. The record shows and the petitioner admits that neither the court nor the district attorney had anything at all to do with the nonattendance of the daughter at the former hearing. Neither does an extrinsic cause appear because the medical diagnosis concerning the petitioner's real condition was not then obtained.

District Court of Appeal, First District,
Division 2, California.
May 2, 1951.

Hearing Denied June 28, 1951.

Proceeding by the Argonaut Mining Co., Ltd., a corporation, opposed by the Industrial Accident Commission of the State of California, and others, to review an award of the Commission. The District Court of Appeal, Nourse, P. J., held that statute fixing date of injury in cases of occupational diseases for purpose of computing the statute of limitations would also set the date for the measurement of compensation which was payable.

Award affirmed.

1. Constitutional law ⇨146

Where employee allegedly contracted occupational silicosis between 1923 to 1928, and Industrial Accident Commission determined that employee sustained a compensable silicosis injury which caused employee's death in 1949, award based on rates of 1948 statutes did not violate contract clause of state and federal Constitutions. Const. art. 1, § 16; U.S.C.A. Const. art. 1, § 10; Labor Code, §§ 3202, 5411, 5412.

2. Workmen's compensation ⇨2, 9

Right to and liability for compensation are not founded upon contract, but are statutory rights and duties arising from employer-employee relationship, and are imposed by law as incidents of that status. Labor Code, §§ 3202, 5411, 5412.

3. Workmen's compensation ⇨60, 1207

Statute providing that date of injury in occupational diseases cases is that date upon which employee first suffered disability therefrom and either knew, or in exercise of reasonable diligence should have known, that said disability was caused by a present or prior employment, establishes date for purpose of computing statute of limitations and also establishes date for measurement of compensation which would be payable. Labor Code, § 5412.

[5] The petitioner's proper remedies were by motion for new trial or by appeal from the judgment entered in 1941. As the foregoing cited cases also determine, the fact that the proper remedies were not pursued does not give to the petitioner any greater right in this proceeding than she otherwise might have. Because of this condition of the record the law cannot afford the petitioner the relief which she seeks.

By her own persistent efforts the petitioner has accomplished much in her objective to dispel an erroneous conception of the nature of her ailment. In her own words she has fought a good fight and kept faith with her children. The record of this proceeding has placed in permanent form the evidence of her steadfast purpose since her discharge in 1943 to avoid the results of a proceeding claimed by her to have been taken against her unjustly. But in accordance with the applicable rules of law the order may not be disturbed.

The order is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

Keith, Creede & Sedgwick, San Francisco (B. K. Wines, San Francisco, of counsel), for petitioner.

Edmund J. Thomas, Jr., T. Groezinger and Robert Ball, San Francisco, for Respondent Industrial Acc. Commission.

NOURSE, Presiding Justice.

Sabino Gonzalez filed an application with the Industrial Accident Commission on December 22, 1948, against petitioner and others. He alleged an injury arising out of and in the course of employment with petitioner, to wit, occupational silicosis. He had worked as a miner for petitioner and others from June, 1923, to December, 1928, exposed to silica hazards. From December, 1928, to August 20, 1948, he engaged in other occupations which did not expose him to silicosis. Gonzalez died before his case went to decision. His dependents then filed an application for an industrial death benefit, which claim was consolidated and heard with the disability claim. Respondent commission made an award on July 21, 1950, finding that on *November 23, 1948*, Gonzalez sustained a *compensable injury* consisting of silicosis which caused his death on April 9, 1949. An award was made jointly and severally against petitioner and others.

The death benefit and the accrued temporary indemnity were based upon the rates in effect according to the statutes of 1948. Based upon the statutes in existence in 1948, the total award was for \$6,415.20. If the award were based upon the statutes in existence in 1928, petitioner alleges, the total award would have been for \$4,334.85.

Petitioner's contentions are twofold. (1) Due process is violated because retroactive effect is given to the 1948 statutes. (2) The commission's award violates the contract impairment clause of the California and United States Constitutions, Const. art. 1, § 16; U.S.C.A. Const. art. 1, § 10, in not following the law in effect in 1928. It concedes that the application was timely filed and that the case is compensable.

[1] With respect to the constitutional inhibition against the legislative impair-

ment of the obligation of contracts, petitioner's position is summarized in the following language: "At the time Gonzalez was hired by your petitioner, the parties dealt in contemplation of the statutes in existence in 1928. The statutes in existence at that time became an integral part of the contract of employment." In support of this contention petitioner cites *Brown v. Ferdon*, 5 Cal.2d 226, 54 P.2d 712. In that case the statute in question purported to remove a civil remedy that had been available for the enforcement of contracts at the time the particular contract was entered into. The court held that the remedy existing at the time the contract was entered into became a part of the contract and could not be later taken away by the legislature.

[2] In *Aetna Casualty & Surety Co. v. Industrial Accident Commission*, 30 Cal. 2d 388, 182 P.2d 159, it was held that certain additional benefits were not to be awarded to the workman when these benefits were provided for after the workman was *injured*. This was on the ground, however, that the added law was intended to operate only prospectively, and not retrospectively. There is in the opinion the recognition that had the legislature disclosed an intent to have the additional benefits operate retrospectively, the law would have been a valid exercise of police power and not in violation of the inhibitions against the impairment of the obligation of contracts.

Alaska Packers Ass'n v. I. A. C., 1 Cal. 2d 250, 34 P.2d 716; *Quong Ham Wah Co. v. Ind. Acc. Com.*, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190, and *North Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, 162 P. 93, L.R.A.1917E, 642, all deal with the extraterritorial effect of the compensation act. They hold uniformly, however, that the right to, and liability for, compensation established by the act are not founded upon contract, but are statutory rights and duties arising from the employer-employee relationship, and are imposed by the law as incidents of that status. See *Campbell, Workmen's Compensation*, Vol. I, pp. 20-23, sections 26, 27; *Horowitz on Workmen's Compensation*, p. 12, et seq.

On the question of due process petitioner cites Aetna Casualty & Surety Co. v. Ind. Acc. Com., 30 Cal.2d 388, 182 P.2d 159. As has been pointed out, this case held that the law in force at the time of the injury is to be taken as the measure of the injured person's right of recovery and thus additional benefits made available by law after an injury could not be granted an injured workman as this would be given retrospective operation to a law which was construed to be prospective in operation only. The question in the instant case is, however, what is the date of injury for the purposes of compensation in cases of occupational disease? Obviously if it is held that for the purposes of compensation the date of injury in cases of occupational disease is that moment in time when the disease results in disability, then the award was proper, as Gonzalez's disability from silicosis occurred after the 1948 statutes.

The contentions of the parties are simple. Petitioner asserts that the date of injury for the purposes of fixing the amount of compensation to be awarded is the last date that the workman was exposed to the silica dust as an employee of petitioner or the date of Gonzalez's employment by petitioner. The commission asserts that in the case of an occupational disease industrial injury does not occur until disability results. Respondents cite *Marsh v. Ind. Acc. Com.*, 217 Cal. 338, 18 P.2d 933, 86 A.L.R. 563; *Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, 30 Cal.2d 388, 182 P.2d 159, and Labor Code, sec. 5412, for this principle.

The *Marsh* case dealt with the date of injury as regards an occupational disease with reference to the statute of limitations. The case holds that the injury in such cases is not deemed to have occurred until compensable disability results. Thus, for the purposes of computing the statute of limitations, the date of injury in cases of occupational disease is that time when the disease culminates in a compensable disability.

After the *Marsh* case, two sections were added to the Labor Code (1947). Section 5411 reads: "What constitutes date of

injury. The date of injury, except in cases of occupational disease, is that date during the employment on which occurred the alleged incident or exposure, for the consequences of which compensation is claimed."

[3] Section 5412 reads: "Same: Occupational diseases. The date of injury in cases of occupational diseases is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that said disability was caused by his present or prior employment." Both sections were added by Stats.1947, Ch. 1034, sections 5 and 6.

These sections are incorporated into Div. 4, Pt. 4, Ch. 2 of the Labor Code. Division 4 of the code deals with workmen's compensation and insurance; Part 4 of Division 4 deals with compensation proceedings; Chapter 2 of Part 4 deals with, and is headed, "Limitations of Proceedings". This would seem to lend support to petitioner's contention that section 5412 of the Labor Code deals with the date of injury in cases of occupational diseases only for the purpose of computing the statute of limitations in such cases.

But respondent commission's position is just as logical. Regardless of the date of exposure to disease, the claimant has no cause of action and no rights accrue to him until that point in time when the cumulative effects of his disease result in a compensable disability. It would seem that the law then in effect should govern the claimant's rights.

It would seem logical that even if the *Marsh* case and the subsequent changes in the code sections are held to set the "date of injury" in cases of occupational disease only for the purpose of relieving a sufferer from occupational disease from the operation of the statutes of limitation, that a necessary corollary would be that it also sets the date for the measurement of compensation payable, and all other incidents of the workman's right. Until the disability there is no compensable injury. When the disease results in disability there then comes into existence for

the first time a right in the petitioner to seek compensation. When the right comes into existence certain rates are applicable. It would seem that these are the rates by which compensation should be payable.

Our Workmen's Compensation Law expressly provides that it shall be liberally construed. Labor Code, sec. 3202. When it is considered that in a silicosis case the workman may have worked in ten mines over a twenty year period, and that the amount of benefits and other provisions of the law may have undergone ten changes in the same twenty year period, benefits being added and taken away, and raised and lowered, a reasonable construction of the act is that the rate and amount of compensation, and the liability of the several employers must be determined by the commission on a consideration of all the facts of employment no matter how remote. Such a determination would not violate any constitutional right of any of the employers.

The award is affirmed.

GOODELL and DOOLING, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



104 Cal.App.2d 59

PEOPLE v. McNEESE.

Cr. 4586.

District Court of Appeal, Second District,
Division 3, California.

May 4, 1951.

Richard Elliott McNeese was convicted in the Superior Court of Los Angeles County, Walter S. Gates, J., of two violations of section 288 of the Penal Code, and for violation of section 286 of the Penal Code, and he appealed. The District Court of Appeal, Wood, J., held that evidence supported convictions.

Judgments affirmed.

1. Criminal law ⇐260(11)

In prosecution for violations of sections 286 and 288 of the Penal Code, questions as to corroboration of complaining witness' testimony, and alleged motive, coaching and impeachment of complaining witness, were for consideration of trier of fact in determining weight to be given to testimony of the witness. Pen.Code §§ 286, 288.

2. Infants ⇐20 Sodomy ⇐6

Evidence was sufficient to support convictions for violations of sections 286 and 288 of the Penal Code. Pen.Code §§ 286, 288.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen. and Howard S. Goldin, Deputy Atty. Gen. for respondent.

PARKER WOOD, Justice.

Defendant was charged in two counts with violation of section 288 of the Penal Code, and in another count with violation of section 286 of the Penal Code (infamous crime against nature). He admitted an allegation in the information that he had been convicted previously of a felony. Trial by jury was waived. He was convicted on the three counts. Although his notice of appeal states that he appeals from "the judgment," it will be assumed that he appeals from each of the three judgments. His contention is that the evidence was insufficient.

The complaining witness, a boy 13 years of age, resided with his parents. On three occasions, with the consent of his parents and upon the invitation of defendant, the boy stayed overnight at the home of defendant and slept in a bed with him. In his testimony the boy related facts which were sufficient to prove that defendant violated said section 288 on the two occasions alleged and that he violated said section 286 as alleged.

[1,2] Appellant contends that the testimony of the boy was of little or no value because he had a motive to make a false accusation, he had been "coached" as a witness, he was impeached, and there was no corroboration of his testimony. The alleged motive, according to appellant, was that the boy's father and the appellant (who had been friends about four months) had had an argument two or three weeks after the last alleged offense occurred. The alleged coaching, according to appellant, was that the dates of the occurrences had been suggested to the boy. Appellant asserts that the boy was impeached, in that, he testified at the trial that he did not ask his father or mother for permission to visit appellant but it was appellant who asked the parents for such permission, and he testified at the preliminary examination that on one occasion he (the boy) asked his mother for permission and on another occasion he asked his father for permission. As to corroboration, appellant asserts in his brief that he does not contend that there is a legal necessity for corroboration of the boy's testimony, but he does contend that the lack of corroboration taken in connection with the other factors, namely, the alleged motive, coaching, and impeachment, "would discredit the testimony of the complaining witness." A brother of the complaining witness, 10 years of age, testified that on two occasions he stayed all night at appellant's home and that he, his brother, and appellant slept in a room in which there were twin beds, and that on those occasions his brother and appellant slept in one bed and he slept in another bed. Appellant testified that the complaining witness stayed all night at his home on two occasions, and that on the first occasion he and the complaining witness were in the same bed for a while, and on the second occasion they slept in the same bed. The matters as to corroboration, alleged motive, coaching, and impeachment were for the consideration of the trial judge in determining the weight to be given to the testimony of the witness. A recital of the details of the testimony would not serve a useful purpose. Factual issues were pre-

sented for the determination of the trial court. The evidence was sufficient to support the judgments.

The judgments are affirmed.

SHINN, P. J., and VALLÉE, J., concur.



104 Cal.App.2d 86

KOLIS v. KOLIS et al.

Civ. 18406.

District Court of Appeal, Second District,
Division 1, California.

May 8, 1951.

Alfred Kolis brought action against Genevieve Kolis and another for partition of realty, appointment of a receiver, and an accounting. The trial court rendered a judgment adverse to the plaintiff, and the plaintiff appealed, and the defendants moved to dismiss the appeal on ground that the appeal was moot, sham, and frivolous, and that there were no substantial questions involved for determination by District Court of Appeal. The District Court of Appeal, Hanson, J., pro tem., held that appeal would not be dismissed.

Motion denied.

I. Partition ☞12(2)

Where mother obtained a judgment against daughter and son-in-law and caused execution to issue, and at execution sale mother bid in realty, and thereafter son-in-law, who was no longer husband of daughter, instituted action against mother and daughter for partition of realty, appointment of receiver, and accounting, court's ruling that action was not maintainable because realty had been sold on execution sale and that daughter and son-in-law were only equitable owners of realty and that it was therefore not subject to partition, was palpably erroneous. Code of Civ.Proc. §§ 752, 752a.

2. Appeal and error ⚡781(2), 786

Where record disclosed that mother obtained judgment against daughter and son-in-law, that she caused execution to issue, and that at execution sale she bid in realty, and that son-in-law, who was no longer husband of daughter, thereafter brought action against mother and daughter for partition of realty, appointment of receiver, and accounting, and trial court erroneously ruled that action was not maintainable, motion to dismiss appeal of son-in-law on ground that appeal was moot, sham, and frivolous, and that there were no substantial questions involved for determination by District Court of Appeal, would be denied.

3. Appeal and error ⚡801(5)

On motion to dismiss appeal on ground that it was moot, sham, and frivolous and that there were no substantial questions involved for determination by District Court of Appeal, District Court of Appeal would not search record to ascertain facts.

Houston A. Snidow, Azusa, for appellant.

David C. Marcus, Los Angeles, for respondents.

HANSON, Justice pro tem.

This is a motion to dismiss an appeal from a judgment denying a partition of real property, the appointment of a receiver and an accounting.

[1] The record discloses that respondent Wladyslawa Lukaszewicz, the mother of respondent Genevieve Kolis, had obtained a judgment against Genevieve Kolis and her then husband Alfred Kolis upon which she caused execution to issue and at the execution sale on October 31, 1949, she bid in the property. On January 20, 1950, Alfred Kolis, who at that time was no longer the husband of Genevieve, instituted the action here involved. On the trial of that action counsel for the defendants, who are here as respondents, contended that the action was not maintainable as the property had been sold on execution sale and hence Alfred and Genevieve Kolis were only equitable owners of the property and it was therefore not subject to partition. The

court so ruled and dismissed the action. The ruling was palpably erroneous. Code of Civ.Proc. §§ 752, 752a.

[2, 3] The motion to dismiss is based on the ground that the appeal is moot, sham, and frivolous and that there are no "substantial questions involved for determination by this Appellate Court." These conclusions of the pleader are not otherwise detailed or defined by the motion, except for the statement that the appeal is moot because of the statements set forth in the affidavit. The affidavit merely discloses the fact that the execution creditor purchased the property on October 31, 1949, and received a sheriff's deed of the property thus purchased under date of November 14, 1950, and the fact that the property was not redeemed. In what manner the cause of action for an accounting and the appointment of a receiver has become moot is not disclosed by the motion. We do not search the record to ascertain the facts. *Betten-court v. Bank of Italy, etc., Ass'n*, 216 Cal. 174, 13 P.2d 659.

The motion to dismiss is denied.

WHITE, P. J., and DRAPEAU, J., concur.



104 Cal.App.2d 35

CIRLINCIONE v. CIRLINCIONE.

Civ. 18392.

District Court of Appeal, Second District,
Division 2, California.

May 3, 1951.

Cecilia Cirilincione brought an action against Joseph Cirilincione to wind up a partnership after dissolution by death of a partner, and to recover value of deceased partner's interest as of date of his death. The Superior Court of Los Angeles County, J. O. Moncur, J., rendered a judgment for plaintiff and defendant appealed. The District Court of Appeal, McComb, J., held, *inter alia*, that evidence sustained finding that a prom-

lessory note executed by defendant when defendant bought a one-half interest in business from plaintiff and from plaintiff's husband, was plaintiff's property after death of plaintiff's husband.

Affirmed.

1. Partnership ⚡336(3)

In action by widow of deceased partner to wind up partnership after dissolution by death of widow's husband, and to recover value of interest of widow's deceased husband as of date of death, evidence sustained finding that note executed by defendant when defendant bought a one-half interest in business from plaintiff and from plaintiff's deceased husband, was plaintiff's property after death of plaintiff's husband.

2. Partnership ⚡336(3)

In action by widow of deceased partner to wind up partnership after dissolution by death of widow's husband, and to recover value of interest of widow's deceased husband as of date of death, evidence sustained finding that interest was due from death of plaintiff's husband on note executed by defendant when defendant bought a one-half interest in business from plaintiff and from plaintiff's husband.

3. Partnership ⚡336(3)

In action by widow of deceased partner to wind up partnership after dissolution by death of widow's husband, and to recover value of interest of widow's deceased husband as of date of death, evidence sustained finding that plaintiff was entitled to \$450 attorney's fees for collecting note executed by defendant when defendant bought a one-half interest in business from plaintiff and from plaintiff's husband.

4. Partnership ⚡336(3)

In action by widow of deceased partner to wind up partnership after dissolution by death of widow's husband, and to recover value of interest of widow's deceased husband as of date of death, evidence sustained finding that value of interest of plaintiff's husband in partnership as of date of death of plaintiff's husband was \$9,484.23.

5. Partnership ⚡336(3)

In action by widow of deceased partner to wind up partnership after dissolution by

death of widow's husband, and to recover value of interest of widow's deceased husband as of date of death, evidence sustained finding that defendant, in addition to \$75 weekly which defendant had drawn from partnership in winding up business, was entitled to only \$100 for defendant's services to business.

6. Partnership ⚡336(3)

In action by widow of deceased partner to wind up partnership after dissolution by death of widow's husband, and to recover value of interest of widow's deceased husband as of date of death, evidence sustained finding that defendant was entitled to an allowance of \$200 for attorney's fees in connection with winding up of partnership.

7. Partnership ⚡333

Where defendant partner was entitled to compensation for his services in connection with winding up partnership, in addition to compensation defendant had drawn weekly from business in winding up partnership, and to attorney's fees, and defendant had cash in partnership bank account, cash in partnership bank account was properly deducted from money with which trial court credited defendant for services in connection with winding up of partnership and for attorney's fees awarded defendant, since defendant was simply given credit for sum defendant possessed.

8. Trial ⚡395(6)

A finding that all allegations of a paragraph of a complaint or answer not expressly found to be true are untrue is sufficient.

9. Partnership ⚡342

In action to wind up partnership after dissolution by death of a partner, and to recover value of interest of widow's deceased husband as of date of his death, finding that all allegations of defendant's answer, which were in conflict with foregoing portions of finding, were untrue, was sufficient as to facts alleged in defendant's answer.

10. Partnership ⚡336(3)

In action to wind up partnership after dissolution by death of partner, and to recover value of deceased partner's interest

as of date of his death, trial court properly refused to make an allowance for a fee for accounting in connection with winding up of deceased partner's estate where a bill from accountants for services rendered to partnership was received in evidence but no evidence was received tending to show that such services had been performed.

Jacob W. Silverman, Los Angeles, for appellant.

John W. Hill, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff in an action to wind up a partnership after dissolution thereof by the death of one of the partners, and to recover the value of the deceased partner's interest as of the date of his death, defendant appeals.

Facts: The record being viewed in the light most favorable to plaintiff (respondent) the essential facts are:

In June, 1948, defendant bought a one-half interest in a delicatessen and liquor business from his brother, Benjamin Cirilincione, and his brother's wife, plaintiff, for the agreed purchase price of \$8,000, paying \$3,500 in cash and giving to plaintiff and her husband a promissory note dated August 11, 1948, due on or before 4 years after date in the sum of \$4,500, payable to them as joint tenants with interest at 6% per annum from maturity. The note promised to pay 10% of the unpaid amount thereof for attorney's fees should it be placed in the hands of an attorney for collection.

Under a verbal agreement between the partners it was provided among other things that in case of dissolution of the partnership for any cause the promissory note would immediately be due and payable out of defendant's share of the proceeds due him upon dissolution of the partnership.

Plaintiff's husband and defendant operated the business as equal partners until the death of Benjamin Cirilincione on April 29, 1949. Thereafter defendant operated the partnership business as a surviving partner until September, 1949, when the

business was sold. The proceeds thereof, \$18,544.23, was deposited with the Fishermen & Merchants National Bank, San Pedro, to be held pursuant to instructions of plaintiff and defendant or a judgment of the superior court.

Under the last will and testament of decedent, plaintiff received the entire interest in the partnership and the ownership of the promissory note mentioned above as the surviving joint tenant thereof.

The trial court found (1) that the value of the deceased partner's interest as of April 29, 1949, the date of his death, was \$9,484.23; (2) that defendant had rendered services in connection with the winding up of the partnership in the reasonable value of \$100 in addition to the amount of \$75 a week which he had drawn from the partnership from the date of his partner's death until the sale of the partnership assets in September of 1949; (3) that defendant's attorney had rendered professional services in the value of \$200 in connection with the winding up of the partnership, one half of which was chargeable to plaintiff and one half to defendant; and (4) that defendant had \$68.03 of the partnership funds in his possession.

The court gave judgment in favor of plaintiff for (a) \$4,500 due on the promissory note plus interest at 7% per annum from April 29, 1949, together with the sum of \$450 as attorney's fees, and (b) \$9,484.23 for the value of the deceased partner's interest. These amounts the court decreed should be paid to plaintiff from the sum on deposit with the Fishermen & Merchants Bank of San Pedro.

Pursuant to the judgment of the court the partnership money on deposit at the bank has been partly distributed to plaintiff and defendant and the balance deposited with the clerk of the trial court subject to further court order.

Questions: First: *Was there substantial evidence to sustain the following findings of the trial court:*

I. (a) *That the promissory note for \$4,500 executed by defendant in favor of plaintiff and her husband was plaintiff's property;* (b) *that interest was due on such*

note from and after April 29, 1949; and (c) that plaintiff was entitled to \$450 attorney's fees for collecting the note?

[1] *Yes.* (a) The note signed by defendant was introduced in evidence and on its face it stated that it was given to plaintiff and her husband "as joint tenants". It is conceded that plaintiff's husband is dead, therefore she as the surviving joint tenant is entitled to the proceeds of the note. Without objection plaintiff testified that defendant agreed with her husband to pay the note should the business be sold or "in the case of death" of her husband.

[2] (b) The note on its face provided for the payment of interest upon the principal sum from the date of maturity which, as the evidence disclosed in this case, was April 29, 1949, the date of plaintiff's husband's death.

[3] (c) The note expressly provided that if placed in the hands of an attorney for collection, 10% of the unpaid amount would be paid for attorney's fees, which in this case amounted to \$450, the amount allowed by the court.

II. That plaintiff's interest as the successor of her deceased husband in the partnership business was of the value of \$9,484.23 on April 29, 1949?

[4] *Yes.* There was received in evidence an auditor's report declaring the assets and liabilities of the partnership business as of April 29, 1949. This statement disclosed that the value of the deceased's interest in the partnership as of April 28, 1949 was \$9,484.23. This evidence clearly sustains the finding of the trial judge.

III. That defendant was entitled in addition to the compensation which he had drawn from the partnership in winding up its business to the sum of \$100 for his services to the business?

[5] *Yes.* The evidence disclosed that from the date of his partner's death until the sale of the partnership assets, defendant had drawn \$75 per week from the partnership for his services. Therefore it cannot be said that the trial judge abused his discretion in allowing defendant only \$100

additional for his services to the partnership. Section 901 of the Probate Code which fixes the fees of executors and administrators has no application to the facts of the present case.

IV. That defendant was entitled to an allowance of \$200 for attorney's fees in connection with the winding up of the partnership business?

[6] *Yes.* The evidence disclosed that there was no litigation in connection with the winding up of the partnership business and that the attorney's services consisted in advising defendant that he as the surviving partner had a right to continue the partnership and an appearance in the Probate Court with defendant when it granted the petition of plaintiff, executrix of the estate of her deceased husband, to sell the partnership interest. Clearly it was a question for the trial court to determine the reasonable value of such services which it did, and which we cannot say shows an abuse of discretion.

Second: Did the trial court improperly deduct \$68.03 from the \$200 with which it credited defendant for services in connection with the winding up of the partnership and for one half of the attorney's fees which had been awarded defendant?

[7] *No.* The trial court found that defendant was entitled to \$100 additional compensation for his services in connection with the winding up of the partnership business, and also to \$200 attorney's fees, one half of which was chargeable to plaintiff. Defendant admitted in his answer that he had cash in the partnership bank account in the sum of \$68.03. Therefore in deducting this amount from the \$200 the trial court acted correctly since defendant was simply given credit for the sum which he had in his possession.

*Third: Was the trial court's finding "All allegations of the defendant's answer, which are in conflict with the foregoing, are untrue * * *" sufficient as to the facts alleged in defendant's answer?*

[8,9] *Yes.* After making eleven specific findings of fact the trial court made the

foregoing finding. A finding that all of the allegations of a paragraph of a complaint or answer not expressly found to be true are untrue is sufficient. (McLennan v. Wilcox, 126 Cal. 51, 52, 58 P. 305; Silver v. Shemanski, 89 Cal.App.2d 520, 542 [16], 201 P.2d 418; Tobola v. Wholey, 75 Cal. App.2d 351, 358 [6], 170 P.2d 952; Sieck v. Hall, 139 Cal.App. 279, 302 [10], 34 P.2d 844; Price v. Hollywood Auto Transfer & Storage Co., 97 Cal.App. 420, 421 [1], 275 P. 471.)

Krug v. F. A. Lux Brewing Co., 129 Cal. 322, 61 P. 1125, Austin v. Harry E. Jones, Inc., 30 Cal.App.2d 362, 86 P.2d 379, and Block v. D. W. Nicholson Corp., 77 Cal. App.2d 739, 176 P.2d 739, are not in point in the instant case for the reason that in such cases there were no detailed findings of fact such as are here present.

Fourth: *Did the trial court err in not making an allowance to Robinson & Weinberger for a fee for accounting in connection with the winding up of the partner's estate?*

[10] *No.* A bill for \$158 from the above mentioned accountants for services rendered to the partnership was received in evidence. However, since no evidence was received tending to show that such services had been performed the trial court was justified in disallowing the amount of the claim.

Fifth: *Was the trial court's judgment reading, "That Fishermen and Merchants Bank is hereby directed to disburse said escrow funds as hereinbefore specified to plaintiff and defendant, respectively, according to this judgment," vague, equivocal and insufficient?*

This question will not be considered by us for the reason that it has become moot since all the funds referred to have been withdrawn from the bank pursuant to the trial court's order, a part thereof delivered to each of the parties and the balance deposited with the clerk of the trial court subject to further court order.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

ALEXANDER et al. v. ANGEL

Civ. 14660.

District Court of Appeal, First District,
Division 2, California.

May 1, 1951.

Rehearing Denied May 31, 1951.

Hearing Granted June 28, 1951.*

Action by Charles N. Alexander and Katherine J. Alexander against John B. Angel to foreclose a chattel mortgage given as security for payment of two promissory notes as purchase price of lunch room equipment. The Superior Court in and for the County of Alameda, A. T. Shine, J., entered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Nourse, P. J., held that there was no evidence of intention on part of plaintiffs-vendors to release defendant vendee as original debtor and accept in his place third party and that there was consequently no novation effected by tripartite agreement involved.

Judgment reversed.

1. Novation ⇨5

Where sellers of lunchroom fixtures took chattel mortgage as security for payment of buyer's note representing purchase price and buyer subsequently resold to third party and parties entered into tripartite agreement that sellers would forbear demanding payment of note as long as third party made monthly payments, but sellers refused to permit provision in agreement for release of original buyer, absence of intention on part of sellers to release original buyer precluded existence of novation and sellers were entitled to bring suit against original buyer upon default in payment by third party.

2. Novation ⇨5

In the absence of a manifested intention on the part of the obligee to release the original debtor and substitute in his place a third party, there is no novation, since release of original debtor constitutes consideration for new agreement.

3. Novation ⇨12

The burden of proving novation is on party asserting its existence and proof thereof must be clear and convincing.

* Subsequent opinion 236 P.2d 561.

Nathan Goldwater, John L. McVey, Oakland, for appellant.

Donahue, Richards, Rowell & Gallagher, George W. Hauer, Oakland, for respondent.

NOURSE, Presiding Justice.

This is an appeal in an action tried without a jury to foreclose a chattel mortgage given as security to the plaintiffs Alexander for the sum of \$4,300, the amount of two promissory notes given by defendant. Defendant answered and cross-complained, alleging he had conveyed the property to Robert J. Haws and Zada M. Haws who had entered into a separate agreement with plaintiffs thereby, he contended, assuming his obligation and relieving him of any further obligation. Defendant and cross-complainant, John B. Angel, named as cross-defendants both plaintiffs Alexander and Robert J. and Zada M. Haws, his vendees, and in his cross-complaint sought to have the rights and duties of himself and cross-defendants established. Cross-defendants Haws failed to answer and let it go by default. There was some question as to their status in the action but Mr. Haws did participate as a witness.

The trial court held that the agreement between plaintiffs and the Haws was in effect a novation, releasing defendant and cross-complainant Angel from the obligations of the promissory notes and decreed: "1. That on their complaint, plaintiffs herein take nothing from the defendant John B. Angel. 2. That on the cross-complaint herein it is declared that the defendant and cross-complainant John B. Angel is not indebted to the complainants and cross-defendants, Charles N. Alexander and Katherine J. Alexander in the sum prayed for in the plaintiffs' complaint or in any sum whatsoever."

Plaintiffs appeal from the judgment contending that neither the Alexander-Haws agreement, itself, nor the pleadings of defendant Angel, nor the testimony of any of the parties, support the court's finding that a novation had been effected.

The facts of the case are: The plaintiffs Charles N. Alexander and Katherine J. Alexander, appellants herein, sold a

fountain lunch and restaurant to defendant, John B. Angel, respondent herein, on January 2, 1947. On that date in the City of Oakland two promissory notes were executed by respondent to appellants secured by a chattel mortgage on the business fixtures. One note was for \$2,150 due January 2, 1948, the other for the same amount due January 2, 1949.

Prior to the maturity date of either of the notes respondent sold his business to the Haws. Just prior to this sale a new agreement was executed by appellants Alexander and Haws. It reads as follows:

"In consideration of the forbearance of Charles N. Alexander and Katherine J. Alexander in asserting their right to payment of the sum of \$2150, due and payable January 2, 1948, pursuant to that certain promissory note, made and executed by John B. Angel on January 2, 1947, and payment of the sum of \$2150, due and payable on January 1, 1949, * * * both of which notes are secured by a chattel mortgage on fixtures and equipment now located in that certain storeroom * * * we, the undersigned, purchasers and assignees of Angel's Fountain Lunch, formerly known as the Dimond Pastime, located at 3421 Fruitvale Avenue, Oakland, California, hereby agree to make monthly payments in the sum of \$150.00 to include interest at the rate of six (6) percent per annum. We hereby agree to make said payments on the 28 day of each month, commencing on the 28 day of October, 1947, until the full amount of the principal of \$4300 is paid.

"In the event, however, said payments as aforesaid, are not made in the manner as hereinbefore provided, then Charles N. Alexander * * * may, at their option, declare the full amount to be due and payable. In such event said payments are not made, we, the undersigned, hereby agree to pay all court costs made necessary in the collection of these notes and such attorney fees as the court may determine." It was signed by Robert J. Haws, Zada M. Haws, Charles N. Alexander and Katherine J. Alexander.

Haws made 8 payments to appellants, amounting to \$636.06, the first on October 28, 1947, the last on November 24, 1948.

No demand was made on respondent for payment until January, 1949, at the time the second note became due when a formal demand was sent on both notes before appellants filed the suit.

Mr. Fox, real estate agent for respondent, negotiated the sale between respondent and the Haws, and was instrumental in obtaining the agreement between the Haws and the Alexanders. At no time did the three parties meet to discuss the agreement which respondent alleges relieved him of his obligation to appellants. Angel testified he first learned of the agreement between Haws and Alexander about the time the sale was made but that he did not remember actually seeing it until about the time of the institution of the action. Mr. Alexander testified that in negotiating the agreement he dealt only with Mr. Fox; he never discussed it with respondent nor with the Haws; that he was told by Fox that Haws wanted the agreement to protect him, for if Alexander foreclosed on the chattel mortgage three or four months after Haws had bought the business Haws would lose everything. Alexander testified, after being asked if any demand had ever been made upon him for the notes, that he told Fox the notes would be held and not released under any circumstances. He also testified that when he received the payments from Haws he understood them to be payments on the notes on respondent's account. Respondent paid nothing on the notes, assuming that Haws was making the payments.

Appellants contend that there was no novation and the trial court erred in so holding. They base their contention on the following arguments: That the Alexander-Haws agreement provided for the collection of the notes in case payments were not made and that if a novation had been effected there would be no notes to collect, that any action would necessarily be upon the later agreement. Respondent answers that a provision had already been made for the collection of attorney's fees and payments of costs in the original chattel mortgage and if the new agreement had not been intended to supplant that, the

provision for costs and attorney's fees on the collection of the notes would have been mere surplusage. Therefore the new agreement must have been intended as a novation.

Appellants also argue that the finding of a novation is contrary to the pleadings of respondent in certain particulars, that in the second defense to the complaint respondent affirmatively alleges with reference to the payments made by Haws "that said plaintiffs accepted said payments in performance of defendant's obligation." In the cross-complaint it was alleged "that the cross-defendants Charles N. Alexander and Katherine J. Alexander agreed to the assumption by the cross-defendants Robert J. Haws and Zada M. Haws of all of the obligations of the cross-complainant under said mortgage and notes." They claim if there had been a novation effected there would be no notes or mortgages any longer in effect, that the allegations completely negative any idea of a novation.

Appellants argue that nowhere in the testimony of Alexander, Angel or Haws is there any claim that it was ever agreed or understood that the original obligation of Angel on his notes and chattel mortgage was to be released. A reading of the reporter's transcript reveals no clear cut intent on the part of the interested parties to effect a novation by the new agreement, relieving respondent of his obligation.

In conclusion appellants state that in order to effect a novation "a. The original debtor would have to be released; b. The original debtor would have to be a party to the novation agreement; c. It is the intent of the obligee that is controlling in determining whether there has been a novation."

Respondent answers that the pleadings expressly raise the issue of novation; that the evidence is sufficient to support the trial court's findings and verdict; that appellant's attorney was the one who prepared the agreement and if he hadn't intended it as a release of respondent's obligation he could and should have so stated in the agreement; that inasmuch as the new agreement was so entirely different

in its terms from those under the notes that it must have been intended as a completely new agreement replacing the other. Respondent contends that the action of the parties clearly indicate a novation, stating that appellants' failure to contact respondent at the time the new agreement was made and their delay in making demand on the notes after Haws failed to meet his obligation indicate they considered respondent out of the picture, released from his obligations. But the problem is not that simple. It is the intention of the obligee which is the controlling factor.

[1,2] The Alexander-Haws agreement is expressly tied to a consideration for "the forbearance" of appellants to press payment of the two promissory notes. In the negotiations with respondent's agent, Alexander refused his request to deliver the notes and informed the agent that he would not release respondent under any circumstance. This evidence completely negates any intention on the part of appellants to create a novation.

It is elementary that intention to release the primary debtor is the first principle of a novation. "Without release of the original debtor—there being no other consideration for the agreement—there is no consideration and consequently no contract." 20 Cal.Jur. p. 251.

[3] "Novation is a bilateral (or multi-lateral) contract requiring the mutual assent of all the parties, Civ.Code, sec. 1530; 20 Cal.Jur., p. 249, § 4; and obviously, as between obligor and obligee, it is the intent of the latter that is controlling on the question of waiver or release of the obligation under the original agreement." *Ayoob v. Ayoob*, 74 Cal.App.2d 236, 251, 168 P.2d 462, 472. "In the determination of this question, cognizance must be taken of the well established rule that the burden of proving a novation is on the party asserting its existence (*Colley v. Chowchilla Nat. Bank*, 200 Cal. 760, 770, 255 P. 188, 52 A.L.R. 569; 46 Corpus Juris, pp. 625, 626, § 72), and that the proof in support thereof must be clear and convincing. *Columbia Casualty Co. v. Lewis*, 14 Cal.App.2d 64, 72, 57 P.2d 1010." *Ayoob v. Ayoob*, supra,

230 P.2d—41½

74 Cal.App.2d at page 250, 168 P.2d at page 471.

The judgment is reversed.

GOODELL and DOOLING, JJ., concur.



104 Cal.App.2d 98

COPELAND v. RABING et al.

Civ. 7994.

District Court of Appeal,
Third District, California.

May 8, 1951.

Action by Esther Copeland, formerly known as Esther Rabing, against C. H. Rabing, and others, to have set aside a deed to defendants of certain realty and for an accounting. The Superior Court, Sutter County, Warren Steel, J., granted defendants' motion for a nonsuit as to the cause of action by which plaintiff sought to set aside the deed and rendered judgment for plaintiff on the cause of action for an accounting and plaintiff appealed. The defendants moved to dismiss the appeal. The District Court of Appeal, Peek, J., held that plaintiff's two causes of action were separate and distinct and plaintiff's right to an accounting of profits would not be affected by the setting aside of her deed and therefore her acceptance of the amount found to be due her on the accounting was not a waiver of the appeal from the portions of judgment with which plaintiff was dissatisfied.

Defendants' motion to dismiss appeal denied.

1. Appeal and error ⇐161

Generally a party who has accepted benefits of a judgment is precluded from prosecuting an appeal therefrom, since the two courses of action are totally inconsistent.

2. Appeal and error ⇐162(2)

Where plaintiff sought to set aside deed to defendants of her interest in realty which parties held as joint tenants, and also

sought an accounting of profits, causes of action were separate and distinct and acceptance by plaintiff of amount of judgment rendered in her favor on cause of action for accounting did not preclude plaintiff from appealing from order denying her motion for new trial on cause of action by which plaintiff sought to set aside deed.

3. Joint tenancy ☞8

Plaintiff's right to an accounting of profit from operation of realty held by plaintiff and defendants as joint tenants, for years 1946 and 1947 would not be affected by setting aside of plaintiff's 1947 deed to defendants and whatever rights of respective parties were for subsequent years would be determined in a separate proceeding for an accounting for later period.

4. Appeal and error ☞162(2)

Where an appellant's right to a benefit secured by a judgment will not be affected by a reversal of other parts of judgment, his acceptance of such benefit will not act as a waiver of his appeal from portions of judgment with which he is dissatisfied.

R. H. Schwab, Carl Kuchman, Sacramento, for appellant.

W. W. Jacka of Jacka & Frasse, San Jose, for respondents.

PEEK, Justice.

This is a motion to dismiss an appeal on the ground that appellant is estopped from prosecuting the same by virtue of having accepted payment of \$3,027.72 in satisfaction of the judgment in her favor.

The original complaint stated three causes of action, of which only the latter two are involved in this proceeding. By the second cause of action plaintiff sought to have canceled and set aside her deed to respondents executed on October 30, 1947, conveying all of her right, title and interest in certain realty then held by her and respondents as joint tenants, on the ground that the grant was induced by respondents' fraudulent misrepresentations. A motion

for a nonsuit was granted as to this second cause of action. The third cause of action was for an accounting of the profits of the operation of the real property, a ranch, for the years 1946, 1947, 1948 and 1949. As to this cause the court found \$2,939.52 to be due and owing to appellant, and judgment was entered in that amount. It is the acceptance of this sum and the filing of a satisfaction of judgment therefor, which respondents now contend bars appellant's appeal from the order granting the motion for nonsuit as to the second cause of action.

[1-3] The general rule is that a party who has accepted the benefits of a judgment is precluded from prosecuting on appeal therefrom, since the two courses of action are totally inconsistent. *Estate of Ayers*, 175 Cal. 187, 165 P. 528; *Schubert v. Reich*, 36 Cal.2d 298, 223 P.2d 242. A limitation is placed on this rule, however, i.e. in those cases where a reversal of the judgment or order appealed from cannot affect the right of the party to the benefit he has already secured. The present case well illustrates the exception. Here distinct causes of action were joined in one complaint and there was a judgment in favor of plaintiff on only one of them, the benefit of which she accepted. She then appealed—not from that part of the judgment in her favor (the third cause of action)—but from the order denying her motion for a new trial which affected only the second cause of action. Appellant's right to an accounting of the profit from the operation of the property for the years 1946 and 1947 will not be affected by the setting aside of her deed of October 30, 1947, should such relief be granted upon the final disposition of her appeal. Whatever the rights of the respective parties may be as to the profits from the operation of the ranch for the subsequent years, that should be properly determined in a separate proceeding for an accounting for the later period. See *Browning v. Browning*, 208 Cal. 518, 282 P. 503; *Wold v. League of the Cross*, 107 Cal.App. 344, 290 P. 460.

[4] In *Weil v. Weil*, Cal.App., 224 P.2d 460, 469, the court stated: " * * * where

an appellant's right to a benefit secured by a judgment will not be affected by a reversal of other parts of the judgment, his acceptance of such benefit will not act as a waiver of his appeal from the portions of the judgment with which he is dissatisfied."

The motion to dismiss is denied.

ADAMS, P. J., and DEIRUP, Justice,
pro tem., concur.



104 Cal.App.2d 88

BROWN v. BROWN.

Civ. 7832.

Sac. 6115.

District Court of Appeal,
Third District, California.

May 8, 1951.

Action for divorce by Aimee Lynette Brown against Harry Daniel Brown wherein motion was filed by defendant for order modifying final decree of divorce to provide that plaintiff be restrained from removing children from custody of defendant or from state and that defendant be awarded sole custody of children. The Superior Court, Siskiyou County, James M. Allen, J., granted defendant's motion, and plaintiff appealed. The District Court of Appeal, Adams, P. J., held that mother was not entitled to notice of action of court upon stipulation entered into between parties which indicated that it was to be acted upon by court and that judgment decree rendered thereon was valid.

Judgment affirmed.

1. Parent and child ☞2(1)

Parents have legal right, subject to control of court in proceedings wherein welfare of child is involved, to contract with each other as to custody and control of their offspring, and as between parents promise by one parent that other may have custody and control of child is legal and is sufficient consideration to support agreement on part of parent in whose favor promise is made.

2. Divorce ☞297

Where parties to divorce proceeding entered into stipulation awarding custody of children to father pending further action of court, mother thereby indicated that court was expected to act upon such stipulation and consented to entering of amended interlocutory decree and final decree awarding custody to father without further necessity of notice.

3. Divorce ☞332

Where final decree of divorce awarded custody of children to father with the right in mother to have children visit with her during summer vacation and mother thereafter took children to another state and held them in excess of vacation period and procured decree in such latter state awarding her custody of children, despite such foreign decree, husband was entitled to order restraining mother from removing children from state in future.

4. Divorce ☞301

In action for divorce wherein right to custody of children was issue, evidence sustained finding that father was proper person to have such custody and that mother was not fit person to have custody.

Mark M. Brawman, Yreka, for appellant.
Tebbe & Correia, Yreka, for respondent.

ADAMS, Presiding Justice.

Plaintiff and respondent were formerly husband and wife, residing in Dunsmuir. On May 10, 1944, Mrs. Brown filed an action for divorce, and on May 29, 1944, an interlocutory decree was entered in her favor, which decree confirmed a settlement agreement between the parties which provided that Mrs. Brown should have custody of the daughter and son of the parties, aged two and one years, respectively, with certain provisions regarding visitation rights and payments by defendant for support of the children. On April 2, 1945, a stipulation signed by the parties to the action was filed, which agreed that the custody of the children should be awarded to the father, with

rights of visitation by Mrs. Brown, and a provision that she should have the children visit with her during the summer vacations, during which time defendant should pay her \$60 per month for their support. This stipulation at least impliedly requested the court to award the custody to Mr. Brown; and the court modified the interlocutory decree to conform to the stipulation.

On or about June 10, 1945, Mrs. Brown married Lee Cool, with whom she lived until October 30, 1945. That marriage was annulled December 3, 1945, it having been consummated before the final decree of divorce from Brown. In the meantime Mrs. Cool had gone to Oregon.

On July 16, 1945, on application of Mr. Brown, the final decree of divorce was entered, and the orders for care and custody contained in the amended interlocutory decree were repeated therein.

Mrs. Brown, on February 11, 1946, married Kenneth Smith, her fourth husband, and thereafter resided in Portland, Oregon. In June, 1948, she and her husband came to Dunsmuir and took the children from Mr. Brown's home during his absence, and carried them to Portland, ostensibly for the summer vacation period, as provided in the amended interlocutory and final decrees. The record shows that they were taken while negotiations were still pending between her attorney and Mr. Brown's counsel for her to give a bond to return them to California at the end of the vacation. In Oregon she filed an action seeking custody of the children. Mr. Brown was served with process in Dunsmuir, but did not appear. However, in August of that year, before a decision of the Oregon court had been rendered, Mr. and Mrs. Slimmer, the father and mother of Mrs. Brown, went to Portland. There Mr. Slimmer picked the two children up off the street and returned with them to Dunsmuir.

Thereafter, on September 8, 1948, the Oregon court entered a decree which purported to modify the final decree of the California court so as to award the custody of the children to the mother, stating that their best interests and welfare demanded

that they stay within the State of Oregon, and providing that neither party should remove them therefrom; that the children should be returned to the jurisdiction of that court and that until they each reached the age of twenty-one years their father should pay the sum of \$50 per month for their support; and that the father might apply to that court for rights of visitation. There was also a statement in the decree that the mother was in all respects a fit and proper person to have the custody of the children.

On September 1, 1948, after the children had been returned to Dunsmuir, Mr. Brown filed in the original divorce action a motion for an order modifying the final decree of divorce to provide that Mrs. Brown (then Smith), her husband, agents, etc., be restrained from removing the children from his custody or from the state of California, and that he (Brown) be awarded the sole custody of the children; and that Mrs. Brown be enjoined from proceeding in or maintaining any action for the custody of the children in any other state. Mrs. Brown appeared in that proceeding and filed a notice of motion to modify the final decree to award the custody of the children to her, and permit her to take them to and keep them in Oregon. On October 19th she filed notice of additional grounds for her motion, setting up the Oregon decree; and on November 10th she filed a notice of motion for an order vacating the order modifying the original interlocutory decree, and vacating the custodial provisions of the final one. Affidavits were filed by the parties in support of their respective motions.

On February 28, 1949, the court began hearings on the aforesaid motions. Testimony was adduced by both parties, and on March 9, 1949, a judgment was made and entered confirming the custody in Mr. Brown, with the right of Mrs. Brown to have the children with her during the school summer vacations, but prohibiting her from taking them out of California, and enjoining all persons from so doing. In the court's order it was found that the best interests of the children would be

served by awarding their custody to their father. It recited that when they were two and three years old Mrs. Brown, in order to live her own life undisturbed by the responsibilities of their care, had delivered them to their father, that the evidence showed that she was afflicted with epilepsy and might suffer further attacks, and that she was not, and had not been since February 15, 1945, a fit and proper person to have custody of the children, and that Mr. Brown was such a fit and proper person.

[1] From that decree Mrs. Brown has taken this appeal. Appellant's first contention is that the order of modification of the interlocutory decree, made on April 2, 1945, is void, and should have been set aside on her motion because she was given no notice of the time and place of making application therefor. This contention is without merit. In *Tiffany & Co. v. Spreckels*, 202 Cal. 778, 791, 262 P. 742, 747, the court said: "Parents have a legal right to contract with each other as to the custody and control of their offspring. *Sargent v. Sargent* 106 Cal. 541, 39 P. 931; *Anderson v. Anderson*, 56 Cal.App. 87, 204 P. 426; *Van der Vliet v. Van der Vliet* [200 Cal. 721] 254 P. 945. This right, however, is subject to the control of the court in proceedings wherein the welfare of the child is involved. *Black v. Black*, 149 Cal. 224, 86 P. 505. But, as between the parents themselves, a promise by one parent that the other may have the custody and control of their child is legal, and is a sufficient consideration to support an agreement on the part of the parent in whose favor the promise is made." Also see *Puckett v. Puckett*, 21 Cal.2d 833, 839-840, 136 P.2d 1.

Appellant relies upon *In re Saunders*, 76 Cal.App.2d 635, 637, 173 P.2d 818, as holding that notice is required; but in that case there was no stipulation.

[2] In the case before us the "stipulation" between Mr. and Mrs. Brown was not merely an agreement between the parties. It was entitled in the divorce proceeding, and it provided that the cus-

tody of the children "be awarded" to Mr. Brown "pending further action of the above-entitled court." Thus it was obviously intended to be presented to the court for its action thereon, and Mrs. Brown was well aware of this. Furthermore, she turned the children over to Mr. Brown and left the state, and not until three years later did she seek to have them with her, and then only for the vacation period provided for in her stipulation and the order of the court. We think these facts sufficiently establish that she well knew and intended that the court was to act upon the stipulation, and consented that no further notice to her was to be given or expected.

[3,4] The second contention of appellant is that the court erred in failing to give full faith and credit to the Oregon decree. In view of the fact that the Oregon decree failed to give full faith and credit to the California decree which, as amended on stipulation of the parties, awarded the custody of the children to their father, appellant's contention is somewhat inconsistent. We also think that the decisions upon which appellant relies are equally applicable to the situation presented at the hearing in California. The children were then in California with their father, who, under the California decree, was legally entitled to their custody. Appellant appeared in the recent proceeding, and testimony was adduced by both parties. The parents of Mrs. Brown testified in support of Mr. Brown, as did her brother and one of her former husbands. The evidence showed that for about three years Mrs. Brown left the children with their father, and that when in 1948 she took them to Oregon she knew that she had no right to retain them after the summer vacation when she should have returned them to Dunsmuir. Their domicile in Oregon was at most, if it constituted domicile at all, only temporary. If that was, as she claims, sufficient to give the Oregon court jurisdiction, their presence in California after their return was sufficient to give jurisdiction over them to the Siskiyou County court. If any showing of change

of circumstances during the period which elapsed after the interlocutory decree was amended to give custody to the father and the present hearing was necessary, there was ample evidence to show it. There was also ample evidence to sustain the court's finding that Mrs. Brown was not a fit and proper person to have the custody. There was testimony that she had suffered from attacks of epilepsy and that one so afflicted might suffer further attacks. There was also evidence that when Mrs. Brown announced her intention to marry Mr. Cool and her parents and brother opposed it, she stated to her brother that she had to marry him, and that she did not care whether she had the children or not; and that she then turned them over to their father. Her conduct in taking action in Oregon to secure custody, after joining in a stipulation in California court that custody be transferred from her to the father, and knowing that her possession of them in Oregon was only for the vacation period, and the further fact that after leaving California in 1945 she had for some three years evinced little interest in her offspring until she and her husband took them away in 1948 under the circumstances above set forth, constituted sufficient grounds for the only substantial change in the previous order of the Siskiyou County court, to wit: that the children should not be taken out of California. The Siskiyou County court originally had jurisdiction of the parties and the children, where all had resided for several years. It amended its interlocutory decree by agreement and request of the parties, and the final decree was based upon the interlocutory decree as amended. The children remained with the father in conformity with those decrees, without protest by the mother; and Mrs. Smith, when she took them to Oregon some three years later, well knew that she was entitled to keep them with her only until the end of vacation period. At the time of the proceeding before us the children were in California, and in their father's custody in conformity with the prior decrees. Both the father and the mother invoked the jurisdiction of the

court to determine whether the father's custody should continue. It had jurisdiction of the action, the parties and the children; and its findings to the effect that the best interests of the children require that they be left with the father, that he is a fit and proper person to have such custody, which is conceded, and that their mother is not, are sustained by sufficient evidence.

The record does not show Mrs. Smith's complaint filed in Oregon, nor does it appear what evidence was there produced; particularly it does not appear that the Oregon court was made aware of plaintiff's stipulation made in California that Mr. Brown should have custody. There was evidence that Mrs. Smith is of a nervous temperament, and her instability is apparent from the record. Under these circumstances no citation of authority is necessary to justify our affirmation of the orders from which this appeal was taken.

The orders are, and each of them is, affirmed.

VAN DYKE, J., and DEIRUP, Justice pro tem., concur.



104 Cal.App.2d 32

PEOPLE v. GRAFF.

Cr. 4521.

District Court of Appeal, Second District,
Division 1, California.

May 2, 1951.

Frederick Smith Graff was convicted in the Superior Court of Los Angeles County, Mildred L. Lillie, J., of issuing fictitious checks and defendant appealed. The District Court of Appeal, Drapeau, J., held that the evidence was sufficient to sustain the conviction.

Affirmed.

1. Criminal law — 1069(6)

Time requirements in the Rules on Appeal are mandatory, and appellate courts

are without jurisdiction to consider an appeal taken after the period limited in the Rule. Rules on Appeal, rule 31.

2. Criminal law ⇨1069(1)

In prosecution for issuing fictitious checks, where the judgment was rendered on March 8, 1950, and the notice of appeal was filed March 20, 1950, but was dated March 16, 1950, and the notice of appeal was prepared by the defendant himself while confined in the county jail, appeal was sufficient and the District Court of Appeal would pass upon the contentions made by defendant. Pen. Code, § 476.

3. Criminal law ⇨1023(10)

A notice of appeal in a criminal prosecution which purported to appeal from the "sentence" would be dismissed.

4. Criminal law ⇨1114(1)

An appellate court cannot consider matters not appearing in the record.

5. Criminal law ⇨728(3)

Unless a defendant promptly complains to the trial court, he is bound by the acts of his counsel.

6. Criminal law ⇨1037(1)

In prosecution for issuing fictitious checks, defendant's charges that his court appointed counsel was guilty of misconduct, which were made after the verdict, could not be considered on appeal. Pen. Code, § 476.

7. Criminal law ⇨1119(4)

In prosecution for issuing fictitious checks, the record failed to show any misconduct on the part of the district attorney. Pen. Code, § 476.

8. False pretenses ⇨49(3)

Evidence sustained conviction for issuing fictitious checks. Pen. Code, § 476.

Frederick Smith Graff, in pro. per., for appellant.

Edmund G. Brown, Atty. Gen., Howard S. Goldin, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant was convicted by a jury of three counts of issuing fictitious checks.

He admitted one prior felony conviction and imprisonment.

The circumstances attending cashing the checks were similar. Defendant entered a store and purchased an article—shoes in one place, a woman's slip and a boy's sport shirt in the others.

He tendered checks in payment, each check being for more than the purchase price of the article purchased. Thus he got the money and the merchandise.

The maker of the checks was unknown and had no account in the bank upon which they were drawn. The payee of the checks was not the defendant, but a man named Kenneth Gilbert. Gilbert's forged endorsement was already on the checks when presented. Defendant exhibited Gilbert's automobile driver's license, and represented that he was Gilbert. Gilbert had theretofore left his driver's license in the glove compartment of an automobile which was stolen.

The clerks who sold the articles, and the store managers who okayed the checks positively identified defendant as the man who cashed them.

Members of defendant's family testified to a alibi with reference to the dates when two of the checks were cashed. Defendant took the stand and categorically denied passing any of the checks. As stated, none of the writing on the checks was defendant's, his conviction being based on the crime of uttering. (Pen. Code, sec. 476.)

First, the Attorney General argues that the appeal must be dismissed, because defendant's notice of appeal was not filed with the clerk of the Superior Court within ten days after rendition of the judgment, as required by Rule 31 of Rules on Appeal.

Judgment was rendered March 8, 1950; notice of appeal was filed March 20, 1950; it was dated March 16, 1950.

Defendant has represented himself on appeal without counsel. He prepared his notice of appeal himself, while confined in the county jail. In his brief he states that the notice of appeal was prepared and signed on March 16, 1950. He does not say that he mailed or caused the notice of appeal to be mailed, or gave it to anyone for that purpose.

[1,2] Time requirements in the Rules are mandatory, and appellate courts are without jurisdiction to consider an appeal taken after the period limited in the Rule. In *re* Horowitz, 33 Cal.2d 534, 203 P.2d 513. However, the facts in this case come close enough to the exception to the rule stated in *People v. Slobodion*, 30 Cal.2d 362, 181 P.2d 868, that this Court is of the opinion it would be better to consider and pass upon the contentions made by defendant.

[3] The Attorney General also suggests that that portion of defendant's notice of appeal which purports to appeal from the "sentence" should be dismissed. This position is correct. *People v. Tallman*, 27 Cal.2d 2C9, 163 P.2d 857.

Defendant claims that he was not accorded a fair trial because he asserts: (a) that the public defender failed to present all of the evidence favorable to him which was available; (b) revealed facts to the district attorney which he should have kept in confidence for use on the trial; (c) called defendant to the witness stand to testify in his own behalf, knowing that defendant could not associate dates with events, with the result that defendant's testimony of an alibi conflicted with that of members of his family; (d) misconduct of the district attorney; and (e) insufficiency of the evidence to support his conviction.

Nothing appears in the reporter's transcript which would indicate any professional misconduct of defendant's counsel. Defendant's charges are all based on asserted facts outside the record.

[4-6] An appellate court cannot consider matters not appearing in the record. *People v. O'Neill*, 78 Cal.App.2d 888, 179 P.2d 10. Unless a defendant promptly complains to the trial court, he is bound by the acts of his counsel. *People v. Youders*, 96 Cal.App.2d 562, 215 P.2d 743. None of defendant's charges were made until after verdict.

[7] Neither does the record show any misconduct of the district attorney.

[8] And there being substantial evidence to support the verdict, *People v. Wright*, 94 Cal.App.2d 70, 210 P.2d 263,

* Subsequent opinion 240 P.2d 304.

all of defendant's labored effort to break down the weight, value, and effect of the evidence against him is wasted. This is a jury state. The jury which tried defendant found him guilty upon positive identification of him by seven clerks and store managers. No legal error appearing in the record, that is the end of it.

The judgment is affirmed, and the purported appeal from the sentence is dismissed.

WHITE, P. J., and DORAN, J., concur.



CARY et ux. v. WENTZEL et al.

Civ. 18195.

District Court of Appeal, Second District,
Division 2, California.

May 3, 1951.

Rehearing Denied May 17, 1951.

Hearing Granted June 28, 1951.*

Action by George E. Cary and wife, against Lawrence Wentzel and others, for personal injuries resulting from automobile accident, alleged to have been caused when defendant drove his automobile on the left-hand side of the road rounding a curve and collided head-on with an automobile which was proceeding plaintiff's automobile which automobile plaintiff then struck. The Superior Court, San Luis Obispo County, Ray B. Lyon, J., entered judgment upon verdict for plaintiff in amount of \$1000, and upon motion by plaintiffs, granted a new trial on the issue of damages alone, and defendants appealed. The District Court of Appeal, McComb, J., held that the trial court did not abuse its discretion in holding that \$296 was inadequate for plaintiffs' suffering and pain.

Affirmed.

I. Appeal and error ⇐880(2)

Since there is no right of contribution between joint tort-feasors, where the evidence sustains a judgment against a defendant, he may not urge as error the fact that his codefendant or another party who was also sued was relieved from liability even though the evidence might have sus-

tained the verdict or judgment against co-defendant or other party.

2. Automobiles ⇨247

Where three separate actions, based on collision which allegedly resulted from driving of defendants' automobile on left-hand side of road around curve and colliding head-on with an automobile, which in turn was struck by automobile following it, were consolidated for trial, and a favorable verdict for defendants was returned as to two of the actions, but against defendants as to the third action, defendants could not complain that the verdicts based on the same evidence were conflicting as to whether defendants were negligent in the operation of their automobile.

3. Appeal and error ⇨1078(1)

Where defendant on appeal did not urge error in sustaining of judgment, other than that the findings in the consolidated actions were inconsistent, any other points attacking the judgment were waived.

4. New trial ⇨9

It is a general rule that in the absence of an abuse of discretion a trial court may grant a new trial on the issue of damages alone.

5. Damages ⇨132(15)

Where plaintiff suffered injury to her knee and back, two of her teeth had been knocked out, and from time of accident to time of trial, she had been confined to her bed almost constantly, the trial court did not abuse its discretion in holding that \$296 was not adequate general damages for the pain and suffering.

6. Appeal and error ⇨108

An appeal does not lie from a verdict.

A. H. Brazil, San Luis Obispo, for appellant Lawrence Wentzel.

Kenneth J. Thayer, Bakersfield, for respondents.

McCOMB, Justice.

After trial before a jury in an action to recover damages for injuries resulting from the negligent operation of defendants' automobile, they appeal from (1) the judg-

ment, and (2) the order granting plaintiffs' motion for a new trial on the issue of damages only. There is also a purported appeal from the verdict.

Facts: Viewing the evidence in the light most favorable to plaintiffs (respondents), the record discloses that defendant Lawrence Wentzel on a dark rainy afternoon drove his automobile on the left side of the center line on the highway, down a steep hill, around a curve which obstructed his view, and collided with an automobile which was being driven in the opposite direction by Robert Seelinger. As a result of the impact the Seelinger automobile was thrown to a position on the highway which made it impossible for plaintiffs' car to avoid a collision with it. Just prior to the accident plaintiffs' automobile was following the car driven by defendant at a proper speed and distance.

As a result of the accident Mr. Seelinger filed an action for negligence against defendants. The heirs of Dora Grove, who was a passenger in the Seelinger car, also filed an action for negligence, and plaintiffs instituted the present suit. By stipulation the three cases were consolidated for trial.

The jury returned a verdict in the Seelinger and Grove cases in favor of defendants (appellants herein), and in this action in favor of plaintiffs (respondents herein), awarding them damages in the sum of \$1,000. Thereafter the trial court granted plaintiffs' motion for a new trial on the *issue of damages solely*.

A. Defendants Appeal from the Judgment.

[1, 2] Defendants contend that since the jury found against Seelinger and Grove they impliedly found that defendants were not negligent in the operation of their car at the time of the accident; on the other hand, the finding of the jury in favor of plaintiffs in the instant cause was an implied finding that defendants were negligent in the operation of their car. Consequently the findings in the two actions based on the same evidence are inconsistent and the judgment herein should be reversed.

Since there is no right of contribution between joint tort-feasors, where the evidence sustains a judgment against a de-

fendant as in the instant case, he may not urge as error the fact that his codefendant or another party who was also sued was relieved from liability even though the evidence might have sustained a verdict or judgment against the codefendant or other party. (*Blackwell v. American Film Co.*, 189 Cal. 689, 698[6], 209 P. 999; *Jennings v. Day*, 7 Cal.App.2d 555, 557[1], 46 P.2d 193; *Switzler v. Atchison, T. & S. F. Ry. Co.*, 104 Cal.App. 138, 156[14], 285 P. 918; *Haun v. Tally*, 40 Cal.App. 585, 590, 181 P. 81; see also cases cited in 6 West's California Digest(1951) Appeal and Error, ¶880(2), page 243.)

[3] Since defendant has not urged other errors in the sustaining of the judgment it is deemed any other points attacking the judgment have been waived by them. (*Heglin v. F. C. B. A. Market, Inc.*, 70 Cal.App.2d 803, 806[4], 161 P.2d 976.)

B. Defendants' Appeal from the Order Granting the Motion for a New Trial on the Issue of Damages Only.

[4] *Question: Was it error for the trial court to grant a motion for a new trial on the issue of damages only? No.* It is the general rule that in the absence of an abuse of discretion a trial court may grant a new trial on the issue of damages alone.¹ (*McNear v. Pacific Greyhound Lines*, 63 Cal.App.2d 11, 15[3], 146 P.2d 34; *Hughes v. Schwartz*, 51 Cal.App.2d 362, 364[1], 124 P.2d 886; *Bauman v. City and County of San Francisco*, 42 Cal.App.2d 144, 159[14], 108 P.2d 989; *Brush v. Kurstin*, 11 Cal.App.2d 258, 262[4], 53 P.2d 777.)

An examination of *McNett v. Volfi*, 205 Cal. 89, 93, 269 P. 932, fails to disclose any holding contrary to the above cited cases.

Metropolitan Life Insurance Company v. Ray, 28 Ala.App. 357, 184 So. 282, which states a contrary rule is not authority in this state in view of contrary holdings of our appellate courts. (In re Estate of Hampe, 85 Cal.App.2d 557, 559[2], 193 P.2d 133; *Schneider v. Schneider*, 82 Cal.App.2d 860, 862[2], 187 P.2d 459.)

[5] In the present case the testimony disclosed that plaintiffs had incurred special

damages in the sum of \$704; that as a result of the accident Mary Cary had suffered from injury to her knee and back; that two of her teeth had been knocked out; and that from the time of the accident until the time of trial she had been confined to her bed almost constantly.

It is evident that the trial court did not abuse its discretion in holding that \$296 was not adequate general damages for the pain and suffering resulting to plaintiffs from the accident.

C. Defendants' Appeal from the Verdict.

[6] An appeal does not lie from a verdict. Therefore defendants' purported appeal from the verdict must be dismissed. (*Robins v. Weis*, 97 Cal.App.2d 144, 145[1], 217 P.2d 156; *Signorelli v. Miller*, 55 Cal. App.2d 538, 543, 130 P.2d 730; *Sawyer v. Sunset Mutual Life Ins. Co.*, 8 Cal.2d 492, 501[7], 66 P.2d 641. See also authorities cited in 5 West's California Digest Appeal and Error, ¶108, page 133.)

The judgment and order granting the motion for a new trial on the issue of damages only are and each is affirmed. The purported appeal from the verdict is dismissed.

MOORE, P. J., concurs.

WILSON, J., concurs in the judgment.



HEFFERNAN v. BENNETT & ARMOUR et al.
Civ. 14489.

District Court of Appeal, First District,
Division 1, California.

April 28, 1951.

Rehearing Granted May 28, 1951.*

Action by F. M. Heffernan against Bennett & Armour, a corporation, and John Lawler, as trustee for benefit of creditors of Bennett & Layton, Inc., to set aside as in fraud of creditors a transfer of certain real estate and the payment of certain monies to Bennett

1. For an exception to the general rule see *Hamasaki v. Flotho*, — Cal.App.2d —, 229 P.2d 801.

* Subsequent opinion 239 P.2d 129.

& Armour. The Superior Court in and for the City and County of San Francisco, Herbert C. Kaufman, J., entered judgment in favor of plaintiff and defendant corporation appealed. The District Court of Appeal, Fred B. Wood, J., held that the action was not brought to trial within the period of time required by Code of Civil Procedure, § 583.

Reversed and dismissed.

1. Dismissal and nonsuit ⇨60(3)

The period of pendency of defendant's appeal from an order denying its motion for change of venue, during which period it was impossible for plaintiff to proceed to trial, was an implied exception to statutory five year period within which actions must be brought to trial. Code Civ.Proc. § 583.

2. Dismissal and nonsuit ⇨60(3)

The time during which, for all practical purposes, going to trial would be impossible, whether because of total lack of jurisdiction or because proceeding to trial would be both impractical and futile, is excluded from determination whether an action has been brought to trial within statutory five year period. Code Civ.Proc. § 583.

3. Dismissal and nonsuit ⇨60(6)

Where action was filed December 7, 1942, and defendant filed its notice for appeal from an order denying its motion for change of venue April 16, 1943, and remittitur after decision on appeal was filed in the trial court May 4, 1944, December 27, 1948, was the last day upon which the action could be brought to trial, failing which court would lose all jurisdiction over the case except to dismiss action. Code Civ. Proc. § 583.

4. Dismissal and nonsuit ⇨60(6)

A motion for change of venue while pending before trial court was but a preliminary proceeding before cause was ready for trial, and was not within implied exceptions to five year period for bringing actions to trial as required by statute. Code Civ.Proc. § 583.

5. Dismissal and nonsuit ⇨60(3)

The test in determining whether preliminary proceedings are to be charged against the five year period prescribed by statute within which actions are to be

brought to trial, is whether plaintiff in view of statutory provisions had a reasonable opportunity to bring action to trial. Code Civ.Proc. § 583.

6. Dismissal and nonsuit ⇨60(6)

The time during which a defendant secretes himself within state to prevent service of summons, or resides outside state and thus prevents plaintiff from proceeding to trial, and time during which a defendant is absent in military service, is excluded in determining whether an action was brought to trial within statutory five year period. Code Civ.Proc. § 583.

7. Dismissal and nonsuit ⇨60(6)

Time consumed by defendant in making a motion for change of venue, by plaintiffs in opposing the motion, by both parties in preparing and filing briefs in support of their position, and by the court in considering the motion and making its decision, was not within the exceptions to the five year period prescribed by statute within which actions must be brought to trial. Code Civ.Proc. § 583.

8. Dismissal and nonsuit ⇨60(6)

Stipulation to set trial of case for certain day within statutory five year period in which actions must be brought to trial, which included an agreement not to dismiss the action on the ground that the same had not been prosecuted with due diligence to date, waived provisions of statute only as to past extensions and not as to future extensions. Code Civ.Proc. §§ 581a, 583.

9. Dismissal and nonsuit ⇨60(2)

An action is not brought to trial within contemplation of statute limiting time to five years after filing of action, by the mere making of an opening statement and then postponing the case to a definite date, or indefinite date, for the commencement of taking of evidence. Code Civ.Proc. § 583.

10. Dismissal and nonsuit ⇨60(2)

Where plaintiff made short opening speech on trial date, set within statutory five year period within which actions are required to be brought to trial, but introduced no evidence and presented no witnesses, and then moved for a continuance without the five year period, not for court's

convenience, but solely for convenience of plaintiff's own attorneys, action was not brought to trial within contemplation of statute. Code Civ.Proc. § 583.

11. Dismissal and nonsuit ⚡60(2)

The word "trial" as used in statute requiring any action to be brought to trial within five years after filing of action, means the trial of the issues of fact, the purpose of which is to determine the cause on the merits, and is not completed until decision of court is made and filed with clerk. Code Civ.Proc. § 583.

See publication Words and Phrases, for other judicial constructions and definitions of "Trial".

12. Dismissal and nonsuit ⚡60(2)

Neither a motion to set hearing and disposition of a demurrer save when a demurrer to a complaint is sustained without leave to amend and judgment is entered thereon which really dispenses with a trial unless the judgment is vacated, or the hearing and disposition of an application for a preliminary injunction, is deemed part of trial of an action. Code Civ.Proc. § 583.

13. Dismissal and nonsuit ⚡60(2)

A partial trial may be sufficient to comply with statute requiring any action to be brought to trial within five years from date of filing of action, if it consists of calling of witnesses and taking of evidence. Code Civ.Proc. § 583.

14. Dismissal and nonsuit ⚡60(2)

Amendment to statute authorizing voluntary dismissal of action by plaintiff at any time before the trial under certain conditions, which substituted words "before the actual commencement of the trial" for "before the trial," and declared that a trial shall be commenced at beginning of opening statement of plaintiff, and if there be no opening statement then at time of administering oath to the first witness, or the introduction of any evidence, did not change meaning of the word "trial" in statute providing that any action shall be dismissed which is not brought to trial within five years from date of filing. Code Civ. Proc. §§ 581, subd. 1, 583.

15. Dismissal and nonsuit ⚡73

Where defendant's motion to dismiss pursuant to statute providing that any action not brought to trial within five years from date of filing must be dismissed, was made within five year period, denial of motion was in court's discretion. Code Civ. Proc. § 583.

16. Dismissal and nonsuit ⚡60(3)

Denial of defendant's motion to dismiss action, pursuant to statute which required any action to be brought to trial within five years from date of filing of action, made after the five year period as extended by the period of the appeal from an order denying the change of venue, had expired, was error. Code Civ.Proc. § 583.

17. Appeal and error ⚡78(2, 3), 913, 918(1)

Order of court permitting amendment of complaint and addition of party, though made and filed the same day as the judgment, was presumed to have been made and filed before judgment, and was an intermediate nonappealable order.

18. Appeal and error ⚡82(3), 935(1)

Order which denied defendant's motion to vacate and strike order permitting amendment of complaint to conform to proof, was presumed to have been made and filed before judgment and was an intermediate nonappealable order.

19. Appeal and error ⚡101(1), 1169(1)

In action to set aside as in fraud of creditors, certain conveyances to defendant, order appointing the receiver was appealable, and subject to reversal on ground that action was not brought to trial within five year period allowed by statute. Code Civ.Proc. § 583.

20. Appeal and error ⚡82(1)

In action to set aside as in fraud of creditors, certain conveyances to defendant, motion of defendant to vacate and strike an order appointing a receiver, findings of fact, conclusions of law, and judgment for plaintiff, on grounds that such actions were taken while defendant's sole attorney was suspended, and without notice to defendant to obtain an attorney or appear in person as required by statute, was appealable as a

special order made after final judgment. Code Civ.Proc. § 286.

21. Receivers ⇐58

Where action had not been brought within statutory five year period, portion of order which denied defendant's motion to vacate order appointing a receiver, and to strike the findings of fact and conclusions of law, and the judgment, was void. Code Civ.Proc. § 583.

Vincent Hallinan, San Francisco, for appellant.

Erskine, Pillsbury & Tulley, Appel, Liebermann & Leonard, and G. D. Schilling, all of San Francisco, for respondent.

FRED B. WOOD, Justice.

Defendant appeals from the judgment rendered in favor of the plaintiff and against the defendant, and from certain orders hereinafter mentioned, in an action to set aside as in fraud of creditors the transfer of certain real property to defendant in March, 1938, and the payment of \$16,000 to defendant in April, 1939.

Defendant claims the judgment is erroneous and should be reversed for the following reasons assigned by it: (1) Insufficiency of the evidence to support the findings of fact; (2) erroneous conclusions of law drawn from certain of the facts found; (3) errors of law occurring during the trial; (4) failure to bring the action to trial within five years after action filed, and (5) the action was barred by the statute of limitations.

We will consider first the jurisdictional question: Was the action brought to trial within the period of time required by section 583 of the Code of Civil Procedure? That section, during the pendency of this action until September 19, 1947, declared that "Any action * * * shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred * * * unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have * * * stipulation in writing that the time may be ex-

tended * * *." In 1947 the section was amended to substitute for "stipulated" the words "filed a stipulation", Stats.1947, ch. 678, p. 1715, effective Sept. 19, 1947, a change not material to the present inquiry.

[1-3] To this five-year period, in the instant case, must be added the period of the pendency of defendant's appeal from an order denying its motion for change of venue. This is one of the implied exceptions to the five-year period prescribed by section 583, an interval during which, "for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile." *Christin v. Superior Court*, 9 Cal.2d 526, 533, 71 P.2d 205, 208, 112 A.L.R. 1153. This interval in this case was the period of one year and 18 days. Defendant filed its notice of appeal April 16, 1943. The remittitur, after decision upon appeal, was filed in the trial court May 4, 1944. The action was filed December 7, 1942. It follows that December 27, 1948, was the last day upon which the action might be "brought to trial," failing which the court would lose all jurisdiction over the case except to dismiss the action.

On January 3, 1949, the case was on the calendar for trial. The parties made their opening statements and then the case was continued until the next day when the first witness was sworn and testified. Thereafter, the trial proceeded to completion. This was not a bringing of the action to trial within the period required by section 583.

[4-6] Plaintiff contends, however, that there should be added to the five-year period the time during which defendant's motion for change of venue was pending in the trial court, a period extending from January 20, 1943, when notice of motion was filed, to April 9, 1943, when the order denying the motion was made. Plaintiff's theory is that during that period the trial court had no jurisdiction except to consider and decide that motion; hence, a period during which it was futile to proceed to trial, an interval impliedly excepted from the five-year period. That argument over-

looks the fact that the making and disposition of such a motion is but one of a variety of preliminary proceedings (such as the hearing and disposition of demurrers, motions to strike, and motions to dismiss) that are potentially involved in the conduct of any action in the trial court before issues are joined and the cause is ready for trial. The time consumed by such preliminary proceedings in the trial court is not within any of the implied exceptions from the five-year period. In effect, time so consumed was in most cases automatically excluded during the period that the five years ran from the filing of the answer (1905 to 1933). The principal result of the 1933 amendment to section 583 (causing the five years to run from the filing of the action), and the manifest intent of the Legislature, was to include the time consumed in preliminary proceedings of that character. As stated in *Breakstone v. Giannini*, 70 Cal. App.2d 224, at page 229, 160 P.2d 887, 890: "The Code extends to defendants the right to demur to the complaint and to the amended complaints. It is quite usual for defendants to demur and for the court to consume time in deciding the legal questions thus presented. It is also quite customary for counsel to stipulate that additional time may be allowed one side or the other within which to prepare, serve and file their respective pleadings. These practices must have been in the mind of the Legislature when it enacted the 1933 amendment to section 583, Code of Civil Procedure. The Legislature by that amendment has said, in effect, that time consumed in connection with demurrers and other ordinary steps before issue is joined is to be charged against the five-year period—that such time is *not* to be excluded from said period." In *Christin v. Superior Court*, supra, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153, the respondent suggested "that the conduct of petitioners in delaying the action by the proceedings instituted for change of venue, and further by their acts inducing the plaintiff to allow the cause to go off calendar pending negotiations for settlement," 9 Cal.2d at page 529, 71 P.2d at page 207, justified the doctrine of estoppel

against a defendant moving to dismiss. The court held that estoppel resulting from such conduct did not appear a proper ground for creating an exception to the terms of the statute. While that is not precisely the point immediately under discussion, it is significant that the Supreme Court in the same opinion, when holding that the time during which the appeal from the order granting a change of venue should be excluded in computing the five years, did not include in that exception any portion of the time during which the motion for change of venue was pending in the trial court. Illustrative of the principle that interruptions in the progress of the action in the trial court do not normally toll the running of the statute, are the following: Time consumed in attempting to negotiate a settlement, *People v. Superior Court*, 86 Cal.App.2d 204, 194 P.2d 571; the time during which a defendant is without an attorney of record, because plaintiff may terminate that interval by giving the notice authorized by section 286 of the Code of Civil Procedure, *Larkin v. Superior Court*, 171 Cal. 719, 154 P. 841; the period during which plaintiff's counsel is in doubt as to the jurisdiction of the court unless new parties are brought into the action, or delay caused by an attempt to agree upon a statement of facts, or the interval between the date of setting and the actual commencement of the trial, "The fair test" being "whether plaintiff in view of statutory provisions has had a reasonable opportunity to bring the action to trial". *Bank of America v. Superior Court*, 84 Cal.App.2d 34, 38, 189 P.2d 799, 802. Consonant with that principle, the time during which a defendant secretes himself within the state to prevent service of summons or resides outside the state and thus prevents the plaintiff from proceeding to trial with reasonable certainty that a judgment would conclusively determine the rights of the parties, is excluded in computing the five-year period, *Judson v. Superior Court*, 21 Cal.2d 11, 129 P.2d 361, unless, as prescribed by the 1945 amendment to section 583, the defendant has had an attorney of record "for a sufficient time to enable the action to have

been tried if the plaintiff had acted with due diligence". So, too, under appropriate circumstances, the time during which a defendant is absent upon military service may be excluded, *Pacific Greyhound Lines v. Superior Court*, 28 Cal.2d 61, 168 P.2d 665. But the only preliminary proceeding in the trial court which thus far has been recognized as coming within one of the implied exceptions, is the reference, in a water suit, to the State Division of Water Resources to investigate and report to the court concerning the available water supply and other related issues in the suit. The reason for this exception, based upon the facts and circumstances of the case before it, was expressed by the Supreme Court in *City of Pasadena v. City of Alhambra*, 33 Cal.2d 908, 207 P.2d 17, in these words: "The order of reference was made on February 8, 1939; the referee's report was filed on July 16, 1943, and, thereafter, respondents proceeded with reasonable dispatch to bring the cause to trial. The issues to be tried were dependent to a great extent upon the facts to be ascertained by the referee, and it would have been impracticable, if not futile, to proceed to trial prior to the completion of the report. It follows that the time consumed by the reference should be excluded in computing the five-year period, and that, therefore, the action was not subject to dismissal under the provisions of section 583." 33 Cal.2d at page 917, 207 P.2d at page 23.

[7] The conclusion is inescapable that the time consumed in the court below by the defendant in making and presenting its motion for change of venue, by plaintiff in opposing that motion, by both parties in preparing and filing briefs in support of their respective positions, and by the court in considering the motion and making its decision after submission, is not within one of the implied exceptions from the five-year requirement of section 583 and cannot be excluded in computing that period of time.

[8] Plaintiff further contends that the five-year period was indefinitely extended by defendant by stipulation in writing. He invokes a writing dated October 29, 1945,

signed by the attorneys of the parties, whereby they stipulated that the trial "be continued to the 7th day of Jan. 1946, to be set," and that "the plaintiff shall not be prejudiced by this extension, or any previous extension which may have been granted," followed by the statement that "Defendant further waives the provisions of Section 581a and 583 of the Code of Civil Procedure and agrees not to dismiss the above entitled action on the ground that the same has not been prosecuted with diligence to the date hereof. Said sections are waived only as to past extensions and the right to move to dismiss for any lack of diligent prosecution hereafter is *not waived*." That, at the very most, was a stipulation that the action might be brought to trial within a reasonable time after the setting date. From that date (January 7, 1946) the five-year period, as extended by the appeal period, had two years, 11 months, and 20 days yet to run, a more than reasonably ample period to bring the action to trial, the answer to the complaint already having been filed. One year and five months was deemed a reasonable time within which to bring an action to trial in *Superior Oil Co. v. Superior Court*, 6 Cal.2d 113, at page 116, 56 P.2d 950, in upholding the application to that case of the 1933 amendment to section 583 which started the five-year period as of the date of the filing of the action instead of the filing of the answer. That plaintiff herein was not misled by this stipulation of October 29, 1945, is demonstrated by the fact that in an affidavit by one of his attorneys, filed September 24, 1947, in support of plaintiff's motion to advance the cause for trial, the statement was made that "the five-year period within which said action may be tried will expire on December 7, 1947 unless trial is begun before that date," and in an affidavit by the same attorney, filed October 1, 1947, appears the statement that on or about October 29, 1945, defendant's attorney "agreed to waive the provisions of Section 581a and 583 of the Code of Civil Procedure to the date of the stipulation, but only as to past extensions and not as to future ones."

[9] Finally, plaintiff claims that the action was brought to trial on October 22, 1947; hence, well within the five-year period. He predicates this claim upon the fact that on that day the cause was on the calendar for trial, the parties answered "Ready," and one of plaintiff's attorneys made an opening statement, and then moved that the cause be continued pending the completion of the trial of another case in which plaintiff's attorneys were then engaged. That opening statement was very brief. It took up but 33 lines of the reporter's transcript, including the reading of the prayer of the complaint. It was avowedly made for the sole purpose of meeting the requirements of section 583. The court asked: "The only reason you are not immediately presenting the case is because you are engaged in Judge Conlan's court?" and one of plaintiff's attorneys replied, "Yes, and will be for some weeks." Defendant resisted the motion for a continuance. Its attorneys testified that the other action was filed almost three years later than this one and that two days prior to the filing of plaintiff's notice of motion to advance this case on the calendar, his attorneys stipulated that the trial of the other case commence and that it did commence while plaintiff's motion to advance this case was pending. Defendant claimed that the mere making of an opening statement was no compliance with the requirements of section 583. The motion for continuance. Its attorney testified that the of the other case. The trial of the other case was completed in February, 1948. This case did not come on for trial until January 3, 1949, when a new, or amplified, opening statement was made by plaintiff, followed by the introduction of evidence commencing January 4, 1949.

[10] We have found no decision which holds that an action is "brought to trial" by merely making an opening statement and then postponing the case to a definite date, or indefinitely, for the commencement of the taking of evidence. In *Miller & Lux Inc. v. Superior Court*, 192 Cal. 333, 219 P. 1006, the court held that the fact that plaintiffs were present in court, ready to proceed to trial, on the day set for trial was

not a bringing of the action to trial, citing with approval a similar holding in *Ravn v. Planz*, 37 Cal.App. 735, 174 P. 690. The mere making of an opening statement, without presenting a single witness or offering any evidence of any kind, would seem even less a bringing to trial, especially when such is done for the avowed purpose of not going ahead at that time, solely for the convenience of plaintiff's own attorneys and not because the business of the court or the demands of the defendant prevent plaintiff from proceeding with the trial.

[11-13] What does the word "trial" mean as used in section 583? "The term 'trial' as applied to one of the steps in the disposition of an action is well understood in the practice in this state. It is the trial of the issues of fact (*Perrin v. Miller*, 35 Cal.App. 129, 169 P. 426), the purpose of which is to determine the cause on the merits, and it is not completed until the decision of the court is made and filed with the clerk (*Broder v. Conklin*, 98 Cal. 360, 33 P. 211; section 632, Code Civ.Proc.), unless findings be waived (section 634, Code Civ.Proc.). Whether made and filed or waived, judgment may then be entered and the cause thus be disposed of on the merits." *Superior Oil Co. v. Superior Court*, 6 Cal.2d 113, 116-117, 56 P.2d 950, 952. Accordingly, none of the following is deemed a part of the trial of an action: The hearing and disposition of a demurrer, *Smith v. Wiget*, 75 Cal.App.2d 591, 171 P.2d 563; *Breakstone v. Giannini*, supra, 70 Cal.App. 2d 224, 160 P.2d 887; *Meier v. Superior Court*, 55 Cal.App.2d 675, 131 P.2d 554, save when a demurrer to a complaint is sustained without leave to amend and judgment is entered thereon, which really dispenses with a trial unless the judgment is vacated, *Smith v. City of Los Angeles*, 84 Cal.App.2d 297, 190 P.2d 943; a motion to set, *Jones v. Superior Court*, 86 Cal.App. 542, 195 P.2d 451; the hearing and disposition of an application for a preliminary injunction, *Superior Oil Co. v. Superior Court*, supra, 6 Cal.2d 113, 116, 56 P.2d 950. We have found no case in which anything short of the introduction of evidence upon issues of fact framed by the pleadings was deemed a bringing to trial. "It has fre-

quently been held that a partial trial within the prescribed period takes the case out of the operation of that section. *Mercantile Invest. Co. v. Superior Court*, 218 Cal. 770, 25 P.2d 12; *City of Los Angeles v. Superior Court*, 15 Cal.2d 16, 98 P.2d 207; *Krasnow v. Superior Court*, 15 Cal.App.2d 141, 59 P.2d 442; *Kosturos v. Municipal Court*, 51 Cal.App.2d 700, 125 P.2d 572. *In all of these cases the partial trial which was held sufficient for this purpose consisted in the calling of witnesses and the taking of evidence.*" *Meier v. Superior Court*, supra, 55 Cal.App.2d 675, 676, 131 P.2d 554, 555; emphasis added. In none of the cases just cited do we find any indication that plaintiff intended to do anything short of going ahead with the trial on the merits. For example, in *City of Los Angeles v. Superior Court*, 15 Cal.2d 16, 98 P.2d 207 (an action to abate a nuisance), after one day of testimony on the part of plaintiff, defendant tendered and plaintiff accepted a stipulation for a continuance of the trial and for a preliminary injunction restraining defendant from operating its plant in a certain manner. In *Krasnow v. Superior Court*, 15 Cal.App.2d 141, 59 P.2d 442, the trial proceeded to the point of plaintiff resting his case before continuances occurred which carried it beyond the five-year period. It is true that in *Miller & Lux Inc., v. Superior Court*, supra, 192 Cal. 333, 219 P. 1006, the suggestion was made that "if counsel had desired to avoid the bar of the statute it would have been a very simple matter, after calling the court's attention to the situation, to have requested that one witness be sworn in the cases and then the hearing of the cases continued until a time which would be convenient for the court and the parties to the action." 192 Cal. at page 342, 219 P. at page 1009. That suggestion must be read in its context. The court had held that merely being present in court with witnesses, ready to proceed on the trial date, but suffering without objection continuance to a date beyond the five-year limit, was not bringing the action to trial. The court went on to say that "Doubtless if objection had been made and the trial court's attention called to the fact

that a further continuance would have the effect of putting the case beyond the bar of the statute, the trial court would have ordered that the cases proceed to trial or else have exacted a written stipulation from the defendants extending the time of the trial." 192 Cal. at page 342, 219 P. at page 1009. Then immediately followed the suggestion above quoted. The reasonable inference is that if in such a situation the court refused to proceed (whether because its calendar did not permit or for other reason beyond plaintiff's control) and refused to exact or was unsuccessful in exacting a stipulation from the defendant, then it might be in order for the plaintiff to request and the court to grant permission to swear a witness and take some testimony on the issues in the case. Such a suggestion falls far short of sanctioning a mere opening statement, especially when made upon the urgent insistence of the plaintiff, for his sole convenience, and under no compelling necessity which excused him from bringing the action to trial within the period of six years and 20 days after action filed, or within three years, 11 months and 15 days after issues joined, defendant's answer having been filed January 12, 1945.

[14] The only authority which plaintiff cites for "bringing to trial" by the making of an opening statement is the 1947 amendment to section 581 of the Code of Civil Procedure. It has no significance in the construction and application of section 583. Section 581, subdivision 1, deals with voluntary dismissal of an action. Until amended in 1947, it authorized dismissal "By the plaintiff * * * at any time before the trial" under certain conditions. That meant at any time before submission of the cause. See *MacDermot v. Grant*, 181 Cal. 332, 334, 184 P. 396, and cases cited. If after trial and before decision the submission were vacated, plaintiff could dismiss. *Reynolds v. Vidor*, 45 Cal.App.2d 685, 114 P.2d 617. Also, it was a right which was revived after reversal of a judgment and remand for a new trial and could then be exercised as if there had never been a trial. *Schubert v. Bates*, 30 Cal.2d 785, 185 P.2d 793.

The 1947 amendment to section 581 merely substituted "before the actual commencement of trial" for "before the trial" and declared that "A trial shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or his counsel, and if there shall be no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence." Manifestly, the Legislature meant that definition to apply only to the situation with which the section amended, § 581 deals, could not have intended by that amendment to change the long established meaning of "trial" as used in section 583.

[15,16] On or about October 4, 1947, the court denied a motion by defendant to dismiss under section 583. Such denial was within the discretion of the court, for the five-year period had not run. Defendant renewed its motion when the case was called for trial on January 3, 1949. That motion should have been granted, for the five-year period, as extended by the period of the appeal from the order denying a change of venue, had expired. The judgment should be reversed and the action dismissed.

Defendant has also appealed from the following orders: An order of May 12, 1949, appointing a receiver of the business, property and assets of defendant; an order of June 14, 1949, permitting amendment of the complaint to conform with the proof and to add a party defendant to the action; and an order of August 20, 1949, denying defendant's motion to set aside the judgment, findings of fact and conclusions of law and the above-mentioned orders of May 12 and June 14, 1949, and also denying defendant's motion to strike the judgment, findings of fact and conclusions of law and the orders of May 12 and June 14, 1949. The findings of fact and conclusions of law were dated and filed June 13, 1949. The judgment was dated and filed June 14, 1949.

[17,18] The appeal from the order of June 14, permitting amendment of the

complaint and the addition of a party, must be dismissed. That order, though made and filed the same day as the judgment, presumably was made and filed prior to the judgment. It was, therefore, an intermediate nonappealable order. That portion of the order of August 20 which denied the motion to vacate and strike the order of June 14 was likewise nonappealable.

[19] The order of May 12, appointing a receiver, was appealable. It should be reversed for the same reason that the judgment should be reversed.

[20,21] That portion of the order of August 20 which denied the motion to vacate and strike the order of May 12, the findings of fact and conclusions of law, and the judgment, was appealable as a special order made after final judgment, one which involved issues of fact not presented by the record upon the appeal from the judgment. The basis of defendant's motion was the claim that the actions of the court which it proposed to vacate and strike were taken and made while defendant's sole attorney was suspended, and without notice to defendant to obtain an attorney or to appear in person, as required by section 286 of the Code of Civil Procedure. If the order of May 12, the findings and conclusions, and judgment were valid, that appeal from the order of August 20 would have to be affirmed. There was substantial evidence in support of the implied finding that the attorney who was under suspension was not defendant's sole attorney in the action. But the order of August 20 was void for the same reason that the judgment was void. Accordingly, the appealable portion of the order of August 20 should be reversed.

The judgment, the order appointing a receiver, and the appealable portion of the order of August 20, 1949, are reversed, with instructions to the trial court to dismiss the action. The appeals from the order of June 14 and from the nonappealable portion of the order of August 20, 1949, are dismissed.

PETERS, P. J., and BRAY, J., concur.

In re MILLER'S ESTATE.

PEOPLE v. McGRATH, U. S. Atty. Gen.

Civ. 14505.

District Court of Appeal, First District,
Division 1, California.

May 1, 1951.

Hearing Denied June 28, 1951.

In the matter of the estate of Alice A. Miller, deceased. The executors filed a petition for partial distribution, the People of the State of California filed a petition in intervention, alleging that the estate escheated to the state, and the Alien Property Custodian of the United States answered intervenor's petition and asked for distribution of the residuary estate to the Custodian. From a decree of the Superior Court in and for the County of Alameda, O. D. Hamlin, J., distributing the estate to the Custodian, for whom J. Howard McGrath, Attorney General of the United States, was substituted as successor to the Custodian's rights and duties, intervenor appealed. The District Court of Appeal, Bray, J., held that the evidence supported the trial court's finding that reciprocal rights of inheritance existed as to personal property between the United States and Germany at the time of testatrix's death, so as to entitle the Custodian to the residuary estate in testatrix's personal, as well as real, property, left by the will to her only heirs, after the death of her sole surviving heir.

Appellant's application for leave to produce additional evidence on appeal denied, and decree affirmed.

1. Appeal and error. ⇨1010(1)

The trial court's finding on fact issue as to existence, translation, interpretation and effect of foreign country's laws will not be disturbed on appeal, if supported by substantial evidence.

2. Aliens ⇨7, 9, 14

The statute providing that nonresident aliens' rights to take property in state by succession or will depends on existence of reciprocal right of United States citizens to take property in such aliens' countries does not require that foreign countries have same judicial system as United States, nor even independent judiciaries, but only requires that no discrimination be shown in inheritance matters as between nationals of such countries and residents and citizens of United States. Probate Code, § 259.

3. Aliens ⇨14

War and national defense ⇨12

In executors' proceeding for partial distribution of testatrix' property, evidence supported trial court's findings that German courts, during Nazi regime, did not so interpret German inheritance laws as to discriminate against Americans and that reciprocal rights of inheritance existed as to personal property between United States and Germany at time of testatrix' death, so as to entitle federal Alien Property Custodian, not state, to personalty bequeathed by will to testatrix' only relatives, who were citizens and residents of Germany, on death of her sole surviving relative. Probate Code, §§ 259, 259.1, 259.2; Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 1 et seq.

4. Aliens ⇨14

War and national defense ⇨12

The statute providing that nonresident aliens' rights to take property in state by succession or will depends on existence of reciprocal rights of United States citizens to take property in such aliens' countries and to receive, by payment in United States, money originating from estates of persons dying within such countries, does not require immediate payment, nor payment during emergency period for which both United States and foreign country involved have suspended payments, as during war, whether foreign country is enemy or not. Probate Code, § 259.

5. Statutes ⇨290

Circumstantial evidence is admissible to prove facts of effect and application of statutes of foreign country.

6. Statutes ⇨290

German probate courts' certificates of inheritance by United States residents, internal revenue reports to German Finance Ministry by German private citizens in control of American property, and German foreign control office's files relating to applications for foreign exchange by American citizens and others, were admissible in evidence as relevant on questions of effect and application of German laws respecting inheritance by and testamentary dispositions to American citizens in executors' proceeding for partial distribution of

deceased American citizen's personal property, claimed by federal Alien Property Custodian after death of testatrix' sole surviving heir and legatee, who was citizen and resident of Germany. Probate Code, § 259; Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 1 et seq.

7. Judgment ⚡540

The application of "res judicata" depends on whether there was final judgment on merits, whether party against whom plea of res judicata is asserted was in privity with party to prior adjudication, and whether issue decided therein was identical with that presented in subsequent action.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Judicata".

8. Courts ⚡107

Expressions in judicial opinions must be construed and limited by reference to matters under consideration and cannot be safely applied in their largest and most universal sense to dissimilar cases.

9. Judgment ⚡715(3)

A final judgment of Supreme Court, affirming on merits superior court's decree determining that German citizens could not share in testatrix' estate as residuary legatees because reciprocal rights of inheritance did not exist between citizens of United States and Germany on April 3, 1945, when testatrix died, was not res judicata on issue whether such rights existed on April 22, 1942, in proceeding by executors under will of one dying on such date for partial distribution of personal property, to which state and Alien Property Custodian asserted conflicting claims after death of testatrix' sole surviving heir and legatee, who was citizen and resident of Germany, though United States Attorney General, as Custodian's successor, was party to both proceedings. Code Civ. Proc. § 1911; Probate Code, § 259.

10. Judgment ⚡956(5)

The fact that proposed evidence, supporting plea of res judicata, tends to show that precise question in instant case may have been involved in previous litigation, is insufficient to warrant admission there-

of, but such question must clearly appear to have been directly involved and adjudicated in previous case. Code Civ. Proc. § 1911.

11. Estoppel ⚡52

Every estoppel must be certain to every intent and not taken by argument or inference.

12. Judgment ⚡725(1)

If anything is left to conjecture, on face of record, as to what was necessarily involved and decided in case, there is no estoppel therein when pleaded as res judicata and nothing conclusive in it when offered in evidence. Code Civ. Proc. § 1911.

13. Trial ⚡392(4)

The trial court, having adopted one party's theory of evidence, properly refused to make adverse party's proposed fact findings directly contrary to court's findings in accordance with such theory.

Edmund G. Brown, Atty. Gen., W. R. Augustine, B. Abbott Goldberg, Deputy Attys. Gen., for appellant.

Harold I. Baynton, Asst. Atty. Gen., of United States, Director, Office of Alien Property, Frank J. Hennessy, U. S. Atty., Northern District of California, San Francisco, Valentine C. Hammack, Lillian C. Scott, Sp. Assts. to Atty. Gen., George B. Searls, Joseph Laufer, Attorneys, Department of Justice, Washington, D. C., for respondent.

BRAY, Justice.

Appeal by the State of California, petitioner in intervention, from probate decree in favor of the Attorney General of the United States, objector, determining rights under section 259 of the Probate Code.

Questions Presented

1. Does the evidence show that on April 22, 1942, reciprocal rights of inheritance existed as to personal property between the United States and Germany?

2. Does the right to receive payment provided in section 259 of the Probate Code mean *immediate* payment?

3. Is *In re Estate of Schluttig*, 36 Cal. 2d 416, 224 P.2d 695, *res judicata* as to this case?

4. May the effect and application of foreign law be proved by circumstantial evidence?

Record

Alice A. Miller, an American citizen, died testate in Oakland, California, on April 22, 1942. She left the entire residue of the estate, consisting of both real and personal property, in equal shares to Wilhelmina Gramann and Dorette Brunotte, first cousins and her only relatives. Wilhelmina Gramann, unmarried and a citizen and resident of Germany, had predeceased the testatrix without leaving issue. Thus, Dorette Brunotte, likewise a citizen and national of Germany, was testatrix' sole surviving heir and next of kin. On September 19, 1944, she, too, died. Acting under the Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 1 et seq., the Alien Property Custodian vested the interests of both residuary legatees. (Vesting Order # 2803.)

The executors filed a petition for partial distribution, listing certain real and personal property as available for immediate distribution and stating that the State of California and the Custodian were asserting conflicting claims to the legacies. The State filed a petition in intervention alleging that on April 22, 1942, American citizens had no right to take property or to receive payment from German estates, and hence, the two German legatees were rendered ineligible by section 259 of the Probate Code to take under the will, and, there being no other heirs or next of kin, the estate escheated to the State of California as provided in section 259.2. The Alien Property Custodian answered the petition, as did the executor, denying the asserted absence of reciprocal inheritance rights for American citizens in Germany, and in reliance on his vesting order asked that the residuary estate be distributed to him.

Following the decision in *Clark v. Allen*, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 (holding that the Treaty of 1923 between the United States and Germany, 44 Stat.

2132, governs the testamentary disposition of realty, but that the disposition of personal property is governed by California law, and that section 259 of the Probate Code is constitutional), the Custodian's claim to the realty was no longer questioned. The question of whether reciprocal inheritance rights existed between the two countries is limited solely to the personal property.

The probate court found that on April 22, 1942, under the laws of Germany, American citizens did enjoy reciprocal rights with German citizens as to personal property and money inherited from German estates. It found that the residuary legacy of Wilhelmina Gramann had lapsed and that the Custodian, as successor in interest to Dorette Brunotte, only surviving heir, was entitled to the distribution of the entire estate. A final decree was entered distributing the estate to the Custodian. (The Attorney General of the United States has succeeded to the rights and duties of the Custodian and has been substituted in his place.)

Law Involved

At the time of the death of the decedent, section 259 of the Probate Code provided: "The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries."

[1] Section 259.1 provided that the burden of establishing that reciprocal rights exist is on the nonresident alien (here the United States Attorney General). As said in *Re Estate of Schluttig*, *supra*, 36 Cal.2d

416, at page 424, 224 P.2d at page 700: " * * * the issue to be determined involved questions as to the existence, translation, interpretation and effect of the laws of Germany * * *. The determination of the issue, therefore, was one of fact, and the finding of the trial court, if supported by substantial evidence, will not be disturbed on appeal." Therefore, the matter for us to determine is whether there is substantial evidence to support the court's finding of the existence of reciprocity on April 22, 1942.

1. Sufficiency of the Evidence

[2, 3] The evidence consisted of German laws, documentary evidence, and the conflicting testimony of certain experts on German laws. The issue before the superior court required a consideration not only of the existence of the foreign statutes but a finding as to their effect based upon the translation of them and their practical application by the German courts. The parties did not agree as to the correct translation of the statutes and each stressed uncertainties and ambiguities which required explanation. Moreover, it was shown that the right to inherit in the foreign countries depended upon certain policies of the Nazi regime. Upon all of these subjects both parties presented considerable testimony by experts. Respondent introduced the texts of the German laws relating to inheritance.¹ Without exception, these laws refer to persons without distinction as to race or nationality. Neither Americans nor aliens generally are mentioned in the German Civil Code which was still in effect during the entire Nazi regime. Section 48 of the German Law Concerning Last Wills and Testaments of 1938 provided: "(1) A disposition for the event of death is void insofar as it is contrary to mandatory provisions of law. (2) Any disposition for the event of death is void insofar as it is contrary—because of being grossly opposed to sound sentiment of the people—to considerations which a decedent who is conscious of his

duties, must have towards his family and the community of the people."

Dr. von Lewinski, a German national, testified for respondent. He qualified as an expert on German law. He studied law in this country at Harvard and Columbia Law Schools and in 1907 was appointed a judge of the County Court at Berlin where he served for a year and a half. For the next 10 years he was an assistant in both the Prussian Department of Justice and the Federal Department of Justice and also a Justice of the Court of Appeals of Berlin. From 1922 to 1932 he served in the United States as German Agent for the Mixed Claims Commission, Consular of the German Embassy and Consul General in New York. Upon his return to Germany in 1932 he practiced law in Berlin until approximately the time of trial herein, specializing in probate law. He testified that he had handled four to five hundred cases in which Americans had inherited estates in Germany and vice versa; that before the war the right to inherit was recognized and the assets transferred; that the German inheritance laws are contained in the German Civil Code, Fifth Book, and that article 154 of the Weimar Constitution enacted in 1919 recognized and guaranteed the right to inherit in accord with the Civil Code. Translations of these were in evidence. Also, at the time here in question, there were no other laws in Germany having any bearing on the right of inheritance.

With respect to the pertinent sections of the Civil Code, and the right to inherit and succeed, this witness testified that no distinction was made between nationals of Germany and foreigners, including American citizens; that under the German laws of inheritance any foreigner may succeed to an estate in Germany on the same terms as a national of that country. He further testified that this right of inheritance remained intact throughout the Nazi regime and that no laws were enacted which in any way abrogated it. At the outbreak of war actual transfers of property inherited by American citizens were discontinued.

1. All discussion herein of German laws and conditions in Germany relates to the

situation as of April 22, 1942, unless otherwise stated.

Thereafter their property was placed in the hands of administrators who were subject to the control of the courts. The title of the enemy alien was not disturbed, and Germany never passed legislation confiscating enemy property. Dr. von Lewinski, himself, was appointed by the court in a number of instances as custodian of the interests of American heirs.

The witness further declared that the Law of Wills of 1938 was not construed as applying to or affecting wartime gifts to belligerents. He had never heard of a single decision in which a legacy to an American had been held void under the statute. On the contrary, in each of the cases he handled during the war the courts issued orders declaring Americans entitled to share in German estates and he personally knew that the prevailing practice conclusively showed that the courts did not regard a testamentary disposition to an American as "opposed to sound sentiment of the people."

Respondent introduced in evidence considerable documentary evidence of reciprocal rights. There were 57 certificates of inheritance (Erbscheine) which Dr. von Lewinski testified were judicial determinations of the probate courts of the several states, and which embody the decrees of these courts of record. These certificates cover the period 1938 to 1945 and determine the heirship of some 77 residents of the United States. The full war years, 1942, 1943, and 1944 are represented by 12, 17 and 19 certificates respectively. They were issued by probate courts in Germany, sitting in villages, cities and towns and in metropolitan centers such as Berlin, Munich and Stuttgart. With one exception, the American residence of the heir involved is shown without, however, disclosing citizenship.

Photostatic copies of two issues of the *Deutscher Reichsanzeiger*, in which government orders and official notices are published, were put in evidence. These publications show that the German Alien Property Custodian placed estates belonging to heirs resident in the United States under the charge of administrators who acted under court supervision. In at least four

of these estates it is clearly indicated that either the decedents or the heirs were Jews.

Respondent introduced in evidence 25 declarations on official forms made to the German Finance Ministry by persons in charge of the property of American residents. These reports cover the period between September, 1941, and June, 1943. In each case the property includes an inheritance claim. These were submitted to prove that no change in treatment of ownership of inheritance claims occurred.

Dr. von Lewinski testified on the basis of personal experience, that between the establishment of foreign exchange control in Germany and the outbreak of the war, citizens of the United States were able to secure the transfer of property inherited by them upon application filed with the German exchange control authorities. In about 600 cases personally handled by him before the United States imposed freezing controls, Executive Order 8785, June 14, 1941, 12 U.S.C.A. § 95 note, actual delivery was made to the American heirs. Among the American heirs whose interests he represented, some were of the Jewish faith, and they duly received their inheritances prior to the outbreak of the war. He recalled one Jewish estate in particular, the Garbet estate, in which 200,000 marks were transferred to the heir in New York in 1940. After the outbreak of war with the United States the actual transmission of inheritances to the United States ceased. As to such inheritances, however, he testified that they were put in the hands of administrators, while the alien's title was not disturbed.

To the same effect was the testimony of Mr. Hoecker, an attorney in San Francisco. He testified that from 1933 to 1941 he represented American heirs, among them American citizens of the Jewish faith, in approximately 25 probate cases in Germany, and that in every instance his clients received actual transfers of the amounts due them.

Copies of ten separate official files of the *Devisenstelle* (Foreign Exchange Control Office) in Berlin were introduced in evidence. They contained correspondence,

license applications and licenses actually issued for the transfer of estates from Germany to the United States. As to at least five of these it affirmatively appears that the applicants are American citizens. Diplomatic correspondence relative to the transmission of funds was put in evidence. In an aide memoire of December 20, 1938, the German government unequivocally guaranteed the rights of American citizens to withdraw inheritances on a reciprocal basis.

Appellant called William B. Stern, since 1939 the Foreign Law Librarian of the Los Angeles County Law Library, who received a Doctor of Laws degree at the University of Wuerzburg in 1933, then entered the Bavarian State Preparatory Service for Jurists in 1933, from which he was discharged in 1934 because of non-Aryan descent. He attended an English university, then had a Fellowship in International Law at the University of Texas, and spent a year at Johns Hopkins University studying International Law. In 1936 he was an invitee of the Carnegie Endowment of International Law at the University of Michigan and for two years was in charge of the Chicago Law Library. He has made a study of German laws of inheritance and has testified considerably as an expert on foreign laws.

Appellant also called one Oppenheimer, who qualified as an expert on German law. He had studied at the Universities of Berlin, Freiburg, and Breslau, had experience in law offices, with the public prosecutor, and then passed an examination which entitled him to become a judge or a practicing attorney, worked with the Mixed Arbitral Tribunals established under the Treaty of Versailles, then returned to Germany where he practiced law for many years, handling a great deal of probate work in America, France and England, as well as in Germany. He remained in Germany three and one-half years under the Nazi regime and then practiced in England until 1940, came to the United States and joined a prominent New York law office working on international and foreign laws until 1943 when he was appointed Chief Analyst of the Board of Eco-

nomic Warfare in Washington, D. C., working on the German and Austrian Nazi legal system. Later he was assigned to the legal division of G-5, Allied Expeditionary Forces, heading up a "Special Legal Unit, Germany, Austria" the objective of which was to investigate the Nazi legal system, to recommend changes so that the German law could be de-Nazified. Later he became Chief of German Law and Court Section with the United States Forces at Frankfurt, Germany. Subsequently he became Assistant Legal Adviser in the Department of State. He returned from Germany about a week before the trial.

In direct contradiction to the testimony of Dr. von Lewinski, both Stern and Oppenheimer testified that the German courts, in interpreting the law, leaned heavily on the commentaries in legal textbooks and periodicals. They then referred to certain commentaries and articles, which were introduced in evidence, which, particularly with reference to section 48, stated in effect that a last will is valid only to the extent to which the intention of the testator coincides with the intention of the community of law. Also, the leaving of property to the church to the elimination of near relatives, excepting wills of the clergy, to foreign associations of freemasons, nationals of an enemy state, the appointment of a Jew as heir by an Aryan testator, would make the will void. Other documents offered by appellant included: (1) Decree for the Settlement of Estates in Cases of Succession by Law in Special Cases, dated October 4, 1944, which states that a person named in a will who is unable to take under section 48 is likewise unable to take under the laws of intestacy. (2) Resolution of the Greater-German Reichstag of April 26, 1942, which among other things states that the Fuhrer must, in his capacity as supreme lord of the judiciary, at any time, with all means he deems suitable, and without being bound by existing rule of law, be in a position to order any judge to fulfill his duties and without institution of prescribed procedures remove him from his office in case of violation of duties. (3) Law for the

Revocation of Naturalizations and the Deprivation of German Nationality, July 14, 1933, which deprived German nationals abroad of their German nationality "if they have damaged German interests by a behavior which is contrary to their duty of loyalty against the Reich and Nation" or who do not obey an order of the Reich Minister of the Interior to return. (4) The Armament Law of May 21, 1935, which places the duty to carry arms on every Reich national although he also possesses a foreign nationality. (5) The Law Restricting the Rights of Succession and Inheritance Because of Antisocial Conduct, November 5, 1937, which states that a person deprived of his German nationality by any of the above-mentioned laws cannot take by succession or inheritance from a German national. There is then a provision that a testator may deprive a descendant of the compulsory portion of an inheritance if the descendant has married a Jew or Jewish person without certain permission. (6) Order concerning the Utilization of Jewish Property of 3 December 1938, providing that owners of Jewish enterprises, real estate, "or other Jewish property" may be ordered to sell or liquidate. (7) Procedure Concerning the Removal of Jewish Influence from Enemy Property, February 27, 1940, which provides in effect that enemy property which has more than a 50 per cent Jewish interest therein is deemed to have a decisive enemy influence and does not require approval of the Reich Commissar for the taking of compulsory measures to remove the Jewish influence. His approval must be had if the Jewish interest is less than 50 per cent. (8) 11th Decree for the Execution of the Reich Citizenship Law, November 25, 1941, a Jew loses German nationality if at the effective date of the decree he usually resides abroad, or thereafter takes up his usual residence abroad. The property of a Jew who loses his German nationality by this Decree escheats to the Reich. "Persons whose property has escheated to the Reich" under this Decree "may not acquire anything from a German national by cause of death." Gifts to them by German nationals is prohibited.

The effect of these laws and decrees was disputed by the experts.

Both Stern and Oppenheimer testified that the Constitution of Weimar and the German Laws permitting inheritance by Americans were not specifically changed by the Nazis. Yet, section 48, which in effect, prohibited disposition of property if it was "opposed to sound sentiment of the people," coupled with the fact that the judiciary were no longer independent but were, it is contended, subject to the will and whim of Hitler, denied to Americans any *right* to take testamentary disposition, and left such taking merely a *privilege* which might or might not be granted. While there is evidence from which such a conclusion can be drawn, it is not one that is impelled. Particularly is this so, when neither Stern nor Oppenheimer pointed to a single instance in which any German court had refused to recognize an American resident's or citizen's right to inheritance, and Dr. von Lewinski had referred to many specific instances of such recognition. While the commentaries took the position that the courts had the right to refuse inheritances to enemy aliens (which, of course, Americans were) and to American Jews, neither of appellant's experts knew of a case in which it was done. Moreover, the testimony of Dr. von Lewinski directly conflicted with that of Stern and Oppenheimer on the effect of these commentaries and the effect and meaning of the various decrees and other documents in evidence. They even disagreed as to the effect of section 48 and its interpretation by the German courts. Dr. von Lewinski was able to point to specific acts of the courts supporting his testimony and interpretation, while appellant's experts could not.

To an American it seems incredible that Hitler would permit German property to be distributed to Americans and particularly to American Jews. Yet, it definitely appears that the procedure provided by the Absentee Administration Decree for the appointment of an administrator for the inheritance of an absent national of an enemy country was followed, and that property of German testators was distributed to admin-

istrators appointed for the purpose of holding it for such enemies, including Americans. It may very well have been that Hitler, in spite of his hatred for both Jews and Americans, concluded that as a matter of expediency and shrewd business it was advisable to retain reciprocity with the United States because the number of estates in which property in Germany would be left to Americans would be inconsequential as compared to the number of estates in America left to Germans.

Appellant lays great value on the judgment in case No. 3, Tribunal III, entitled *United States v. Joseph Altstotter et al.* This was one of the Nuremberg trials held in 1947, in which 16 defendants who were former German judges, prosecutors or officials in the Reich Ministry of Justice, were found guilty of committing war crimes and crimes against humanity. The Tribunal found, in effect, that while on paper the rights established by the Weimar Constitution were retained by the Nazis, there was a progressive degeneration of the judicial system under Nazi rule and that substantially every principle of justice enumerated by prior German law was violated by the Hitler regime. This judgment does not compel a conclusion that the rights of aliens as to inheritance was not recognized. The Tribunal was dealing primarily with the denial of justice to the German residents and citizens, and their deprivation of fundamental constitutional rights. There can be no question but that, had Hitler deemed it expedient to do so, he could have caused the law as to inheritances or their effect to be changed, just as our California Legislature could, if it saw fit, change our inheritance laws as they affect aliens. But the question here is, did he do so? Apparently from the evidence in this case he did not, whether because he deemed it important not to stop the flow of inheritances from this country to Germany, or for some other reason. It is significant upon this question that the Nazis did not adopt a policy of confiscating enemy property. It must be pointed out that section 259 does not require that foreign countries have the same judicial system as ours, nor even an independent judiciary. All that it requires

is that there be no discrimination shown in inheritance matters as between the nationals of that country and the residents and citizens of ours.

Summing up appellant's evidence,—the German laws could have been interpreted by the German courts in such a way that the matter of inheritance in a foreign country did not exist as a matter of legal right, but was subject to the arbitrary action of Nazi administrators acting in accordance with Nazi ideology. The courts, too, could have interpreted testamentary dispositions to Americans to be "opposed to sound sentiment of the people," thereby directly discriminating against citizens of the United States because of their citizenship or residence. Had such been the interpretation of the German courts, that is, that the taking of estates by testamentary disposition or succession was merely a matter of sufferance and not one of legal right, there would be no "reciprocal right" as that term is used in the Probate Code. However, the trial court, on conflicting evidence, found that the German courts adopted a different interpretation and that there was no discrimination against Americans. As the evidence does not compel a contrary conclusion, we are bound by the trial court's finding.

2. Immediate Payment

[4] Section 259 of the Probate Code states that the rights of aliens not residing here to take by succession or testamentary disposition depend (1) upon reciprocal rights of United States residents to take in the country of which the alien is an inhabitant, and (2) upon the rights of our citizens "to receive by payment to them" here. Appellant contends that this means a right to *immediate* payment. The evidence shows that both the United States and Germany suspended payments to the nationals of the other during the war. Even before the war, on June 14, 1941, the United States prohibited transfers of credit between banking institutions in the United States and those in other countries except under Treasury license. After the war between the United States and Germany started, the Trading with the Enemy Act forbade the payment of American inherit-

ances to Germany or the receipt by Americans of German inheritances. On December 12, 1938, Germany adopted the Law Concerning the Management of Foreign Currency, which required a licensee to pay claims of a foreigner against a German. Germany on April 9, 1942, extended the Treatment of Enemy Property Act of January 15, 1940, to the United States, thereby prohibiting the payment of any money to our nationals.

While the portion of section 259 dealing with payment does not use the word "reciprocal" as it does in the prior portion of the section, it is clear that the right to receive payment by our citizens referred to a reciprocal right of citizens of a foreign country to receive payment here. Thus, during the war, there was no reciprocal right of a German to receive payment of an inheritance from an American any more than there was such a right for an American to receive payment of an inheritance from a German. The right to immediate payment was suspended by both countries. Again, prior to the war, both countries required the obtaining of a license before money could be transferred from the one country to the other. Dr. von Lewinski testified that he had never heard of this license being denied an American before the war. That reciprocal right to payment under section 259 did not apply to wartime suspension of payments by the respective countries under their particular Trading with the Enemy Acts is shown by *In re Estate of Blak*, 65 Cal.App.2d 232, 150 P.2d 567. There the question was whether in 1942 reciprocity under section 259 was accorded citizens and residents of the United States by the Netherlands, in spite of the fact that that country was then under occupation by the Germans. In holding that such reciprocity existed, the court also considered the same contention made by appellant here—that the conditions of section 259 were not met because immediate payment could not be made. As to this, the court said, 65 Cal.App.2d at page 239, 150 P.2d at page 570: "It will also be observed that the Legislature did not say when United States citizens were to receive

payment. It used the words "the rights" to receive. The Legislature therefore necessarily contemplated and had in mind that the availability of the proceeds of such foreign estates for immediate distribution and payment to United States citizens would be controlled by the exigencies of the battlefield. It placed no time or other limitation as to when payment was to be made. It was concerned only with the existence of "rights" accorded to United States citizens by and under the legally constituted and recognized laws and government of the country of which the alien was a citizen and resident, to receive their inheritance, knowing that such rights persist and carry on in the scheme and order of society in spite of the immediate fluctuations of war, and that, at most, the remedies for the enforcement of the right may be temporarily suspended."

Appellant attempts to distinguish the *Estate of Blak* decision from the situation in the instant case by pointing out that although the Netherlands was under German occupation its citizens were still Netherlands nationals, and although for certain purposes, because of its occupation by the enemy, it must be considered enemy territory, its territory was recognized by the United States as belonging to the Netherlands, one of our allies. However, the portion of section 259 dealing with payment does not make a distinction between enemy and nonenemy countries. It holds that there must be a reciprocal right to payment, but does not require immediate payment, nor payment during a period when both our country and the other country involved have suspended payments for an emergency period.

Appellant contends that respondent has not sustained the burden cast upon him by section 259.1 to establish the fact of the existence of reciprocal rights. The testimony of Dr. von Lewinski, plus the volume of documents showing the action of the German courts, was sufficient to meet that burden.

4. Evidence

[5, 6] Appellant contends that the 58 Certificates of Inheritance, the 25 Internal

Revenue Reports made by private citizens in control of property belonging to absentees, and 11 files relating to administrative action on applications for foreign exchange, were not admissible in evidence; that the proper way to prove foreign law is to introduce the law itself, and foreign law may not be proved by circumstantial evidence; that the documents were not relevant in any event, as they did not show the existence of a right of Americans to receive inheritances.

The German laws introduced in evidence did not show any discrimination against Americans as to inheritance or testamentary disposition. If it were merely a question of the existence of a foreign statute, the introduction of the particular law would meet the situation. But there must in addition be a consideration of the effect of the law and its application. This being a question of fact, can be determined only by the admission of any facts showing the effect and the application. See *In re Estate of Schluttig*, supra, 36 Cal.2d 416, 224 P.2d 695, where the court said, referring to these very issues: "Upon these subjects, the superior court heard highly conflicting testimony by experts upon the laws of those countries and their application under given circumstances." 36 Cal.2d at page 424, 224 P.2d at page 700. See also *In re Estate of Reihls*, 102 Cal.App.2d 260, 227 P.2d 564. So, such issue may be proved in the same manner as any other issue of fact. Obviously, then, circumstantial evidence is admissible in this type of case. Actually, how better can the effect and application of the law be proved than by showing what the German probate courts and persons charged with administering property of foreigners did under it? The documents were relevant. The fact that some of them referred to inheritances due others than Americans did not affect their admissibility, but may have affected their weight, although they tended to show that there was no discrimination against any foreigner.

Appellant relies on the diplomatic correspondence for its contention that there was no reciprocity in the transfer of inheritance money. Again, here, there were circumstances upon which the court might

have found favorably to appellant, but such conclusion is not compelled.

Appellant attacks the evidentiary value of the Certificates of Inheritance, the declarations as to property of absentee owners, and the foreign exchange licenses, on various grounds. While some of them probably are irrelevant, some remote, and some were after the Allied Occupation, the bulk of them, under Dr. von Lewinski's testimony, were significant.

3. Estate of Schluttig

[7-10] During the appeal in our case the Estate of Schluttig was decided. At oral argument, appellant asked permission to produce as additional evidence the entire record in the Schluttig case, in order that it might plead it as *res judicata*. In the Schluttig case the trial court found that on April 3, 1945, reciprocity as to rights of inheritance did not exist between citizens of this country and those of Germany or Austria. In that case the United States Attorney General claimed the interests of the alien heirs. Obviously, those heirs, and, in fact, all of the parties to the proceeding other than the Attorney General, were different from the parties to this proceeding. Appellant contends that as the United States Attorney General is a party to both proceedings, the Schluttig decision is *res judicata* as to him, basing such contention primarily on *Bernhard v. Bank of America Nat. Trust & Savings Ass'n*, 19 Cal.2d 807, 122 P.2d 892. There the decedent in her lifetime had instructed her agent, Cook, to deposit certain moneys in the bank in her name. Before she died, Cook withdrew these funds and deposited them in his own account. After her death he qualified as her executor. He filed an account accompanied by his resignation, omitting any mention of these funds. The legatees objected to the failure to include these funds as assets of the estate. Upon the hearing, the court settled the account as presented, and as part of its order declared that the decedent during her lifetime had made a gift to Cook of the moneys in question. Thereafter one of the objecting legatees was appointed administrator with the will annexed. As such she sued the Bank of

America, in which the moneys had originally been deposited, seeking to recover the moneys on the ground that the bank was liable for them as the decedent had never authorized the withdrawal. Among other defenses, the bank pleaded that the finding of the court that the decedent had made a gift of these moneys to Cook was *res judicata*. Plaintiff contended that the doctrine did not apply because the defendant asserting the plea was not a party to the previous action, nor in privity with a party thereto, and because there was no mutuality of estoppel. The Supreme Court upheld the action of the trial court in applying the doctrine. After reviewing the doctrine at some length, the decision points out that generally the plea of *res judicata* is available only when there is privity and mutuality of estoppel; also that "The criteria for determining who may assert a plea of *res judicata* differ fundamentally from the criteria for determining against whom a plea of *res judicata* may be asserted. The requirements of due process of law forbid the assertion of a plea of *res judicata* against a party unless he was bound by the earlier litigation in which the matter was decided. [Citations.] He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. *Ibid*. There is no compelling reason, however, for requiring that the party asserting the plea of *res judicata* must have been a party, or in privity with a party, to the earlier litigation." 19 Cal.2d at pages 811-812, 122 P.2d at page 894. It then goes on to show that "Many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of *res judicata* is asserted" 19 Cal.2d at page 812, 122 P.2d at page 895, and then holds that the issue as to ownership of the money is identical with the issue in the probate proceeding; that the order of the probate court was a final adjudication of this issue on the merits. In determining whether the plaintiff was a party or in privity with a party to the earlier proceeding, it pointed out that plaintiff was suing in the capacity of administratrix of the estate, and thereby represented the same persons and interests that were rep-

resented in the earlier hearing. In that hearing plaintiff and the other objecting legatees represented the estate of the decedent, as they were seeking not a personal recovery but, like the plaintiff in the present action, as administrator, a recovery for the benefit of the legatees and creditors of the estate, all of whom were bound by the order settling the account. "The plea of *res judicata* is therefore available against plaintiff as a party to the former proceeding, despite her formal change of capacity. 'Where a party though appearing in two suits in different capacities is in fact litigating the same right, the judgment in one estops him in the other.'" 19 Cal.2d at page 814, 122 P.2d at page 895. An analysis of the Bernhard case shows that while it uses broad language which might indicate that the requirement of mutuality had been completely abandoned in *res judicata* cases, it is only in cases where there is a real privity to the party against whom the plea is asserted that it actually is not required. Thus, it gives as examples of derivative liability master and servant, principal and agent, indemnitor and indemnitee situations. Moreover, its ruling is that in the two proceedings there involved, it was the estate represented at the hearing by the objecting legatees and at the trial by the administratrix, which was the real party in interest and hence bound by the first order.

The Bernhard case lays down three rules to determine the application of *res judicata*: (1) Was there a final judgment on the merits? (2) Was the party against whom the plea is asserted a party in privity with a party to the prior adjudication? (3) Was the issue decided in the prior adjudication identical with the one presented in the action in question? Applying these rules, we find that at most, only two of them are met by the instant situation. The Schluttig decision was a final judgment on the merits, and we will assume (without deciding) that lack of mutuality can be extended to situations other than those of master and servant, principal and agent, indemnitor and indemnitee, or persons representing the same estate, and that therefore the requirement of privity is met. It is doubtful if the rule of the Bernhard case

should be given such a sweeping application. “* * * it is a familiar rule that expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and that they cannot be safely applied in their largest and most universal sense to dissimilar cases.” *City of Pasadena v. Stimson*, 91 Cal. 238, 250, 27 P. 604, 606. But when we come to the third rule, we find very definitely that the issue decided in the Schluttig case is not identical with the one presented here. In that case the court was considering and found upon the fact of German law effect and application on April 3, 1945, while the important date in our case is April 22, 1942, practically three years earlier in the war. While in the Schluttig case, as in ours, evidence was introduced covering the whole period of the war, the finding that a certain condition existed in 1945 was not a finding that that condition existed either before or after that year, see *In re Estate of Reihs*, supra, 102 Cal.App.2d 260, 227 P.2d 564, for a finding that on November 24, 1946, reciprocity actually existed. Section 1911 of the Code of Civil Procedure provides: “That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.” The situation in 1942 was neither actually nor necessarily included in the finding of the situation in 1945. “* * * it is not enough that the proposed evidence tends to show that the precise question may have been involved in such litigation. It must clearly appear that it was directly involved and adjudicated.” *Emerson v. Yosemite Gold Min. & Mill Co.*, 149 Cal. 50, 57, 85 P. 122, 125.

[11,12] Appellant contends that the evidence in the Schluttig and our case is essentially the same. In its brief it compares the evidence in the two cases. In order to get very much similarity in that comparison it includes the evidence given before the District Court of Appeal which the Supreme Court held was improperly admitted and which it refused to consider. Much of that evidence was before the trial court in our case, although not before the

trial court in the Schluttig case. For example, Dr. von Lewinski was not a witness at the trial of that case. Nor were “certificates of inheritance issued by German courts having probate jurisdiction during the period from August, 1937, to August, 1945, * * * 37 decrees or orders appointing curators for beneficiaries of German estates residing in the United States, issued from 1940 to 1944, copies of some foreign statutes and case files of German probate courts which show the procedural steps taken in the administration of certain estates.” *In re Estate of Schluttig*, supra, 36 Cal.2d at page 420, 224 P.2d at page 698. Most of this evidence appears in our case. It is highly significant that in *Re Schluttig's Estate*, 218 P.2d 819 (taken over by the Supreme Court) the District Court of Appeal, after it had considered the additional evidence above mentioned, produced by the United States Attorney General, felt that a new trial must be granted. In referring to this evidence the Supreme Court said 36 Cal.2d at page 420, 224 P.2d at page 698: “In summary, said the district court of appeal, it creates a conflict with the evidence produced at the trial and presents questions of credibility of witnesses which an appellate court is not in a position to determine.” Moreover, several of the legal documents used in the instant case were issued after April 22, 1942. Again three of the four Commentaries relied upon by appellant and concerning which in the Schluttig case it was said, 36 Cal.2d at page 425, 224 P.2d at page 701, “Comments upon German law, shown to have been relied upon in the probate courts of that country, cited as examples of legacies which would be void * * *” were not published until 1944. Even were we to examine the record in the Schluttig case, we would have to guess in order to determine whether the trial court in the Schluttig case in making its finding of the situation in 1945 was also necessarily determining the situation in 1942. This we cannot do. It was not a question there decided. “‘Every estoppel must be certain to every intent, and not to be taken by argument or inference.’ Co. Litt. 352b. ‘If upon the face of a record anything is left to conjecture as to what was necessarily in-

volved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence.'” *Beronio v. Ventura County Lumber Co.*, 129 Cal. 232, 236, 61 P. 958, 959.

We realize that it is unfortunate that a rule of *res judicata* or some other rule which might put at rest the determination of the facts as to inheritance reciprocity during the Nazi regime, cannot be applied here. The effect of the decision in the *Schluttig* case, considered, as it was, without regard to the pendency of other somewhat similar cases, is that inheritance of German nationals in California estates during the Nazi regime is, as a practical matter, to be determined as each case arises and then is dependent upon which set of experts the trial court may believe. On the other hand, were such a rule to be attempted, it would be manifestly unfair to select the *Schluttig* case as the determining factor for the reason that the evidence before the trial court there did not give a full and complete picture of the situation. Had the evidence introduced in the District Court of Appeal been before the trial court, its ruling on the facts would have been a far fairer criterion of what the actual facts are. We now have three cases on the general subject: (1) *Estate of Schluttig*, which held that reciprocity did not exist as of April 3, 1945; (2) our case which holds that it did exist as of April 22, 1942; and (3) *Estate of Reihs*, which held that it did exist as of November 24, 1946. Undoubtedly there are other decisions in the offing.

The record in the *Schluttig* case is inadmissible for the reason that the issue there was not identical with the issue here, nor was it determined by the court there.

Failure to Find

[13] Appellant contends that the court should have made certain findings of fact set forth in “Petitioner’s Objections and Proposed Amendment to the Objector’s Proposed Findings of Fact and Conclusion of Law.” It is not necessary to consider these proposed findings other than to say that, in effect, they are the opposite of the findings the court made. Thus, if the court had accepted appellant’s theory of the evi-

dence, these would have been proper findings, but as it adopted respondent’s theory, it would have been improper to have made the directly contrary findings proposed by appellant.

The application for leave to produce additional evidence on appeal is denied. The judgment and decree is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



103 Cal.App.2d 894

MARTIN v. SMITH et al.

RICHARDSON et al. v. MARTIN et al.

Civ. 7908.

District Court of Appeal, Third District,
California.

April 30, 1951.

Action by Tony G. Martin against Charles Glen Smith, Walter P. Jaarsma, Raymond Riley Richardson and Manuel Souza for injuries sustained by plaintiff when automobile in which he was riding collided with rear of stalled truck and trailer. The Superior Court, Solano County, Harlow V. Greenwood, J., after verdict against first two named defendants and in favor of last two named defendants, entered an order granting a new trial and defendants Richardson and Souza appealed. The District Court of Appeal, Adams, P. J., held that leaving disabled truck and trailer, which became immovable when brakes locked, on highway during daytime unattended while driver sought assistance was not negligence proximately causing collision and that granting a new trial as to driver and owner of truck and trailer was abuse of discretion.

Order reversed.

I. Appeal and error §979(2)

Order granting or refusing a new trial will not be reversed unless it can be said as a matter of law that there was no substantial evidence to support a judgment for the moving party or that there was a clear

or manifest abuse of discretion by trial court in granting the new trial.

2. Appeal and error ⇨1015(1)

An order granting a new trial should be reversed if there is no substantial evidence to support a judgment in favor of parties whose motion for new trial was granted.

3. Automobiles ⇨244(14)

New trial ⇨68

In action for injuries sustained by plaintiff when automobile in which he was riding collided during daylight with rear of disabled truck and trailer which had become immovable when brakes locked and which had been left on highway unattended while driver sought assistance, evidence failed to show any negligence which would justify or sustain a decision in favor of plaintiff against owner or driver of truck and hence granting a new trial as to owner and driver after verdict in their favor was abuse of discretion. Vehicle Code, §§ 582, 584.

4. Automobiles ⇨173(5)

Driver is not required by law to remain with vehicle which becomes disabled on highway and personally warn oncoming traffic. Vehicle Code, §§ 582, 584.

5. Automobiles ⇨173(5)

While statute provides what shall be done when any commercial vehicle becomes disabled upon the highway at night, there is no similar provision regarding warning signals which driver of a commercial vehicle must display when vehicle becomes disabled upon the highway during the daytime. Vehicle Code, §§ 582, 584, 590.

6. Automobiles ⇨173(5), 201(5)

Leaving disabled truck and trailer, which became immovable when brakes locked, on highway during daytime and going for help after setting up warning reflectors and not remaining with truck to warn oncoming traffic was not negligence which proximately caused automobile traveling in same direction to collide with rear of truck causing injury to automobile passenger. Vehicle Code, §§ 582, 584, 590.

Appelbaum & Mitchell, Oakland, John JeWett Earle, Oakland, for appellants.

Sinclair M. Dobbins, Walter W. Weir, Jr., Vacaville, Charles V. Barfield, San Francisco, Burt D. Goodman, Fairfield, for respondents.

ADAMS, Presiding Justice.

Plaintiff brought this action to recover damages for injuries which he sustained in a collision between an automobile belonging to Walter P. Jaarsma and driven by Charles Glen Smith, and a truck belonging to Manuel Souza, driven by Raymond Riley Richardson. Martin was a passenger in the Jaarsma car in which Jaarsma and another person were also riding. He sued Smith and Jaarsma, as well as Souza and Richardson. A jury returned a verdict for plaintiff against Jaarsma and Smith, but denied any recovery against the owner and driver of the truck. Plaintiff Martin and defendants Jaarsma and Smith all moved for new trials, which were granted. This appeal is taken by Souza and Richardson, it being their contention that no negligence on their part was shown, and that the verdict of the jury in their favor should not have been disturbed.

The facts are conceded to be substantially as follows: About noon on April 2, 1948, Richardson was driving defendant Souza's yellow milk truck and trailer in a westerly direction on a two-lane highway, approximately seven miles west of Rio Vista, Solano County. The road traversed a hilly region which consisted of a succession of rolling elevations and depressions. Rain had fallen during the morning, the highway was damp, and the adjacent ground was muddy and soft. As Richardson surmounted the crest of a slight hill he heard a noise like an explosion apparently emanating from under his truck. As there was only a two foot shoulder which dropped off into a ditch four or five feet deep he did not turn off the roadway at that point to check the vehicle, but proceeded slowly toward a wider area near the foot of the slope where an intersection appeared to afford an opportunity to stop outside of the traffic lane.

However, before he reached it the brakes on the trailer locked and the entire equipment became disabled and immovable in the right-hand traffic lane at a distance below the crest of the hill variously stated to be 150 to 300 feet. Being unable to move the truck he set out three warning devices which consisted of metal frames four inches wide and six to eight inches high, with two three or four inch reflectors on each side. One was placed at the crest of the hill, another about 60 feet behind the stalled vehicle, and the third about 25 feet in front of it, all in the right-hand driving lane near the white line. He also blocked the wheels of the truck and trailer. He then flagged a passing car and returned to Rio Vista for assistance, leaving the truck unattended for about an hour.

The car in which plaintiff was riding was also proceeding west toward Fairfield, along the same highway. As it ascended the east slope of the hill on the other side of which the truck was standing, plaintiff Martin was reading a book, there apparently being enough light for this purpose despite the slight rain. Martin testified that the Jaarsma car was traveling about 50 miles per hour, while Smith, the driver estimated his speed at 40 to 45 miles per hour. The three occupants of the car testified that they saw the truck as they reached the crest of the hill, though Smith, the driver, said that when he came over the crest of the hill he did not realize that the truck was stopped; also that he did not notice an eastbound car in the other lane and swung out to his left, intending to pass the truck; that he then observed the oncoming car, swerved back to his own side of the road and slammed on his brakes about 50 feet from the truck; that after the oncoming car had passed, he again tried to pass to the left of the stalled truck and trailer and as he pulled to his left the rear end of his car "slipped around" and hit the stalled equipment, throwing Martin to the ground and causing him severe injury.

Appellants assert that there was error in granting the new trial as to them; that they made a motion for a nonsuit at the conclusion of the plaintiff's case during

which the facts set forth were educed; that the nonsuit was denied by the trial court, with the comment that Richardson should not have left his vehicle unattended but should have taken a position near the brow of the hill to warn oncoming traffic; and that it was for the jury to determine whether Richardson was or was not negligent. Yet even after the jury had absolved appellants from liability, the trial court nevertheless set aside the decision of that body which he himself had said was the proper tribunal to resolve the issue.

Appellants contend that there was no negligence on Richardson's part; that he did all that was required of him under the circumstances and that it was not negligence for him to fail to remain near the place of the accident and warn oncoming traffic; that in fact he exercised greater precaution than required by law when he set out the reflectors, since the Vehicle Code contains no such requirement for warning of a disabled car during daylight hours. They also state that the disabled truck was not the proximate cause of the accident, but that the negligence of Smith in driving too fast and in failing to observe the warning reflectors and the obvious truck stalled in the middle of the road was the proximate cause; and they also assert that it cannot be said that the failure of Richardson to remain in person to warn oncoming vehicles was the proximate cause of the accident.

[1,2] The rule is well established that an appellate court will not reverse an order of a trial court granting or refusing a new trial unless it can be said as matter of law that there was no substantial evidence to support a judgment for the moving party, or that there was a clear or manifest abuse of discretion on the part of the trial court in granting the new trial. This subject has recently been dealt with extensively in two opinions by this court, to wit: *Yost v. Johnson*, 91 Cal.App.2d 849, 206 P.2d 13, and *Rembold v. Goodwin*, 93 Cal.App.2d 605, 209 P.2d 402. However, if and when it appears that there is no substantial evidence to support a judgment in favor of a party whose motion for new trial has been granted, an appellate court

may and should reverse the order of the trial court granting a new trial. The rule as stated in *Mazzotta v. Los Angeles Ry. Corp.*, 25 Cal.2d 165, 168, 153 P.2d 338, is that if the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party, the order appealed from should be reversed. Also see *Roscoe Moss Co. v. Jenkins*, 55 Cal.App.2d 369, 373, 130 P.2d 477. In *Seth v. Lew Hing*, 125 Cal.App. 729, 732, 14 P.2d 537, 538, 15 P.2d 190, in which an order granting a new trial was reversed and a hearing in the Supreme Court denied, the rule was thus stated: "Preliminarily we should consider the function of this court on an appeal from an order granting a new trial. On this point the authorities are in accord with the statement found in *Moss v. Stubbs*, 111 Cal.App. 359, 363, 295 P. 572, 573, 296 P. 86, that: 'It is equally well settled that, where there is no substantial conflict in the testimony on material issues, and the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party, an order granting a new trial cannot be sustained.' [Numerous cases cited.]" In *Henderson v. Braden*, 35 Cal.App.2d 88, 91, 94 P.2d 625, 626, a verdict was returned for defendant in a collision case, the court granted a new trial, and this court reversed the order, saying: "It is well settled that where the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party, an order granting a motion for a new trial cannot be sustained. *Moss v. Stubbs*, 111 Cal.App. 359-363, 295 P. 572, 296 P. 86, where numerous cases are cited." In *De La Falaise v. Gaumont-British Picture Corp.*, 39 Cal.App.2d 461, 103 P.2d 447, an action for breach of contract in which the court granted a new trial, the order was reversed; and after restating the above rule many cases were cited in support thereof. In *Schlemmer v. Stokes*, 47 Cal. App.2d 164, 117 P.2d 396, plaintiff, a minor, sued to recover damages for injuries resulting from a fall out of an apartment window. A jury returned a verdict for defendant and the court granted a new

trial, which was reversed, repeating the above rule.

[3-5] In the case before us we are satisfied that as matter of law there was no evidence which would justify or sustain a decision in favor of plaintiff as against these appealing defendants, and that in granting a new trial as to them the trial court abused its discretion. While section 582 of the Vehicle Code prohibits the stopping, parking, or leaving standing of any vehicle upon any highway outside of a business or residential district, whether attended or unattended, when it is practicable to stop, park or so leave such vehicle off the paved or improved or main traveled portion of the highway, section 584 of said code provides that such restriction "shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle upon such part or portion of said highway." There is no requirement of law that one whose vehicle is disabled shall remain with said car and personally warn oncoming traffic. While section 590 of the Vehicle Code, which was added by Stats.1935, ch. 508, p. 1579, and amended by Stats.1937, ch. 282, sec. 8, p. 620, provides what shall be done when any commercial vehicle becomes disabled upon the highway *at night*, there is no similar provision regarding warning signals which the driver of a commercial vehicle is compelled to show when his vehicle becomes disabled upon the highway during the daytime, and nothing that requires him to remain with the vehicle to warn oncoming traffic.

In *James v. White Truck & Transfer Co.*, 1 Cal.App.2d 37, 36 P.2d 401, 403, a case decided prior to the enactment of section 590 regarding warning signals at night, it was contended that the trial court erred in ordering judgment for defendants after a jury had returned a verdict against them in favor of plaintiffs. In that case a truck became disabled upon the highway at night and the driver left the vehicle while he went to telephone for aid. It was

contended by appellant that the driver should have backed his truck and trailer from the place where they came to a stop over to and near the curb before he left the vehicle on the highway, and also that he was negligent in failing to remain on guard at the rear of the truck to warn approaching motorists that the truck was disabled and was stationary. The evidence showed that the provisions of the Vehicle Act concerning lights, and particularly a red tail light, were fully complied with by the driver of the truck. Appellants suggested that a motorist observing a red light ahead would assume or believe that it was attached to a moving vehicle and that they were therefore entitled to some other warning of a stationary object; but the appellate court said: "We cannot give assent to this contention, nor approval to the doctrine involved in the suggestion. Whether the red light is on a swift or slow-moving vehicle, or on a stationary obstruction, from the time it is first observed, it conveys the information of danger and the observer is bound to heed its warning."

In *Lockie v. Pence*, 5 Cal.App.2d 172, 42 P.2d 340, also decided prior to the enactment of section 590 of the Vehicle Code, a truck became totally disabled upon the highway at night. Defendant left the truck in charge of an employee while he went to telephone for a mechanic. It was raining at the time, and after observing that the tail light on the truck was burning, the employee got into the cab of the truck. A car in which plaintiff was riding approached from the south and crashed into the rear end of the stalled truck. A jury returned a verdict in favor of plaintiff, but the trial court granted defendant's motion for a judgment notwithstanding the verdict, and such judgment was affirmed on appeal. Appellant contended that the tail light on the truck was not burning, but the appellate court held that the evidence was to the contrary and that there was no evidence in the record to establish, by inference or otherwise, any negligence on the part of defendant. A petition to have the cause heard in the Supreme Court was denied in that case.

Chapin v. Stickel, 173 Wash. 174, 22 P.2d 290, and *Currier v. Ingram*, 1 Cir., 75 F.2d 783, 111 A.L.R. 1511, are in accord with the above cited decisions. Also see *Scoville v. Clear Lake Bakery*, 213 Iowa 534, 239 N.W. 110, 112, a daylight case, in which it was held that failure to have warning lights attached to, or an attendant with, a disabled truck did not show negligence as to a traveler who observed the truck some distance therefrom. The appellate court said: "Nor does it appear that the 'dead' truck was the proximate cause, of plaintiff's injury. Though the question of proximate cause, like that of negligence, is usually one for the jury, yet it is such only when the evidence warrants doubt thereon. In this case, the evidence introduced by the plaintiff himself discloses affirmatively that the proximate cause of plaintiff's injuries was other than the alleged act of defendant." Another Iowa case is *Albrecht v. Waterloo Const. Co.*, 218 Iowa 1205, 257 N.W. 183. There a motorist, at a distance of 250 feet, perceived the object on the highway, and at 150 feet recognized it as a truck on the pavement. The court said it was therefore clear that the absence of lights or other warning to advise plaintiff's driver of the presence of the truck was immaterial. Citing *Scoville v. Clear Lake Bakery*, supra.

In the later Iowa case of *Engle v. Nelson* 220 Iowa 771, 263 N.W. 505, 509, the court approved the *Scoville* case and thus quoted from *Ryan v. Trenkle*, 203 Iowa 443, 212 N.W. 888, 889: "A person who has knowledge of the presence of a train or auto which imparts to him the very thing that a signal was intended to impart cannot, under ordinary circumstances, predicate negligence on the failure to give a signal." Then quoting from the *Scoville* case, the court said: "The only function to be served by lights, or by an attendant, would be to warn travelers of the presence of the obstruction in the road. Such ground of negligence could not be available to a plaintiff, who saw the truck for hundreds of feet in his approach thereto, and had no need of further warning."

In *Farrar v. Farrar*, 41 Ga.App. 120, 152 S.E. 278, the court said that the driver

of an auto is not required by statute, when stopping on the highway; to put out a guard to give notice of his presence to drivers of cars approaching from the rear. Also see *Hoffmann v. Krause*, 247 Wis. 565, 20 N.W.2d 546, *Boepple v. Mohalt*, 101 Mont. 417, 54 P.2d 857, and *Currier v. Ingram*, supra, 75 F.2d at page 786, in which latter case the court specifically said that the lights on plaintiff's truck having complied with statute, there was no negligence on the part of plaintiff in stopping his truck where he did, and that the jury was not warranted in finding that due care also required a man to be stationed at the rear of the truck to warn oncoming traffic.

[6] In the case before us we think it is clear that Richardson was not negligent in failing to remain with his truck for the purpose of warning oncoming traffic. The yellow truck and trailer were in themselves ample warning to Smith, the driver of the automobile, and he admitted that he observed same in ample time to slow up or stop. Instead, he elected to pass the truck and trailer to the left, but, on discovering an oncoming vehicle in that lane, he turned back into his lane and after the oncoming vehicle had passed he again tried to pass the truck and trailer but the rear end of his car "slipped around" and hit the stalled truck and trailer. Furthermore, he failed to observe the warning reflector placed on the brow of the hill, which reflector was still there after the accident; and apparently he did not observe the one placed 60 feet behind the truck, though according to plaintiff's testimony, he apparently ran over it in his course. Under the authority of the cases above cited there was no negligence on the part of Richardson in leaving his disabled truck upon the highway, since he was powerless to do otherwise; nor can it be said that his failure to remain with the truck to warn oncoming traffic was negligence. Certainly it was not negligence which was in any sense the proximate cause of the accident.

The order is reversed.

DEIRUP, Justice pro tem., and VAN DYKE, J., concur.

104 Cal.App.2d 81

In re BOGART'S GUARDIANSHIP.

LO CICERO v. BOGART.

Civ. 14754.

District Court of Appeal, First District,
Division 2, California.

May 8, 1951.

Barbara Elizabeth Bogart Lo Cicero filed a petition to have her mother, Lorene May Bogart, declared an incompetent person. The Superior Court in and for the City and County of San Francisco, T. I. Fitzpatrick, J., entered an order denying the petition, an ex parte order eliminating from the order of denial a provision for visitation, and an ex parte order declaring that respondent was sane and competent to manage her affairs, and petitioner appealed. The District Court of Appeal, Nourse, P. J., held that order denying petition was supported by sufficient evidence as to competency of respondent.

Orders affirmed.

1. Insane persons ⇐2

Denial of petition to have respondent declared an incompetent person was supported by sufficient evidence as to competency of respondent.

2. Insane persons ⇐26

In proceeding to have petitioner's mother declared an incompetent person, court was without jurisdiction to grant daughter the right to visit mother or to deny such right and recital in order denying petition that daughter should be entitled to visit mother at all reasonable times was surplusage and daughter could not complain of the elimination by ex parte order of the provision as to visitation.

3. Insane persons ⇐26

Where trial court in ex parte amendment of order denying petition to have respondent declared an incompetent person declared that respondent was sane and competent to manage her affairs, court presumably meant that it thereby found that respondent was sane and competent and ex parte amendment was not objectionable on ground that the findings were insufficient to show competency, since petitioner had suffered no prejudice from brevity of findings and fact that they ap-

peared in amended order. Probate Code, § 1230; Code Civ.Proc. § 632.

cussion. Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689.

Howard B. Crittenden, Jr., San Francisco, for appellant.

David Livingston, Louis F. Di Resta, San Francisco, for respondent.

NOURSE, Presiding Justice.

The daughter of Lorene May Bogart filed a petition to have her mother declared an incompetent person. After trial the petition was denied, the order of denial containing a recital that the daughter shall be entitled to visit her mother at all reasonable times. A few days later the court made an ex parte order eliminating this recital. Later the court made another ex parte order reciting that "Said Lorene May Bogart is hereby declared sane and competent to manage her affairs."

Appeals are taken from all three orders—the first is attacked on the ground that the evidence of competency was insufficient, the second on the ground that appellant was not given prior notice; the third on the ground that the "findings" are insufficient to show competency.

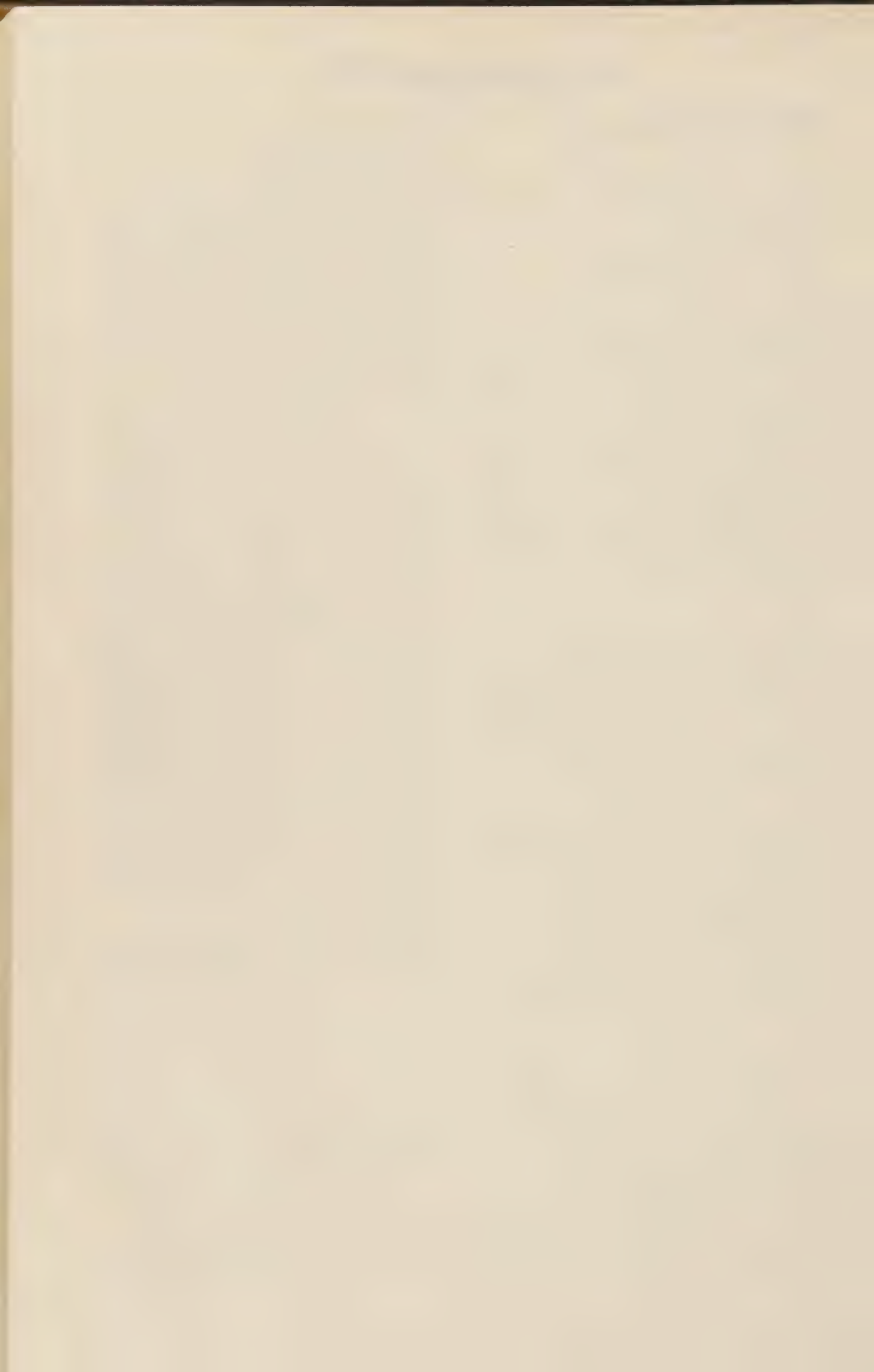
[1] The attack on the first order is without merit. Witnesses were called by both parties, both lay and professional. They uniformly supported the party calling them. It was left to the trial court to determine what testimony should be accepted. It cannot be contended that the respondent's evidence was insufficient to support the order—and that ends the dis-

[2] The inclusion in the first order of the provision giving the daughter permission to visit her mother was simple surplusage. The question before the court was solely that of the competency of respondent. In that proceeding the court was without jurisdiction to grant the daughter the right of visitation or to deny it. Since that recital had no part in the order the appellant cannot complain because it was stricken.

[3] The propriety of the third order is at least debatable. The original order did not contain anything in the nature of a finding of competency. The amendment is no great improvement. When the court "declared" that respondent was sane and competent it presumably meant that it thereby found that she was sane and competent. The provisions of section 1230 of the Probate Code and of section 632 of the Code of Civil Procedure, calling for findings have not been over zealously enforced when the judgment or order contains recitals of facts adjudged sufficient to meet the requirement of "findings of fact." Estate of Janes, 18 Cal.2d 512, 514, 116 P.2d 438. However, the appellant has suffered no prejudice from the brevity of the "findings", and no prejudice from the fact that they appear in an amended order. A reversal would be limited by a direction to amend the findings and that would benefit neither party.

The orders are affirmed.

GOODELL and DOOLING, JJ., concur.



CITY OF PASADENA v. LOS ANGELES COUNTY.

L. A. 21002, 21003.

Supreme Court of California, in Bank.

May 11, 1951.

Rehearing Denied June 7, 1951.

The City of Pasadena sued the County of Los Angeles to recover taxes paid under protest on certain improvements on land in the county but outside plaintiff's corporate limits. The Superior Court, Los Angeles County, Clarence M. Hanson, J., rendered judgments for plaintiffs, and defendant appealed. The Supreme Court, Carter, J., held that the improvements constructed by plaintiff, after acquisition of the property, in order to replace improvements that were on the property at the time of its acquisition and thus subject to taxation, should be taxed at their current value, and not, as contended by plaintiff, at current value of improvements originally on property when acquired.

Reversed.

Prior opinion, 224 P.2d 875.

1. Taxation ☞217

Under constitutional provision specifically exempting from taxation by county, improvements "constructed" by city on certain lands, in order to be exempt such improvements must be wholly new structures, and replacements of existing improvements are not within exempt class. Const. art. 13, § 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Constructed".

2. Taxation ☞217

Where city owned property and improvements thereon consisting of water system, located outside of the city limits but within county, which were subject to taxation at time of their acquisition, and subsequent to acquisition of property city replaced improvements, replacements would be subject to tax by county at their current value, and not, as contended by city, at current value of improvements originally on property at time of its acquisition by city. Const. art. 13, § 1.

Harold W. Kennedy, County Counsel,
A. Curtis Smith, Asst. County Counsel, and

230 P.2d—51

John D. Maharg, Deputy County Counsel,
all of Los Angeles, for appellant.

H. Burton Noble, City Atty. and Frank
L. Kostlan, Asst. City Atty., Pasadena,
for respondent.

CARTER, Justice.

In two actions to recover taxes paid under protest by plaintiff city to defendant county, one for the fiscal year 1945-46, the other for the fiscal year 1946-47, defendant's demurrers were overruled, and it failing to answer, judgments for plaintiff were entered.

The controversy involves the application of the constitutional provision reading: "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. * * * provided, that property * * * as may belong * * * to any * * * municipal corporation * * * shall be exempt from taxation, except such lands and the improvements thereon located outside of the * * * municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said * * * municipal corporation; provided, that no improvements of any character whatever constructed by any * * * municipal corporation shall be subject to taxation. All lands or improvements thereon, belonging to any * * * municipal corporation, not exempt from taxation, shall be assessed by the assessor of the county * * * in which said lands or improvements are located, and said assessment shall be subject to review, equalization and adjustment by the State Board of Equalization." Cal.Const., Art. XIII, § 1.

Plaintiff pursued its administrative remedy, see City & County of San Francisco v. County of San Mateo, 36 Cal.2d 196, 222 P.2d 860, and was denied relief by the State Board of Equalization.

The facts fitting the law as declared in the constitutional provision quoted are: That plaintiff owns property and improvements thereon consisting of a water system

located outside its city limits, but within defendant county which were subject to taxation at the time of their acquisition; that defendant's assessor assessed for taxation those improvements at \$56,310 for the first year and at \$51,640 for the second year; that certain of said improvements were constructed by plaintiff since acquisition of the property by it "to replace" improvements that were subject to taxation at the time of acquisition; that the assessor placed a value on the "replaced improvements" on the basis of the value thereof as they existed on the first Monday of March of the respective years, although the "replaced improvements" were larger and more substantially constructed, and of greater value than the improvements they replaced; and that they were constructed to serve a different purpose in that they were larger and would serve more parts of the water system.

Plaintiff contends that the assessor should have fixed the value of such "replaced improvements" at the value the original improvements would have had as of the first Monday in March of the respective tax years, rather than the value at that time of the "replaced improvements" which is a much higher figure. In other words, it says that when improvements are replaced, the replacements should not be taxed at their current value, but at the current value of the improvements originally on the property when acquired, because the increased value, by reason of the replacing of the original improvements, is, in effect, a new improvement which is not covered by the exception to the exemption in the constitutional provision above quoted. We cannot agree.

The constitutional provision is not concerned with assessed valuation before or after acquisition by the municipal corporation. It deals only with whether or not any improvements were constructed by the city after it acquired the property. They either are or are not improvements so constructed regardless of their value. The first part of the constitutional provision deals with valuation as distinguished from the part here involved, which, by its language, embraces what property is taxable.

While the precise issue here was not involved, the whole tenor of the cases heretofore decided by this court points to this conclusion. *City & County of San Francisco v. County of San Mateo*, 17 Cal.2d 814, 112 P.2d 595, 597; *City & County of San Francisco v. County of San Mateo*, supra, 36 Cal.2d 196, 222 P.2d 860. In the first case the issue was whether a concrete flume which the city built to replace a wooden one was, an improvement constructed by the city after acquisition of the property and thus exempt from taxation. We held it was not exempt as it was only a replacement, and stated: "In furtherance of that purpose the intent of the amendment must have been to *preserve for taxation not only the identical improvements existing on the property at the time of the acquisition of the property by the municipality, but also substitutes for the same and replacements thereof*. The improvements constructed on the property by the municipality which are exempt, are only such as are of an *entirely new character and not theretofore existing in any form*. In this connection it may be noted the words 'construct, constructed and construction' generally import the creation of something new and original that did not exist before rather than replacement, repair or improvement. [Citations] Otherwise by merely repairing, enlarging or replacing existing improvements, the county in which the property was located would lose the tax revenues formerly received from such improvements, while the municipality would be enjoying the same use and benefits from the improvement as it did prior to the replacement, at least to the extent of the value of the improvement as it originally existed." (Emphasis added) In the second case the problem was whether a fill made after acquisition was an improvement and thus exempt from taxation. We held it was exempt, pointing out that the test was whether the fill constituted an improvement, stating, 36 Cal. 2d at page 198, 222 P.2d at page 861-862: "*If the fill constitutes an improvement as contemplated by the constitutional amendment, it is to that extent exempt, and the county had no power to take it into con-*

sideration in making the assessment. * * Retained within the exemption provision were 'improvements of any character whatever constructed' by the city. 'Construction' or 'constructed' means the creation of something that did not exist before as distinguished from replacement or repair. *City & County of San Francisco v. San Mateo County*, supra, 17 Cal.2d at [page] 819, 112 P.2d [595] at page 596, citing cases. The obvious purpose was to permit the assessment of the property which was in existence at the time it was acquired by the city. The assessment in successive years of that much of the municipally owned property was made subject to review, equalization and adjustment. The phrase 'improvements of my character whatever' must be held to include any addition (i. e. *excluding matters of repair and replacement*) to the property as it was when acquired. The amendment does not define 'improvements' beyond the descriptive language 'improvements of any character whatever'. It is difficult to perceive what more inclusive language could have been employed to express the intent to preserve to the county a continuation of the property on the tax rolls as a source of revenue restricted, however, in each successive year to an equalized valuation of the property before the addition of any construction." (Emphasis added.)

Plaintiff argues that in the first case the assessed value was the current value of the original improvements. Be that as it may, the point stressed is, what may be taxed.

[1,2] It argues that the purpose of the constitutional provision is to keep on the tax rolls improvements "as were subject to taxation at the time of the acquisition of the same" and that where improvements are replaced they are not such as were subject to taxation at that time. But the constitutional provision goes on to say specifically what improvements are exempt from taxation; namely, those which were *constructed* by the city, and we held in the first San Francisco case, supra, that to be such improvements, they must be wholly new structures, that replacements of existing improvements were simply not

improvements of the exempt class. As seen, the issue is not one of valuation. This should be clear, for if the replacement eliminates the old improvement, there is no longer any improvement to tax, unless we look to the replacement. When we do that we have something to tax, and the question is, what is that something, not what is its value. If we tax it by the current value of the old improvement, we are not taxing an article of property; we are taxing a fiction. The difference in value does not make two separate articles of property. If the fiction is to be employed as the basis for fixing value, it would violate the spirit of the forepart of the above quoted constitutional provision that all property shall be taxed according to its value, for the replaced improvement would not be taxed according to that value.

The judgments are reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



37 Cal.2d 89

MILLER et al. v. PETERS et al.

L. A. 21849.

Supreme Court of California, in Bank.

May 4, 1951.

Rehearing Denied May 31, 1951.

Action by Emily Miller, Louis Miller, and Harold Herbert Miller against Charles Luther Peters, the San Bernardino Valley Transit Company, and others, for injuries sustained in a collision between automobile and bus. The Superior Court, San Bernardino County, Russell Goodwin, J., rendered judgment for defendants and first two named plaintiffs appealed. The Supreme Court, Spence, J., held that giving of instruction on first named plaintiff's contributory negligence when such defense was not pleaded in defendants' answer, nor tried by parties, was error.

Judgment reversed.

Prior opinion, 224 P.2d 79.

1. Negligence ⇨93(14)

Negligence of driver of an automobile cannot be imputed to a passenger unless passenger exercised some control over driver, or had power to supervise or direct manner in which vehicle should be operated.

2. Appeal and error ⇨882(6)

When parties and court proceed throughout trial upon a theory that a certain issue is presented for adjudication both parties are thereafter estopped from claiming that no such issue was in controversy even though it was not actually raised by pleadings.

3. Appeal and error ⇨882(6)

Principle that both parties are estopped from claiming that issue was not in controversy, even though it was not actually raised by pleadings, when court proceeds upon theory that issue was presented for adjudication, operates only where it appears from record on appeal that issue was actually and intentionally tried by introduction of pertinent evidence, and that party against whom estoppel is invoked, consciously participated or acquiesced in such trial.

4. Appeal and error ⇨882(6)

Evidence which is relevant to an issue actually raised by pleadings cannot be considered as authorizing determination of an issue not presented.

5. Appeal and error ⇨882(6)

A party cannot object to introduction of evidence which is pertinent to an issue made by pleadings.

6. Automobiles ⇨224(1), 245(88)

An automobile passenger is bound to use reasonable care for his own safety, and whether such care has been exercised is ordinarily a question of fact to be submitted to jury in its consideration of passenger's duty to remonstrate against excessive speed.

7. Automobiles ⇨243(3, 7)

In action by automobile driver and passenger for injuries arising out of collision

between automobile and bus, evidence that passenger had not asked driver to slow automobile down or remonstrate with him in any way concerning his manner of operating automobile was relevant in establishing driver's contributory negligence, which was an affirmative defense specifically pleaded, and admissible.

8. Automobiles ⇨246(58)

In action by automobile passenger and driver for injuries arising out of collision between automobile and bus, where both driver and passenger did not consciously accept matter of passenger's contributory negligence as issue in trial, and defendants did not plead such defense, instruction on passenger's contributory negligence was error, especially when it could not be determined, because of general verdict in favor of defendant, whether jury had found that accident had occurred solely through negligence of driver, or was result of joint negligence of driver and bus driver.

9. Automobiles ⇨246(58)

In action by automobile driver and passenger for injuries arising out of collision between automobile and bus, had issue of passenger's contributory negligence been raised by pleadings and tried by parties, evidence would have been sufficient to authorize instruction submitting to jury passenger's contributory negligence.

Novack & Haberkorn, San Bernardino, and Henry F. Walker, Los Angeles, for appellants.

Guthrie, Lonergan & Jordan and Swing & Gillespie, San Bernardino, for respondents.

SPENCE, Justice.

Plaintiffs sought damages for personal injuries sustained by reason of a collision between an automobile and a bus on Highland Avenue a short distance east of the city limits of the city of San Bernardino. Plaintiff Harold Herbert Miller was driving the automobile and his mother, plaintiff Emily Miller, was riding with him. The bus was owned by defendant San Bernardino Valley Transit Company and was

being operated by its employee, defendant Charles Luther Peters.

The complaint set forth two causes of action: (1) that of plaintiffs Louis Miller and Emily Miller, husband and wife, for injuries received by the latter while riding as a guest of her son; and (2) that of plaintiff Harold Herbert Miller, the son, for his own damages. In their answer defendants denied the alleged negligence, and as an affirmative defense to the *second* cause of action—but not to the *first* cause of action involving the claim of the mother—defendants pleaded contributory negligence, such defense relating only to the son. The case was tried before a jury and judgment on the verdict was rendered in favor of defendants. From such judgment, plaintiffs Louis and Emily Miller have appealed. They contend that the trial court committed prejudicial error in (1) submitting to the jury the question of contributory negligence on the part of plaintiff Emily Miller; and (2) in refusing to instruct the jury that such question was not an issue as to her cause of action. The record shows their position to be well taken.

The accident occurred at about 6 o'clock p.m. on May 9, 1948, at which time the weather was clear and dry. The automobile driven by appellants' son struck the left side of respondents' bus as it was making a "U" turn on Highland Avenue at the terminal of the bus line just beyond the city limits of San Bernardino. Appellants' son testified that he first noticed the bus turning when he was "about 150 feet away," at which time he was traveling at about 40 to 45 miles per hour; that he sounded his horn; that the bus continued its circling movement; that he applied his brakes but was unable to avoid the collision. In response to questions asked by counsel for respondents, both the mother and son testified that the mother made no suggestion or remonstrance to the son regarding his speed, and the mother further testified that she never saw the bus prior to the collision. There was evidence that the brakes on the son's automobile were in good condition, that they left tire marks on the pavement for some 102 feet, and that just prior to the accident appellants' son was driving

at a speed variously estimated from 50 to 60 miles per hour. Respondent bus driver testified that after he had looked in both directions on Highland Avenue and had adjusted the hand-signal on his bus to indicate a left turn, he shifted into low gear and commenced to make his turn; that he was then traveling between 3 and 4 miles per hour when the bus stalled; that he set the emergency brake and attempted to start it; and that while in such position and within a few seconds, the automobile driven by appellants' son struck the bus.

[1] From the above brief summary, it is apparent that there was conflicting evidence which would support a determination that the collision was proximately caused by the negligence either of appellants' son or of respondent bus driver, or by the concurrent negligence of both. But the negligence of the driver of an automobile cannot be imputed to a passenger unless the latter exercised some control over the driver, or had the power to supervise or direct the manner in which the vehicle should be operated. *Marchetti v. Southern Pacific Co.*, 204 Cal. 679, 681-682, 269 P. 529; *Renowden v. Pacific Electric Ry. Co.*, 73 Cal.App. 383, 388, 238 P. 785; *Queirolo v. Pacific Gas & Electric Co.*, 114 Cal.App. 610, 615, 300 P. 487; *Strandt v. Cannon*, 29 Cal.App.2d 509, 514, 85 P.2d 160. Concededly there was no evidence here that would sustain a finding of imputed negligence against the mother, and no instruction on this theory was given. However, although the issue was not pleaded, the trial court instructed the jury on the personal contributory negligence of a guest and its application in bar of a recovery for the injuries to the mother. The instruction, in substance, was as follows: that if the jury found that the son "was driving * * * at a dangerous and excessive rate of speed * * * under all the facts and circumstances immediately prior and leading up to the happening of [the] accident," that the mother "knew of that fact in time to have objected or remonstrated," that "an ordinarily prudent person would have [so] remonstrated," but that the mother "did not [so] remonstrate" and "the accident was proximately caused in whole or in part by

such rate of speed," then the mother "[was] not entitled to recover any damages." The trial court refused to instruct the jury, at the request of appellants, that there was no issue of contributory negligence on the part of the mother presented for its consideration. The jury returned a verdict in favor of respondents on both counts: the damage claims for the mother's injuries as well as for the son's.

[2-5] It is settled law that where the parties and the court proceed throughout the trial upon a theory that a certain issue is presented for adjudication, both parties are thereafter estopped from claiming that no such issue was in controversy even though it was not actually raised by the pleadings. 14 Cal.Jur. § 62, p. 974; Northwestern Mut. Fire Ass'n v. Pacific W. & S. Co., 187 Cal. 38, 40, 200 P. 934; Baar v. Smith, 201 Cal. 87, 98-99, 255 P. 827; McAllister v. Union Indemnity Co., 2 Cal.2d 457, 460, 42 P.2d 305. But such principle of estoppel operates only where it appears "from the record on appeal * * that the issue was actually and intentionally tried by the introduction of pertinent evidence, and that the party against whom the estoppel is invoked consciously participated or acquiesced in such trial, as if the issue had been made by the pleadings * *". Ortega v. Cordero, 88 Cal. 221, 227, 26 P. 80, 82; see 2 Cal.Jur. § 69, p. 239, and cases there cited. Furthermore, there is the added "qualification that evidence which is relevant to an issue actually raised by the pleadings cannot be considered as authorizing the determination of an issue not presented." Freeman v. Gray-Cowan, Inc., 219 Cal. 85, 87, 25 P.2d 415, 416. So applicable is the fundamental proposition that a party cannot object to the introduction of evidence which is pertinent to an issue made by the pleadings. Greiss v. State Investment & Insurance Co., 98 Cal. 241, 244, 33 P. 195. These distinguishable considerations are precisely noted in Riverside Water Co. v. Gage, 108 Cal. 240, at page 245, 41 P. 299, at page 300, as follows: "It is frequently the case that evidence which is admissible to establish one issue may tend to establish another issue than that for which it is offered, and it is a rule that

evidence so introduced is available to establish any of the issues in the case. This rule is, however, limited to the issues which are to be tried. *If the other issue that the evidence may tend to establish is not before the court, the evidence must be limited to the actual issue. The fact of its introduction cannot be used to establish an issue that the parties have not made in their pleadings. The court would not be authorized to consider it as establishing an issue that was not before it for trial.*" (Emphasis added.) To like effect, see Crescent Lumber Co. v. Larson, 166 Cal. 168, 171, 135 P. 502.

[6,7] It is true that an automobile passenger is bound to use reasonable care for his own safety; and whether such care has been exercised is ordinarily a question of fact to be submitted to the jury in its consideration of the passenger's duty to "remonstrate against excessive speed [as] dependent upon the circumstances of the particular case." Queirolo v. Pacific Gas & Electric Co., supra, 114 Cal.App. 610, 615, 300 P. 487, 491. As above indicated, both the son and the mother testified that she at no time asked the son "to slow the car down" or remonstrated with him in any way concerning his manner of operating the car. This testimony was elicited, without objection, toward the end of the trial after these witnesses had been recalled by the defense for further questioning. Code Civ.Proc. § 2055. While the questions in response to which this testimony was given would have been relevant on a plea of personal contributory negligence of the mother, they were likewise relevant in establishing the son's contributory negligence, an affirmative defense specifically pleaded. As evidence bearing on the son's rate of speed and method of operating the automobile related to the issue of his contributory negligence, so would evidence as to whether at any time prior to the happening of the accident, the mother had remonstrated with her son or protested against the speed at which they were traveling be pertinent on the same issue of the son's contributory negligence in showing whether or not the son had been given an advance warning which he failed to heed. Annotation 125

A.L.R. 645, 646; *Hiller v. Desautels*, 268 Mass. 437, 169 N.E. 494, 495. As so relevant to the pleaded issue of the son's alleged contributory negligence, this evidence was admissible and appellants could not properly have urged an objection to the questions asked, *Greiss v. State Investment & Insurance Co.*, supra, 98 Cal. 241, 244, 33 P. 195, but the introduction of such evidence would not authorize the submission of matter not raised by the pleadings. *Meindersee v. Meyers*, 188 Cal. 498, 504, 205 P. 1078.

[8] Nor does it appear that appellants at any time consciously accepted the matter of personal contributory negligence on the part of the mother as an issue in the trial, so as to preclude them from raising the objection on appeal. 2 Cal.Jur. § 73, p. 246; *Malinow v. Dorenbaum*, 51 Cal.App.2d 645, 653, 125 P.2d 554; *Roynon v. Battin*, 55 Cal.App.2d 861, 868, 132 P.2d 266; *Grimes v. Nicholson*, 71 Cal.App.2d 538, 543, 162 P.2d 934. Thus, at the conclusion of the trial they expressly requested the court to instruct the jury that there was no issue of contributory negligence on the part of the mother for consideration. Such instruction was not only refused, but the court gave the instruction heretofore noted. This instruction served to emphasize the error of the court by inviting "the jury to predicate a finding of negligence upon the failure of the mother to give" a cautionary warning to her son with regard to "the perils attending [his driving]," which "finding, if made, would be entirely outside of the issues" affecting appellants' right to recover. *McKeon v. Lissner*, 193 Cal. 297, 306, 223 P. 965; see, also, *Starr v. Los Angeles Ry. Corp.*, 187 Cal. 270, 275, 201 P. 599; *Stehli Silks Corp. v. Director*, 86 Cal.App. 591, 595, 261 P. 313. From the general verdict of the jury in favor of respondents, it cannot be determined on what basis the jury absolved respondents from any liability in this case: whether it found that the accident (1) occurred solely through the negligence of the son; or (2) was the result of the joint negligence of both the son and respondent bus driver in the operation of their respective vehicles, and the failure of the mother to caution

her son in his driving as an "ordinarily prudent person" would have done under the circumstances precluded her recovery. Cf. *Edwards v. Freeman*, 34 Cal.2d 589, 594, 212 P.2d 883. In such circumstances it is apparent that the error in giving an instruction on a matter not within the issues, and the error in refusing to give the instruction correctly defining the issues operated to the prejudice of appellants. *Stoneburner v. Richfield Oil Co.*, 118 Cal.App. 449, 456, 5 P.2d 436; *Van Noy v. Frank*, 10 Cal.App.2d 423, 425, 51 P.2d 1166; *Krupp v. Los Angeles Ry. Corp.*, 57 Cal.App.2d 695, 697, 135 P.2d 424.

[9] Appellants further urge that the evidence was insufficient as a matter of law to support a finding of contributory negligence on the part of the mother. To this point they claim that a guest is under no duty to remonstrate against his driver's rate of speed unless there is "reason for [him] to be apprehensive of his safety", *Martinelli v. Poley*, 210 Cal. 450, 458, 292 P. 451, 455, and he "is aware that the [driver] is carelessly rushing into danger", *Marchetti v. Southern Pacific Co.*, supra, 204 Cal. 679, 683, 269 P. 529, 531, in time to have done something "to avert the accident", *Queirolo v. Pacific Gas & Electric Co.*, supra, 114 Cal.App. 610, 615, 300 P. 487, 490; *Swink v. Gardena Club*, 65 Cal. App.2d 674, 680, 151 P.2d 313. In this connection they argue that there is no evidence indicating that the mother ever saw respondents' bus or was aware of the danger of a collision therewith, or that she had time in which to make an effective protest, *Dover v. Archambeault*, 57 Cal.App. 659, 662, 208 P. 178, and that they may therefore rely on the presumption that she did take "ordinary care for her own safety", *Chinnis v. Pomona Pump Co.*, 36 Cal.App.2d 633, 642, 98 P.2d 560, 565; see Code Civ. Proc. § 1963, subd. 4; *White v. Barker Bros.*, 12 Cal.App.2d 164, 166, 55 P.2d 248. However, other factors in evidence relating to the speed of the son's automobile and the manner in which he was driving immediately prior to the accident would justify submitting to the jury the matter of the mother's personal contributory negligence for determination as a question of fact un-

der all the circumstances of the case. Accordingly, had the issue of her contributory negligence been raised by the pleadings and tried by the parties, an instruction submitting to the jury her conduct as an "ordinarily prudent person" in the discharge of her duty to exercise reasonable care for her own safety would have been proper. *Curran v. Earle C. Anthony, Inc.*, 77 Cal.App. 462, 471, 247 P. 236; *Queirolo v. Pacific Gas & Electric Co.*, supra, 114 Cal.App. 610, 619, 300 P. 487; *Aungst v. Central California Trac. Co.*, 115 Cal.App. 113, 120 P. 2d 56.

The judgment in favor of defendants and against plaintiffs Emily Miller and Louis Miller is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAINOR and SCHAUER JJ, concur.



37 Cal.2d 106

In re WIELING'S ESTATE.

LUCHSINGER v. WIELING.

S. F. 17933.

Supreme Court of California.

May 4, 1951.

Proceedings in the matter of the estate of Andrew Wieling, also known as Anne Annes Wieling, deceased, wherein David Luchsinger, administrator of the estate of Matilda Wieling, also known as Tillie Wieling, deceased, and Andrew Wieling, Jr., executor of the estate of Andrew Wieling, also known as Anne Annes Wieling, deceased, sought a determination of heirship as to several parcels of real property, some standing of record in the name of the deceased husband and some standing in the name of the deceased wife. The Superior Court, Contra Costa County, Hugh Donovan, J., decreed that certain of the real property was the separate property of Andrew Wieling and not his and his wife's community property, and David

Luchsinger appealed. The Supreme Court, Traynor, J., held that the evidence sustained the trial court's finding.

Affirmed.

Prior opinion 223 P.2d 55.

1. Frauds, statute of 63(1)

Husband and wife 266

Husband and wife can change character of their property by oral agreement. Civ. Code, §§ 163, 164.

2. Husband and wife 264

In heirship proceedings, where claim that certain real property had been separate property of husband was sought to be substantiated by proof that wife had surrendered her community interest in property by agreement under which parties were to acquire property in wife's own name sufficient to equalize separate holdings of each, trial court could, under evidence, reasonably conclude that agreement had been carried into effect and that wife had achieved equal division when she acquired last parcel of land in her own name in 1926, notwithstanding fact that wife had acquired only four parcels as against husband's seven and that in 1947, when parties died, property in husband's name had been worth approximately twice that in his wife's name. Civ. Code, §§ 163, 164.

3. Husband and wife 264

In heirship proceedings, where claim that certain real property had been separate property of husband was sought to be substantiated by proof that wife had surrendered her community interest in property by agreement under which parties were to acquire property in wife's own name sufficient to equalize separate holdings of each, where there was evidence that wife had paid taxes and made repairs on her property only and that she had made it clear to her husband that he was solely responsible for taxes and maintenance of his property, trial court could reasonably conclude from such evidence that parties had intended from time agreement was made that property in name of each spouse was his or her separate property rather than that they had intended that wife was not to lose her interest in community property until she had acquired separate

property equivalent in value to that held by her husband. Civ. Code, §§ 163, 164.

4. Witnesses ⇨133

A proceedings to determine heirship was not an action on a claim or demand against estate of deceased person within meaning of dead-man statute, and accordingly interested party would not be incompetent to testify as to events occurring before death of parties whose property was involved in heirship proceedings. Code Civ. Proc. §§ 1844, 1880.

5. Trial ⇨140(1)

In heirship proceeding, it was for probate court to determine what credit should be given witness' testimony. Code Civ. Proc. § 1844.

6. Husband and wife ⇨264

In heirship proceeding, evidence sustained probate court's finding that certain real property had been separate property of husband and not his and his wife's community property. Civ. Code, §§ 163, 164; Code Civ. Proc. §§ 1844, 1880.

7. Husband and wife ⇨266

In heirship proceedings, where claim that certain real property had been separate property of husband was sought to be substantiated by proof that wife had surrendered her community interest in property by agreement under which parties were to acquire property in wife's own name sufficient to equalize separate holdings of each, where it appeared that agreement had been conceived by wife and that it had not been the result of any suggestion or act on part of her husband, trial court was justified in concluding that any presumption of undue influence or fraud had been rebutted. Civ. Code, §§ 158, 2235.

Lorne M. Stanley and Douglas A. Pease, San Francisco, for appellant.

Carlson, Collins & Gordon, Frederick Bold, Jr., and Harold F. Sawallisch, all of Richmond, for respondent.

TRAYNOR, Justice.

The administrator of the estate of Matilda Wieling appeals from a judgment of

the probate court in an heirship proceeding determining that certain real property was the separate property of Andrew Wieling and not his and his wife's community property.

Andrew and Matilda Wieling were married in 1912. Matilda had five children by a previous marriage, four of whom survived her. Andrew Wieling, Jr., is the only child of the marriage between Andrew and Matilda and is the sole beneficiary of Andrew's will. Andrew died January 13, 1947, and Matilda May 9, 1947. During their marriage they acquired eleven parcels of real property. Title to seven of these parcels was taken in Andrew's name, and title to the remaining four in Matilda's name. The evidence is not clear whether the money used to purchase the property was the community property or the separate property of either spouse. One of the lots in Matilda's name was a gift from two of her children.

On the basis of the foregoing evidence and applicable presumptions appellant contends that the property in Matilda's name was her separate property, Civil Code § 164, and that the property in Andrew's name was community property, on the ground that it was acquired by him after marriage other than by gift, bequest, devise, or descent. Civil Code §§ 163, 164. Respondent Andrew Wieling, Jr., executor of the estate of Andrew, contends that the property in Andrew's name became his separate property by virtue of an oral agreement between him and Matilda. It is therefore necessary to determine whether the evidence relating to the alleged oral agreement sustains the trial court's finding that the seven parcels in Andrew's name were his separate property.

Evidence of the agreement was presented by respondent, who testified that in 1925, when Matilda took title in her name to the tenth parcel of property, Andrew asked her, "Why wasn't it good enough to keep all of it in the community?" She said, "I am going to have half of it in my name and half in your name, and we each have our own property, and there won't be any trouble about it." Respondent further testified: "My mother [Matilda] was going

to have half in her name, and my father [Andrew] was going to have half in his name, and she was going to build up until she got that much. * * * That plan was followed out right to a 'T.' At the time the agreement was made there were seven parcels in Andrew's name and two in Matilda's name. At that time Matilda took title to a third parcel, and the following year she took title to a fourth parcel. No additional property was acquired by either spouse, and at the time of their deaths in 1947 the appraised value of the property in Andrew's name was approximately twice that of the property in Matilda's name.

[1,2] Appellant does not dispute the rule that by oral agreement husband and wife can change the character of their property. See, *Huber v. Huber*, 27 Cal.2d 784, 789, 167 P.2d 708; *Tomaier v. Tomaier*, 23 Cal.2d 754, 757-758, 146 P.2d 905. He contends that the agreement was not carried into effect, since Matilda acquired only four parcels as against Andrew's seven, and since the property in Andrew's name was worth approximately twice that in Matilda's. There is no evidence, however, that the relative values of the properties remained the same in the 21 year period between 1926, when the last parcel was acquired, and the deaths of the spouses; and since respondent testified that the agreement was carried out, the trial court could reasonably conclude that when Matilda acquired the last parcel in 1926 she had achieved an equal division.

[3] Even if it be assumed, however, that Matilda did not succeed in acquiring property equivalent in value to that held by Andrew, it does not follow that the agreement was ineffective to make the property in his name his separate property. It could be inferred from the terms of the original agreement either that Matilda was not to lose her interest in the community property until she acquired separate property equivalent in value to that held by Andrew, or that the parties intended that the property held in the name of each should immediately become separate property and that any inequality

should be rectified as additional property was acquired. After the agreement Matilda regarded the property in Andrew's name as his property. Although she collected rents on both his property and hers, she paid taxes and made repairs on her property only and made it clear to Andrew that he was solely responsible for the taxes on and maintenance of his property. From this evidence the trial court could reasonably conclude that from the time the agreement was made the parties intended that the property in the name of each spouse was his or her separate property.

[4-6] Appellant contends, however, that the evidence does not support the finding of the trial court because it consists almost wholly of the testimony of respondent, an interested witness, given after the parties to the contract were dead. The present action, however, is not on a claim or demand against the estate of a deceased person within the meaning of section 1880 of the Code of Civil Procedure, *Streeter v. Martinelli*, 65 Cal.App. 2d 65, 71-72, 149 P.2d 725; *Bollinger v. Wright*, 143 Cal. 292, 296, 76 P. 1108, and accordingly respondent was not incompetent to testify to events occurring before the deaths of the parties. It was for the trial court to determine what credit should be given his testimony. In re Estate of Duncan, 9 Cal.2d 207, 217, 70 P.2d 174. The trial court accepted it as true, and it supports the finding. Code Civ.Proc. § 1844.

[7] Finally, respondent contends that under the agreement Andrew gained an advantage over his wife, and that it must therefore be presumed that the agreement was the result of undue influence or fraud. See, Civil Code §§ 158, 2235; *McKay v. McKay*, 184 Cal. 742, 746, 195 P. 385. There is evidence, however, that Matilda was aware of the status of the property at the time she proposed the agreement. Andrew was willing to keep the property that stood in his name within the community. Since the agreement was conceived by her and not the result of any suggestion or act on the part of her husband, the trial court was justified in con-

cluding that any presumption of undue influence or fraud had been rebutted. *Smith v. Lombard*, 201 Cal. 518, 524-525, 258 P. 55.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.



37 Cal.2d 97

DEAN v. KUCHEL.

Sac. 6186.

Supreme Court of California, in Bank.

May 4, 1951.

Original mandamus proceeding by James S. Dean, as director of the Department of Finance, and others, against Thomas H. Kuchel, as Controller of the State of California, to compel the respondent to draw warrants for payment of salaries of employees of the Wild Life Conservation Board. The Supreme Court, Carter, J., held that the constitutional provision stating that Legislature may enact appropriate laws for protection of fish and game, and creating Fish and Game Commission, and stating that Legislature may delegate to the Commission such powers relating to protection and propagation of fish and game as Legislature sees fit, does not give Commission exclusive power to control state's fish and game resources, and does not require Legislature to act solely through Commission, and does not deprive Legislature of authority to create Wild Life Conservation Board to determine the lands to be acquired by state for fish and game conservation purposes.

Writ issued.

I. Administrative law and procedure ⚡202

Fish ⚡11

Game ⚡6

The constitutional provision stating that Legislature may enact appropriate laws for protection of fish and game, and creating Fish and Game Commission, and stating

that Legislature may delegate to the Commission such powers relating to protection and propagation of fish and game as Legislature sees fit, does not give Commission exclusive power to control state's fish and game resources, and does not require Legislature to act solely through Commission, and does not deprive Legislature of authority to create Wild Life Conservation Board to determine the lands to be acquired by state for fish and game conservation purposes. Gen.Laws, Act 9250, §§ 1 et seq., 1-3, 5; Public Resources Code, § 501; Business and Professions Code, § 19627; Const. art. 1, § 25; art. 4, § 25½.

2. Constitutional law ⚡14

The express enumeration in constitution of legislative powers is not an exclusion of others not named unless accompanied by negative terms.

3. Constitutional law ⚡14

The word "may" in Constitution is reasonably susceptible of permissive meaning rather than mandatory or prohibitory, and when such word is used it will not create a restriction on the legislative power even though the Constitution also provides that the provisions of the Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise. Const. art. 1, § 22.

See publication Words and Phrases, for other judicial constructions and definitions of "May".

4. Fish ⚡8

Game ⚡3½

The constitutional provision creating Fish and Game Commission and stating that Legislature may delegate to Commission such powers as Legislature sees fit, does not strip the legislative and executive departments of all power with relation to fish and game and substitute a Fish and Game Commission with unlimited power, and is not a special provision controlling over the general provision creating the legislative department, and is not like a provision creating an executive or judicial office, each of which is entitled to its sphere of authority under the separation of powers principle. Const. art. 4, § 25½.

5. Constitutional law ⚡26

The Legislature has all legislative power not expressly or by necessary implication denied to the Legislature by the Constitution.

Frank K. Richardson, Ralph N. Kleps, Legislative Counsel, Sacramento, Chas. W. Johnson, Chief Deputy Legislative Counsel, San Francisco, and Joseph W. Paulucci, Deputy Legislative Counsel, Sacramento, for petitioners.

Edwin J. Regan, Weaverville, as amicus curiae on behalf of petitioners.

Edmund G. Brown, Attorney General, Bert W. Levit, Chief Deputy Attorney General, Ralph W. Scott and W. R. Augustine, Deputy Attorneys General, for respondent.

Robert L. Mann, San Francisco, as amicus curiae on behalf of respondent.

CARTER, Justice.

In 1947, the Legislature passed the "Wildlife Conservation Act of 1947" Stats.1947, ch. 1325, Am.Stats.1949, ch. 1440. 3 Deering's Gen.Laws, Act 9250. It declares that the "preservation, protection and restoration" of wild life in the state and maintaining "high productivity" thereof is the public policy of the state. To achieve those aims "a single and coordinated program for the acquisition of lands and facilities suitable for recreational purposes and adaptable for conservation, propagation and utilization of the fish and game resources of the State is hereby established." Id., § 1. In the Department of Natural Resources, Public Resources Code, § 501 there is created a Wildlife Conservation Board, consisting of the President of the Fish & Game Commission, an employee or executive officer of the commission, chosen by the commission, and the Director of Finance. Three members each of the Senate and Assembly shall meet with the board and participate in its activities to the extent that such participation is not incompatible with their membership in the Legislature. Id., § 2. The board shall study and determine the areas and land in the state most suitable for the production and preservation of wild life and for recreation, and, as a result of such study, shall

determine what areas shall be acquired by the state "to effectuate a coordinated and balanced program resulting in the maximum revival of wild life in the State and in the maximum recreational advantages to the people of the State", Id., § 3 and may authorize the acquisition of such areas by the Fish & Game Commission or the State Public Works Board. The commission, when authorized by the board shall construct such facilities as are suitable. Completed areas are to be managed by the commission. Id., § 3. The money in the Wild Life Recreation Fund is available for expenditure under the act. Also in 1947, § 19627 of the Business & Professions Code was amended to create a Wildlife Restoration Fund and with the direction that \$3,000,000 per year be paid into it from the license fees from horse race meetings. Stats.1947, ch. 1327, § 1. The Conservation Act repealed Budget Item 245 for 1947, which amounted to \$1,-400,000 for use by the commission in construction, improvement and repairs, and equipment. Id., § 5.

Pursuant to the act the board employed Seth Gordon to make a survey of conditions in California. Respondent, State Controller, has refused to draw warrants for the payment of the salary of Gordon and other employees on the ground that the act is unconstitutional. Petitioner seeks by this proceeding in mandamus to compel him to draw such warrants.

The constitutional provision invoked states: "The Legislature may provide for the division of the State into fish and game districts and may enact such laws for the protection of fish and game in such districts or parts thereof as it may deem appropriate.

"There shall be a Fish and Game Commission of five members appointed by the Governor, subject to confirmation by the Senate, with a term of office of six years * * *. The Legislature may delegate to the commission such powers relating to the protection, propagation and preservation of fish and game as the Legislature sees fit. Any member of the commission may be removed by concurrent resolution of the Legislature passed by the vote of a majority of the members elected to each of the two houses thereof." Cal.Const., art. IV, § 25-

½, as amended in 1948. That section was originally added to the Constitution in 1902 and then included only the first paragraph. By amendment in 1940, the second paragraph was added. The 1948 amendment made no change here pertinent.

[1] It is asserted that by reason of the above constitutional provision the Legislature has no authority to delegate to anyone except the commission any powers relating to the protection, propagation and preservation of fish and game; that under the rule of construction, *expressio unius est exclusio alterius* (the mention of one thing implies the exclusion of another thing), that result must be reached; and that, therefore, the Conservation Act is invalid because it delegates such powers to the conservation board. The applicable legal principles compel a contrary conclusion.

[2] The fundamental rule has been stated by this court: "There is no express prohibition against the allowance of or reimbursement for other expenses, but the respondent contends that under the doctrine of *expressio unius exclusio alterius*, since the Constitution specified two items which may be allowed, any other allowances are invalid. This argument overlooks the fact that our Constitution is not a grant of power but rather a limitation or restriction upon the powers of the Legislature [Citations] and 'that we do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited.' *Fitts v. Superior Court*, supra. If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations are to be construed strictly, and are not to be extended to include matters not covered by the language used." (Emphasis added.) *Collins v. Riley*, 24 Cal.2d 912, 915, 152 P.2d 169, 171. See, also *City of Los Angeles v. Post War etc. Bod.*, 26 Cal.2d 101, 156 P.2d 746; *Delaney v. Lowery*, 25 Cal.2d 561, 154 P.2d 674; 5 Cal.Jur., 666-670. Specifically, the express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms. *Ex parte McCarthy*, 29 Cal. 395; *Macmillan Co. v.*

Clarke, 184 Cal. 491, 194 P. 1030, 17 A.L.R. 288; *Slavich v. Walsh*, 82 Cal.App.2d 228, 186 P.2d 35.

There are numerous pertinent illustrations of the application of that principle. The provision that the Legislature shall protect from forced sale a homestead for heads of families does not limit its power to provide homesteads for others than heads of families. *Hohn v. Pauly*, 11 Cal.App. 724, 106 P. 266. Provisions authorizing removal of officers by trial for misdemeanor in office and the recall of specified officers, the first including and the second not including those of an irrigation district do not prevent the Legislature from authorizing the recall of the latter. *Wigley v. South San Joaquin Irr. Dist.*, 31 Cal.App. 162, 159 P. 985. A grant of power to county boards of education (Cal.Const., art. IX, § 7) to "control" examination of teachers and "granting of teachers' certificates," did not oust the Legislature of power to establish the requisites for a teacher's certificate. *Mitchell v. Winnek*, 117 Cal. 520, 49 P. 579. The court there stated, 117 Cal. at page 525, 49 P. at page 581: "If, therefore, it be asserted, as it is here, in effect, that the power of the legislature to enact section 1503 of the Political Code does not exist, the restriction or limitation of that power must not only be found in the constitution, but the prohibition of its exercise must be clear. It must appear either from express words or by necessary implication. It is not asserted that there is any express prohibition, nor does the use of the word 'control' necessarily imply that the power of legislation upon the subject in question is prohibited to the legislature. Apparently inconsistent provisions must be harmonized, and each given some effect, if that be possible. To give the word 'control' the effect given it by the court below, some qualifying word, such as 'exclusive,' 'absolute,' or 'unlimited,' must be implied, since without such implication that word does not necessarily imply that the legislature had no power to declare that holders of the specified diplomas should be entitled to certificates of the grammar grade."

[3] Here there are factors which not only create a doubt that the Legislature was

to be restricted to acting through the Fish and Game Commission in legislating in the fish and game field, but there are indications that it was not to be so limited. The wording of § 25½ points in that direction. It begins with the declaration that the *Legislature* may enact such laws for the protection of fish and game "as it may deem appropriate." The commission is created and to it the Legislature *may* delegate such powers relating to fish and game as *it sees fit*. The word "may" is at least reasonably susceptible of a permissive meaning rather than mandatory or prohibitory, and it has been held that when such word is used it will not create a restriction on the legislative power even though the Constitution, Cal.Const., art. I, § 22 also provides: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." See *Fresno National Bank v. Superior Court*, 83 Cal. 491, 24 P. 157; *People ex rel. Mattison v. Nye*, 9 Cal.App. 148, 98 P. 241; *Mundell v. Lyons*, 182 Cal. 289, 187 P. 950; but see *In re Cencinino*, 31 Cal.App. 238, 160 P. 167. That it may delegate such powers as it may see fit indicates that it may fail to delegate any powers. It is true that the provision may impliedly mean that it may or may not, at its discretion, delegate such powers, but if it does, they must be conferred on the commission. But this is not necessarily the meaning or a necessarily implied negative; nor does it eliminate any doubt.

The important problems in the fish and game field have long been entrusted to the Legislature as the representative of all the people. "The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State; provided, that the *Legislature may by stat-*

ute, provide for the season when and the conditions under which the different species of fish may be taken." (Emphasis added.) Cal.Const., art. I, § 25. Moneys collected under fish and game laws are to be used in matters pertaining to that subject and "The Legislature may provide for the division of" such money. Cal.Const., art. IV, § 25-5/8. It is said in *In re Marincovich*, 48 Cal.App. 474, 481, 192 P. 156, 159: "Wild game (included within which is fish, *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 P. 374, 39 L.R.A. 581, 58 Am.St.Rep. 183,) always has belonged to all the people of the state. It is evident, therefore, that what the people of the state own they can alienate on such terms as they choose to impose, and that the Legislature, as the law-making representative of all the people, may dispose of the fish in the state's deep-sea waters on such terms as to it may seem best, subject only to the constitutional limitations against discrimination. Within those limitations, the Legislature, for the protection of fish, may pass such laws as to it may seem most wise. The measures best adapted to that end are for the Legislature to determine * * *." In view of those policies and principles, we do not believe the people in adopting the amendment to § 25-1/2 intended to place a straight jacket on the Legislature by requiring it to act solely through the Fish and Game Commission thereby created. Nor does the argument presented to the voters for the amendment shed a contrary light. The measure was entitled for the ballot: "Amends Constitution, Article IV, section 25-1/2. Creates Fish and Game Commission of five members, appointed by Governor subject to confirmation by Senate, with six year terms, removable by majority vote of Legislature; rotates terms by requiring terms of those first appointed shall expire one each year. *Empowers Legislature to delegate to Commission powers relating to protection, propagation and preservation of fish and game.*" There is no intimation that the Legislature would be thereby prohibited from exercising other powers not delegated. The main thought was that it was empowered to delegate authority to the commission. The argument for this amendment states that it "will re-

move the Fish and Game Commissioners from political influence by:

"1. Providing a nonsalaried board of five commissioners.

"2. Appointment of commissioners for staggered terms so that no one administration can dominate the commission. This avoids a sudden reversal of policy.

"3. The Governor's appointments of commissioners are to be confirmed by the Senate which will nullify poor appointments.

"This proposition will give an opportunity to the Division of Fish and Game to manage the wild-life resources of the State on a basis of sound, scientific and factual knowledge by:

"1. Allowing Legislature to delegate regulatory powers to the commission so that regulations may be based on scientific knowledge rather than on supposition and hearsay from self-interested pressure groups.

"2. Allowing the commission to establish and follow through long term policies and plans for scientific fish and game management.

"3. Allowing the commission to employ and retain thoroughly trained personnel so that the management policies of 'sustained yield without endangering future supply' may be effectively carried through." The matter chiefly stressed is the right of the Legislature to delegate powers to the commission, probably out of an abundance of caution to avoid the possibility that such delegation would constitute an unlawful delegation of legislative power. The major thought is the enlargement rather than curtailment of the power of the Legislature in dealing with problems with respect to fish and game.

There are cases which have applied the rule *expressio unius est exclusio alterius* in construing the Constitution. See *Wheeler v. Herbert*, 152 Cal. 224, 92 P. 353; In re *Werner*, 129 Cal. 567, 62 P. 97; *Spier v. Baker*, 120 Cal. 370, 52 P. 659, 41 L.R.A. 196; *Martello v. Superior Court*, 202 Cal. 400, 261 P. 476; *People ex rel. Atty. Gen. v. Wells*, 2 Cal. 198. In the *Wheeler* case the restriction was positive and express.

In the *Werner* case the court was dealing with an express and direct delegation of legislative power to cities and towns to enact police, etc. regulations, Cal.Const., art. XI, § 11, and involved the fundamental structure of the state and local government. The *Spier* case involved the right of suffrage declared to be one of the "highest privileges" of citizens and was express and explicit. In the *Martello* case there was a complete change in the method of assignment of judges and a former provision that had also been stated by statute was omitted, thus indicating an implied repeal of the statute. The court in the *Wells* case was dealing with the separation of powers and felt that the construction given was necessary to preserve the courts from the uncontrolled domination of the Legislature.

[4,5] It is urged by respondent that when the Constitution creates an office the Legislature cannot add to or detract from the powers such office traditionally or theretofore possessed. See *Love v. Baehr*, 47 Cal. 364. The instant constitutional provision, while it creates a Fish and Game Commission, does not give it any powers, and, as seen, it leaves with the Legislature the power to give it such authority as it "sees fit." It cannot be lightly assumed that the people intended to strip the legislative and executive departments of all power with relation to fish and game, and substitute for them, a Fish and Game Commission with unlimited power in this field. For the same reasons it may not be said that it is a special provision controlling over a general provision (that creating the legislative department). It must be conceded that the Legislature has all legislative power not expressly or by necessary implication denied to it by the Constitution. It is not like a provision creating an executive or judicial office, each of which departments is entitled to its sphere of authority under the separation of powers principle. The construction urged by respondent would result in a direct invasion of legislative power in a field in which such power has not been abridged by constitutional mandate.

If the people, by the amendment here involved, desired to repose in the Commission created therein the exclusive power to

control the fish and game resources of the state, this objective could have been achieved by employing language similar to that used in the provision for the control of the liquor industry in this state. See Cal.Const. art. XX, § 22.

There are objectives which the people may well have desired to achieve in adopting the instant constitutional amendment creating a Fish and Game Commission. They may have desired, as above noted, to make it clear, that the Legislature could, if it wished, delegate some of its powers in the specified field to such Commission, regardless of the principle of separation of powers; that the members of the Commission should have six year terms and thus achieve more stability in administration, see constitutional provision fixing four years as term of office, Cal.Const. art. XX, § 16; and that the commissioners could be removed by a concurrent resolution adopted by a majority vote of the Legislature. We may not assume that the Legislature, by adopting the statute here involved, intended to defeat any of those objectives.

Let the writ issue forthwith.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



37 Cal.2d 79

STEIN et al. v. SIMPSON et al.
L. A. 21335.

Supreme Court of California, in Bank.
May 4, 1951.

Jack R. Stein and another sued Russell Brown Simpson and others to quiet title to certain realty. From a judgment of the Superior Court, Los Angeles County, Ben V. Curler, J., quieting plaintiffs' title on condition that they pay named defendant a sum claimed by him to be insufficient, he appealed. The Supreme Court, Carter, J., held

that named defendant's payment of plaintiffs' debt, secured by a first trust deed on the realty, before sale thereof to such defendant under his second trust deed, without securing assignment of debt or disclosing to plaintiffs fact of such payment, was not made under mistaken belief that he had an interest in property to protect by paying debt, but for purpose of enabling him to acquire the property for less than its value, so that he was not subrogated to the creditor's rights against plaintiffs, who were not required to reimburse named defendant for the amount paid.

Judgment affirmed.

Schauer, J., and Gibson, C. J., dissented.

Prior opinion, Cal.App., 224 P.2d 61.

1. Equity ⇐66

Though plaintiff seeking equity may be required to do equity in some cases, though defendants could not obtain such equity by independent action or as acting party, court, in application of such maxim, does not create substantive rights, or confer rights on defendant having no such rights, under guise of doing equity.

2. Equity ⇐66

The maxim that he who seeks equity must do equity does not authorize court to impose any arbitrary conditions not warranted by settled doctrines of equity jurisprudence, and court cannot deprive a plaintiff of his full equitable rights under pretense of awarding defendant something to which he has no equitable right.

3. Equity ⇐66

Under maxim that he who seeks equity must do equity, terms imposed on plaintiff as condition of obtaining equitable relief must consist of awarding or securing to defendant something to which he is justly entitled under principles and doctrines of equity or something over which he has distinctively equitable right.

4. Subrogation ⇐1

A person, who is not a volunteer in paying debt for which another is primarily answerable and which should be discharged by such other in equity and good conscience, has right of subrogation to creditor's rights against debtor.

5. Subrogation ⇨17

Generally a junior lien holder paying debt secured by senior lien on same property to protect his interest therein, becomes subrogated to senior lien holder's rights as against property owner, though he takes no assignment of senior lien. Civ.Code, §§ 2903, 2904.

6. Subrogation ⇨26

One invoking rule of subrogation because of his payment of another's debt must not have been a volunteer or officious intermeddler in making payment and must have had some interest to protect.

7. Subrogation ⇨1

A person discharging a lien, not incurred by him, on property which he mistakenly believes to be his, is subrogated to lien holder's rights against property owner.

8. Subrogation ⇨17

A junior lien holder, discharging senior lien on same property, is not officious, so as to deprive him of remedy of subrogation to obtain reimbursement from senior lien holder, where he makes payment under mistake or as result of fraud or duress, owes duty to make payment or acts to protect his own interest, nor where his property is used without his consent by another in discharging obligation, or lien on property, of such other.

9. Subrogation ⇨17

One paying another's debt, secured by first trust deed on debtor's realty, before sale of property to payor under his second trust deed thereon, without obtaining assignment of debt or disclosing to debtor fact of such payment until after sale, which was made after his refusal of debtor's redemption tender, did not act under mistaken belief that he had interest in property to protect, in absence of demand by creditor for payment, but was volunteer paying debt to enable him to acquire property for less than its value, and hence was not entitled to subrogation for reimbursement by debtor of amount paid.

10. Contracts ⇨5

A person unconditionally or officiously conferring a benefit on another, without mistake, coercion or request, is not en-

titled to restitution, unless benefit was conferred under circumstances rendering such action necessary to protect interests of such other or of third persons.

11. Contracts ⇨5

A person on whom benefit is conferred by another because of such other's wrongful conduct is not unjustly enriched so as to require person benefitted to make restitution to person conferring benefit.

12. Quietting title ⇨14

Persons whose debt, secured by first trust deed on their realty, was voluntarily paid by holder of second trust deed thereon in effort to obtain property unlawfully for less than its value at sale under second trust deed after wrongful refusal of debtors' redemption tender, were not bound to reimburse such junior lien holder for amount paid, as condition precedent to quieting their title to realty in equity, on theory that they would otherwise be unjustly enriched, as junior lien holder's conduct was either actually or constructively fraudulent or tantamount to fraud, not merely actuated by bad motive.

13. Quietting title ⇨52

In suit to quiet title to realty, judgment declaring that plaintiffs were not entitled to damages, that they were owners in fee of property, and that defendants had no interest therein and no lien or encumbrance thereon, and quieting plaintiffs' title, free of any lien or encumbrance in one defendant's favor, on condition that plaintiffs pay such defendant a specified sum within stated time, clearly quieted plaintiffs' title subject to such payment, and adequately set forth such defendant's rights. Civ.Code, §§ 2941, 3294.

14. Appeal and error ⇨161

Generally, acceptance of benefits under judgment forecloses right to appeal therefrom, but such rule is inapplicable where appellant is admittedly entitled to benefits accepted or they would not be affected or put in jeopardy by appeal.

15. Appeal and error ⇨162(2)

Where persons whose title to realty was quieted by judgment did not object to requirement thereof that they pay holder

of second trust deed thereon amount due on notes secured thereby, so that such requirement would not be put in jeopardy by his appeal from judgment because of failure to require additional payment to him of amount paid by him in satisfaction of debt secured by first trust deed on property, he was not justified in refusing owners' tender of amount required to be paid within time fixed by judgment on ground that his satisfaction of judgment, as demanded by owners, would deprive him of right to appeal therefrom.

16. Appeal and error ⇨161

A party accepting something to which he is affirmatively shown to be entitled under judgment in his favor is not precluded from prosecuting appeal therefrom for purpose of establishing greater claim.

17. Appeal and error ⇨162(2)

A party accepting payment of part of judgment favorable to him is not estopped from prosecuting appeal from part of judgment against him, where adverse part can be reversed without affecting favorable part.

Joseph D. Taylor and John W. Hill,
Los Angeles, for appellant.

Cobb & Utley and Ernest R. Utley, all of
Los Angeles, for respondent.

CARTER, Justice.

This is an appeal from a judgment quieting plaintiffs' title to real property on the condition that they pay defendant Simpson \$12,000, less costs, within 30 days from notice of entry of the judgment. Simpson claims the amount payable should be \$28,911.87.

From the unchallenged findings of fact the following appears. Plaintiffs were the owners of property having a value of over \$50,000. It was encumbered by a first trust deed securing a debt owed to Hollywood State Bank amounting to \$18,000. Simpson loaned \$20,000 to plaintiffs and demanded and received therefor two notes, each for \$22,000, the additional \$2,000 on each being a bonus demanded by Simpson. The notes called for interest at 7%. One

of the notes was secured by a second trust deed on the property and the other by a chattel mortgage on the furniture. At Simpson's request the notes were made payable to a third party Simons (an employee of Simpson) who was to and did assign them to Simpson. (That was an attempt to avoid a claim of usury.) Each of the notes was payable in monthly installments of \$2,000 from August 24, 1946, to January 24, 1947, when the balance became due. The \$2,000 bonus was usurious interest charged by Simpson. Plaintiffs paid \$8,000 on the notes, reducing the principal to \$12,000, in accordance with the notes and a subsequent understanding in which additional interest amounting to \$240 was to be paid. Various proper tenders of the balance due were made by plaintiffs or their agent to Simpson or his agent and refused. Simpson gave notice of default and election to sell, and the sale of the property under the trust deed was scheduled for July 23, 1947. It was continued from time to time at Simpson's request to September 10, 1947, at 10 A.M. An hour before the sale, plaintiffs offered to pay the full amount which Simpson claimed was then due, and Realty Title Co., Simpson's agent for collection from plaintiffs, and trustee under the trust deed, advised plaintiffs that \$16,641.13 was all that was required. Thereupon, and still before the sale, plaintiffs made a cash tender to Simpson of \$17,000. The tender was refused, Simpson stating that he was interested in acquiring the property, not the money. The sale proceeded, Simpson bidding \$36,000 and plaintiffs' agent, Bassett, \$50,000. Bassett having only \$17,000 in cash with him, the title company, at Simpson's request, declared "all bids off" and started a new sale. The title company then announced that Simpson had paid the plaintiffs' debt to the Hollywood State Bank under the first trust deed in the sum of \$17,380.85, and hence the sale would be for the amount represented by both trust deeds. Simpson had paid the bank the amount due on the first trust deed the morning of the sale. Bassett's request for a 24-hour postponement of the sale to obtain funds to cover his \$50,000 bid was refused at Simpson's direction. The sale proceeded, Bas-

sett bidding \$17,000 and Simpson \$18,000. The property was sold to Simpson. The court found the sale invalid; that the amount owed by plaintiffs to Simpson under said notes and trust deeds was \$12,000 and that amount is due without interest.

The foregoing facts are undisputed, and with the other facts found, depict a shocking and unconscionable course of conduct by Simpson.

The court also found: "That in the payment to the Hollywood State Bank of the sum of \$17,380.85 in satisfaction of its first trust deed, Simpson did not secure from the bank an assignment of said indebtedness, and his aforesaid satisfaction of said bank's note and trust deed was not disclosed to plaintiffs either at the time of their aforesaid redemption tender on said date or prior to the time Bassett had bid the sum of \$50,000.00 for said property.

"That the Trustee's sale under Simpson's second trust deed advertised said property for sale subject to the Hollywood State Bank's first trust deed; that no one had demanded of Simpson the payment of said first trust deed and there was no reason appearing which would have then required Simpson to have paid and satisfied the bank's first trust deed in order that Simpson's interest might be protected; that Simpson had no property interest to protect at the time which would have required payment of the indebtedness due the bank and in paying and satisfying the bank's first trust deed, Simpson was a volunteer and Simpson's act and conduct in paying and satisfying the bank's first trust deed was only for the reason of springing a surprise upon plaintiffs and to enable him to acquire the property in question for himself at said Trustee's sale and at a price far below the real value of said property." Simpson does not question the factual matters in the finding last quoted, but asserts that the finding that he was a volunteer and had no interest to protect, is a conclusion of law.

Simpson's contention is that he was not a volunteer; that he had an interest to protect, and that, therefore, he is entitled to have repaid to him the amount he paid

the bank (\$17,380.85) in addition to the \$12,000. His claim is that "he who seeks equity must do equity" (10 Cal.Jur. 508), hence plaintiffs, who are seeking equity, must pay the amount he paid the bank.

[1-3] It is true that the maxim applies, and a plaintiff may be required to do equity in some cases, though defendant could not have obtained such equity by independent action or as the acting party. *Dool v. First National Bank*, 207 Cal. 347, 278 P. 233; *Holland v. Hotchkiss*, 162 Cal. 366, 123 P. 258, L.R.A.1915C, 492; *Pomeroy's Equity Juris.*, (5th ed.) § 386a. It is also true, however, that in the application of that maxim the court does not create substantive rights under the guise of doing equity, that is, it does not confer rights when the one who invokes it has none, *Rosenberg v. Lawrence*, 10 Cal.2d 590, 75 P.2d 1082; *Lande v. Jurisich*, 59 Cal.App.2d 613, 139 P.2d 657 or as has been stated: "With respect to the terms which may be imposed upon the party as a condition to his obtaining the relief in accordance with the rule,—that is, the 'equity' which he must do,—it is undoubtedly true, as said by Vice-Chancellor Wigram, that the court obtains no authority from this principle to impose any arbitrary conditions not warranted by the settled doctrines of equity jurisprudence; the court cannot deprive a plaintiff of his full equitable rights, under the pretense of awarding to the defendant something to which *he* has no equitable right, something which equity jurisprudence does not recognize. The principle only requires the plaintiff to do 'equity.' According to its true meaning, therefore, the terms imposed upon the plaintiff, as the condition of his obtaining the relief, must consist of the awarding or securing to the defendant something to which he is justly entitled by the principles and doctrines of equity, although not perhaps by those of the common law,—something over which he has a distinctively equitable right." *Pomeroy's Equity Jurisprudence* (5th ed.), § 386.

[4,5] The right which Simpson claims he is entitled to have plaintiffs accord him here, in claiming equity, is that of subrogation. "The principle upon which the

right of subrogation is founded applies in all cases in which one person, not a volunteer, pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter." 23 Cal.Jur., p. 918. And the rule has found express application with reference to payment by a junior lien holder of a senior lien on the same property. "Every person, having an interest in property subject to a lien, has the right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed, and, by such redemption, becomes subrogated to all the benefits of the lien, as against all owners of other interests in the property, except in so far as he was bound to make such redemption for their benefit." Civ. Code, § 2903. "One who has a lien inferior to another, upon the same property, has a right:

"1. To redeem the property in the same manner as its owner might, from the superior lien; and,

"2. To be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests, upon satisfying the claim secured thereby." Civ. Code, § 2904. It is the general rule that where the holder of a junior lien on property pays the debt secured by a senior lien to protect his interest, he thereby becomes subrogated to the rights of the senior lien holder as against the owner of the property, even though he takes no assignment of the senior lien. *Diehl v. Hanrahan*, 68 Cal. App.2d 32, 155 P.2d 853; *Swain v. Stockton Savings etc. Soc.*, 78 Cal. 600, 21 P. 365; 50 Am.Jur., Subrogation, §§ 23, 103.

[6] As appears from the rule of subrogation, the one invoking it must not have, in making the payment, been a volunteer—an officious intermeddler, or affirmatively he must have had some interest to protect. See authorities cited *supra*; *Guy v. Du Uprey*, 16 Cal. 195; *McMillan v. O'Brien*, 219 Cal. 775, 29 P.2d 183, 91 A. L.R. 383; *Richards v. Griffith*, 92 Cal. 493, 28 P. 484; *Bowman v. Sears*, 63 Cal.App. 235, 218 P. 489; 23 Cal. Jur., 919; *Rest., Restitution*, § 162; 50 Am.Jur., Subrogation,

§ 21; *Pomeroy's Equity Juris.* (5th ed.), § 1212.

Simpson does not dispute that at the time he paid the bank's trust deed his security-trust deed interest in the property was extinguished by reason of plaintiffs' tenders of payment. Thus it would appear he had no interest in the property when he paid the bank. He asserts, however, that he must have had an interest in the property, otherwise the court would not have required plaintiffs to pay the \$12,000 due on their indebtedness to him. That is not persuasive, for he cannot complain if he obtained more than he should have, if that is the case.

[7] In this same connection, he further argues that he thought he had an interest and that a payment of a superior lien by one under a mistaken belief that he has an interest to protect is not a volunteer. It has been held that where a person discharges a lien not incurred by him on property not his own, but which he mistakenly believes to be his, is subrogated to the rights of the lien holder. *Walker v. Walker*, 138 Tenn. 679, 200 S.W. 825; *Minchew v. Hankins*, Tex.Civ.App., 278 S.W. 306; *Fowler v. Parsons*, 143 Mass. 401, 9 N.E. 799; *Detroit & Northern Michigan Building & Loan Ass'n v. Oram*, 200 Mich. 485, 167 N.W. 50; *Fuller v. Harwell*, 126 Cal.App. 654, 15 P.2d 562.

[8] In *Fuller v. Harwell*, *supra*, 126 Cal.App. 654, 15 P.2d 562, property owned by Sue Harwell was subject to a mortgage given by her. Plaintiff had a judgment against her husband, T. J. Harwell, and levied execution on the property. On demand of the mortgagee he paid the mortgage. It was held that he was subrogated to the rights of the mortgagee. In response to the contention that plaintiff never had an execution lien on the property as it did not belong to the judgment debtor, and that, therefore he was a mere volunteer with no right of subrogation to the mortgagee, the court held that he was subrogated, stating that an "apparent interest" of the judgment debtor is sufficient to support an "honest endeavor" to protect his asserted lien where he paid the mortgagor under the "com-

pulsion" that he would have had to release his lien unless he did. Also, in the other cases cited supra, a point is made as to the honest belief and endeavor on the part of the claimed lien holder to protect his interest. It has been said in speaking of subrogation where a junior lien holder pays a senior lien: "* * * the plaintiff is not officious, and he uses his property or his property is used in discharging the obligation of another or a lien upon another's property, he is entitled to reimbursement and is entitled to the remedy of subrogation to obtain reimbursement. The plaintiff is not officious where he makes the payment under a mistake, or where he is induced to make the payment by fraud or by duress (see §§ 43, 54). He is not officious where he was under a duty to make the payment, as for example where he was a surety (see § 76). He is not officious where he makes the payment to protect an interest of his own, as for example where the holder of a junior encumbrance discharges a prior encumbrance in order to prevent foreclosure (see § 104). The plaintiff is not officious where his property is used by another without his consent in discharging an obligation of the other or a lien upon the other's property (see § 207)." (Rest., Restitution, § 162, com. b)

[9] Here it appears from the foregoing quoted finding that Simpson did not obtain an assignment from the bank; he failed to disclose his discharge of the bank's trust deed until the sale under his trust deed; the sale of the property was advertised as for the default on his trust deed; that no demand was made that he pay the bank and there was no reason which would have required him to pay it; and that his conduct in respect to paying it and otherwise was to enable him to acquire the property for less than its value, rather than protect any supposed interest of his. Under those circumstances there was no mistake on his part of law or fact that he had to pay the bank to protect his interest or that he had any interest to protect. It is hardly credible that a person who has been tendered the full amount of the debt owed him and without reason refuses the tender, can be said to believe mistakenly that he has any further

interest except the aim of obtaining the property for less than its value.

[10, 11] Simpson urges, however, that where a plaintiff must do equity to obtain equitable relief, defendant's motive is immaterial; that even though he was a volunteer and guilty of wrongful conduct, plaintiffs will be unjustly enriched if they are not required to reimburse him for his discharge of the bank's trust deed. It is said: "A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons." (Rest., Restitution, § 112) Further: "A person who officiously confers a benefit upon another is not entitled to restitution therefor." (Id., § 2) We believe those principles are applicable to a defendant who seeks to have an equity granted to him. Plaintiff is not "unjustly" enriched when the cause of the benefit conferred was the wrongful conduct of defendant.

[12] We think that Simpson's conduct was fraudulent, either actually or constructively or at least tantamount to fraud, that is, an endeavor to unlawfully obtain plaintiffs' property for less than its value. It was more than merely having a bad motive. It was a fraudulent scheme carried to fruition by Simpson, and only the intervention of the court by this action, prevented its full realization. The cases such as *Bateman v. Kellogg*, 59 Cal.App. 464, 211 P. 46; *Olivero v. Rosano*, 42 Cal.App. 2d 740, 109 P.2d 976; *Wolfe v. Titus*, 124 Cal. 264, 56 P. 1042; *Savings & Loan Soc. v. Burke*, 151 Cal. 616, 91 P. 504; *Holland v. Hotchkiss*, supra, 162 Cal. 366, 123 P. 258; and *Dool v. First National Bank*, supra, 207 Cal. 347, 278 P. 233 cited by Simpson are not in point.

[13] Simpson asserts that the judgment is not clear that plaintiffs' title is quieted, subject to the payment of the \$12,000, less costs. It reads: "It is * * * adjudged * * * that plaintiffs are not entitled to damages under and pursuant to

the provisions of Sections 2941 and 3294 of the Civil Code of the State of California.

"It is * * * adjudged * * * that plaintiffs * * * are the owners in fee [of the property].

"That the defendants, or either of them, have no right, title or interest therein, and no lien or encumbrance of any nature or kind therein, and that plaintiffs' title to their said real property is quieted, and is free and clear of any lien or encumbrance or claim in favor of the defendant Russell Brown Simpson, the quieting of said title to said real property is conditioned upon the payment to the defendant, Russell Brown Simpson, of the sum of \$12,000.00 less allowed costs herein, within a period of thirty (30) days from the date of notice of entry of this judgment and decree." We believe it is clear enough and adequately sets forth Simpson's rights.

[14-17] Finally, Simpson asserts that plaintiffs have lost their right under the judgment to have their title quieted because they failed to pay the \$12,000 less costs within 30 days after the notice of entry of judgment as provided in the judgment. It appears that a tender was made within the time, but that a satisfaction of the judgment was demanded by plaintiffs. Simpson refused the tender on the basis that if he gave a satisfaction he would lose his right to appeal. The general rule is that the acceptance of benefits under a judgment will foreclose the right to appeal therefrom. *Schubert v. Reich*, Cal.Sup., 223 P.2d 242; 2 Cal.Jur., 229. However, "The rule has no application where the benefits accepted are such that appellant is admittedly entitled to them or would not be affected or put in jeopardy by the appeal." *Schubert v. Reich*, supra, 223 P.2d at page 243. All that Simpson is asking is that the judgment be modified so as to require payment to him of the \$17,380.85, which he paid to the bank in addition to the \$12,000. There is no dispute about the amount paid to the bank. Plaintiffs do not object to the requirement that the \$12,000 be paid to Simpson. Thus, the requirement that \$12,000 be paid to Simpson is not put in jeopardy by this appeal. Hence Simpson should have accepted that tender and given satisfaction for it.

As said in *People v. Roath*, 62 Cal.App.2d 241, 246, 144 P.2d 648, 650: "From what we have heretofore said it is at once apparent that respondents' claim in this regard cannot be upheld because an appellant is not precluded from prosecuting an appeal from a judgment in his favor when such appeal is for the purpose of establishing a greater claim and where, as here, it affirmatively appears that he is entitled to that which he has accepted, but is contending for something more. * * * Furthermore, where as in the case at bar, appellant accepted payment of a part of the judgment which was favorable to it, but the part adverse to appellant can be reversed without affecting the part which was favorable, the appellant is not estopped from prosecuting an appeal from that part of the judgment which was against it."

The judgment is affirmed.

SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice, dissenting.

I can understand that the result reached by the majority deservedly, in a moral sense, punishes Simpson; but I think that in a legal sense it unjustly enriches the plaintiffs. I can agree with the majority that Simpson paid the bank loan because he thought that such procedure would aid him in securing the property at less than its reasonable value; but I think that it also indubitably appears that in so doing he labored under a mistake of fact or of law or of both fact and law.

It seems to me there can be no doubt that Simpson did not intend to make a volunteer payment for the benefit of another; he believed that he had an interest in the property and he believed that he was protecting and furthering that interest when he discharged the bank's lien. The bank's lien was valid; it was a bona fide prior charge against the property and payment of it protected that property against, and relieved it of, the bank's claim. Such claim of the bank, existing against the property, was just as much adverse to plaintiffs as it was to defendant. In fact, with the extinction of defendant's lien, the lien of the bank

was left as more substantially adverse to plaintiffs than to anyone else. Simpson thought he was paying off a charge against his own property; it developed that he paid a charge against plaintiffs' property. Since plaintiffs receive the full benefit of the payment it seems to me that as a condition of quieting their title the court should require them to reimburse the payor. This conclusion appears to me to accord with the cases cited in the majority opinion.

GIBSON, C. J., concurs.



37 Cal.2d 116

PARKER v. WOMACK et al.

L. A. 21842.

Supreme Court of California.

May 8, 1951.

Loretta May Parker brought action against Roy A. Womack and Carl William Womack to recover for damages resulting from intersectional collision of automobiles. The Superior Court of Los Angeles County, Fred Miller, J., entered an order granting the plaintiff a new trial, and the defendants appealed. The Supreme Court, Edmonds, J., held that evidence entitled defendants to have jury instructed in regard to the rule of unavoidable accidents, and that the granting of a new trial because of the giving of such instruction was an abuse of discretion.

Order reversed.

Prior opinion, 224 P.2d 25.

Carter and Shenk, JJ., dissented.

1. Automobiles ⇨201(10)

The terms "inevitable accident" or "unavoidable accident" signify an injury caused by something other than actionable negligence of motorists involved, and the terms thus include an accident caused by a "vis major" which is a greater or superior force, or an irresistible force.

See publication Words and Phrases, for other judicial constructions and definitions of "Inevitable Accident", "Unavoidable Accident" and "Vis Major".

2. Negligence ⇨63

A loss by "viz major" is one that results immediately from a natural cause without the intervention of man, and which could not have been prevented by exercise of prudence, diligence, and care.

3. Automobiles ⇨201(10)

An automobile accident which is caused by an absence of exceptional foresight, skill, or care which the law does not expect of the ordinarily prudent man, is an "inevitable accident" or "unavoidable accident", and no redress is afforded for an injury caused by such an accident, and loss must be borne by one on whom it falls.

4. Automobiles ⇨201(10)

An automobile accident is an "inevitable accident" or "unavoidable accident" when it is not proximately caused by negligence.

5. Automobiles ⇨201(10)

The defense of "inevitable accident" in an automobile accident case is nothing more than a denial by defendant of negligence or a contention that his negligence, if any, was not the proximate cause of the injury.

6. Automobiles ⇨239(1)

The defense of inevitable accident or unavoidable accident need not be specially pleaded in automobile accident case, but is raised by a general denial of negligence.

7. Automobiles ⇨242(7)

The law does not impose on the defendant in an automobile collision case the burden of defending a charge of negligence with affirmative proof of an unavoidable accident.

8. Automobiles ⇨244(40)

A determination that an automobile accident was an "unavoidable accident" is proper where evidence merely shows that plaintiff has failed in his proof.

9. Appeal and error ⇨1064(1)

Where an instruction defining an unavoidable accident is given at the request of the defendant, in automobile collision case, it cannot be said to have been harmful to plaintiff, who in any event had burden of proving that collision was occasioned solely by the negligence of defendant, which would exclude unavoidable accident.

10. Automobiles ⇨246(57)

In action for damages resulting from intersectional collision of automobiles, evidence which imposed on jury the duty to decide which, if either, of the drivers failed to use due care in entering intersection, justified instruction as to unavoidable accident.

11. New trial ⇨41(3)

Generally, determination as to whether an erroneous instruction was prejudicial and justifies granting of new trial is one left to trial court's discretion. Code Civ. Proc. § 657, subd. 7.

12. Appeal and error ⇨978(1)

Where motion for new trial is granted on ground that erroneous instruction was prejudicial, order will not be disturbed on appeal, unless it appears that there has been an abuse of the trial court's discretion in granting the motion. Code Civ. Proc. § 657, subd. 7.

13. New trial ⇨39

Granting of new trial on ground that instruction, which was in fact correct and which should have been given, was erroneous, was an abuse of discretion. Code Civ. Proc. § 657, subd. 7.

Ball, Hunt and Hart and Clarence S. Hunt, all of Long Beach, for appellants.

Delmar W. Doddridge, Lindsay, for respondent.

EDMONDS, Justice.

Loretta May Parker is suing for damages assertedly caused by the negligent operation of an automobile driven by Carl Womack. At the request of Womack, the jury was instructed that no recovery could

be had if the accident were an unavoidable one. After the entry of judgment for Womack, a new trial was granted upon the ground that the instruction was prejudicially erroneous. The only question presented upon the appeal from that order concerns the propriety of the instruction.

Mrs. Parker alleged that she was driving her automobile in a northerly direction along Earl Avenue when it collided with one owned by Roy Womack and being driven in a negligent manner, westerly along 25th Street, by Carl Womack. The answer denied all negligence and pleaded that Mrs. Parker had been guilty of contributory negligence.

Each of the streets is 36 feet wide, with no marked center line. There were no traffic signs at the intersection. A house, trees, and other objects on the southeast corner obstructed the view of one traveling from east to west and also that of a northbound driver.

Mrs. Parker was familiar with the intersection. In describing it, she testified that a driver traveling north on Earl Avenue could not see traffic on 25th Street which was approaching from the east until the front of his automobile was approximately one foot north of the south curb line.

According to Mrs. Parker, in approaching 25th Street, when five or six feet from the intersection she decreased the speed of her car to less than 12 miles per hour and shifted into first gear. She looked to the west and, when her car was a foot or more into the intersection, looked to the east. She saw a westbound car approximately 75 or 100 feet from Earl Avenue, but formed no opinion as to its speed. She proceeded into the intersection at approximately the same speed, and did not again observe this vehicle until it was directly in front of her and about one foot away.

Roy Womack owned the westbound car, which was being driven with his consent by Carl Womack. Five other young people were in it. Carl testified that he had stopped his car at American Avenue, one block east of Earl Avenue. As he related the details concerning his operation of the

automobile, after crossing American Avenue, he increased the speed to approximately 30 miles per hour, reducing it to 20 miles per hour as he reached the intersection where the accident occurred.

Continuing his testimony, Carl said that although his view to the south on Earl Avenue was obstructed, at a point 100 feet east of the intersection he believed he could see traffic within 20 or 30 feet of 25th Street. When 50 feet or less from the intersection, he looked to the south, but saw no automobiles. As he entered the intersection, he looked to the north. He then turned to look to the south, and saw the Parker automobile "a couple of seconds" before the collision. At this time, the front of his automobile was more than six feet into the intersection and the Parker car was six or seven feet south of the center of 25th Street. He did not apply the brakes.

The impact occurred in the northeast quadrant of the intersection, approximately 16 feet south of the north curb line of 25th Street and 10 1/2 feet west of the east curb line of Earl Avenue. A reasonable conclusion to be drawn from the evidence regarding the damage to the vehicles is that the Parker automobile struck the side of the one driven by Womack at approximately its center.

Passengers in the Womack automobile testified that they were traveling approximately 20 miles per hour when entering the intersection. One of them estimated that when she first saw the Parker automobile, it was traveling at a speed of 20 miles per hour. Both vehicles, the witness said, were then in the intersection and an equal distance from the center of it.

Upon this evidence, the jury returned a verdict in favor of the Womacks. Mrs. Parker then moved for a new trial upon nine grounds. However, her points and authorities in support of the motion, and the argument at the hearing of it, were limited to the sole point that the court erred in instructing the jury as follows: "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided.

They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it."

The minute order which records the action of the court in granting the motion does not specify the ground upon which it was made. However, unquestionably the new trial was ordered because the trial judge concluded that he had erred in instructing the jury regarding the rule of unavoidable accident.

Upon the appeal from that order, the Womacks contend that, as the issue of unavoidable accident is present in every case in which the defendant is not guilty as a matter of law, the challenged instruction was proper. Mrs. Parker argues that there is no evidence justifying the giving of the instruction because all of the testimony shows the happening of an accident which would not have occurred except for the negligence of one or both of the drivers.

[1,2] The terms inevitable or unavoidable accident signify an injury which is caused by something other than the actionable negligence of the parties involved. The terms thus include one caused by *vis major*, which usually is defined as a greater or superior force, or an irresistible force. "A loss by *vis major* is one that results immediately from a natural cause without the intervention of man, and could not have been prevented by the exercise of prudence, diligence and care." Black's Law Dictionary.

[3-6] An accident which is caused by an absence of *exceptional* foresight, skill or care which the law does not expect of the ordinarily prudent man is also characterized as inevitable or unavoidable. No redress is afforded for an injury caused by such an accident and the loss must be borne by the one upon whom it falls. 38 Am.Jur. § 6, pp. 648, 649; 65 C.J.S., Negligence, § 21, pp. 429-434; 1 Shearman & Redfield on Negligence [rev. ed. 1941], § 32, pp. 86-90. Otherwise stated, and incorporating both factors which relieve one

from liability, an accident is inevitable or unavoidable when it is not proximately caused by negligence. As recently defined by this court, " * * * the so-called defense of inevitable accident is nothing more than a denial by defendant of negligence or a contention that his negligence, if any, was not the proximate cause of the injury" *Polk v. City of Los Angeles*, 26 Cal.2d 519, 542, 543, 159 P.2d 931, 943. It need not be specially pleaded, but is raised by a general denial of negligence. *Polk v. City of Los Angeles*, supra, 26 Cal.2d at page 542, 159 P.2d 931; *Martindale v. Atchison, T. & S. Ry. Co.*, 89 Cal.App.2d 400, 201 P.2d 48; *Stevenson v. Fleming*, 47 Cal.App.2d 225, 117 P.2d 717; *Schubkegel v. Dunn*, 31 Cal.App.2d 312, 87 P.2d 875; *Sitkei v. Ralphs Grocery Co.*, 25 Cal.App.2d 294, 298, 77 P.2d 311; *Pearce v. Elbe*, 98 Cal.App. 101, 105, 276 P. 389.

Upon a record which includes affirmative evidence tending to prove an accident proximately caused by circumstances beyond the control of an ordinarily prudent person, an instruction upon unavoidable accident has been held proper. Examples of such situations are an unforeseen failure of brakes, *Merry v. Knudsen Creamery Co.*, 94 Cal.App.2d 715, 211 P.2d 905; *Alward v. Paola*, 79 Cal.App.2d 1, 179 P.2d 5; the foot of an automobile driver becoming caught between the brake and clutch pedals, *Zaferis v. Bradley*, 28 Cal.App.2d 188, 82 P.2d 70; the sudden appearance of a horse upon the highway, *Jolley v. Clemens*, 28 Cal.App.2d 55, 82 P.2d 51; and a child darting into the street. *Creamer v. Cerato*, 1 Cal.App.2d 441, 36 P.2d 1094; *Graham v. Consolidated M. T. Co.*, 112 Cal.App. 648, 297 P. 617.

But the application of the rule allowing the defense of unavoidable accident has not been limited to cases where the defendant relies upon evidence of a proximate cause beyond his control. An instruction stating the law regarding the right of a defendant from exemption from liability because the accident could not have been avoided has also been approved where there was no evidence that it was caused by any factor other than the lack of care. "The dominating consideration in dealing with the

whole subject of inevitable accident, * * * is the elementary requirement that before a plaintiff can recover he must make out his case by the preponderance of all the evidence before the court or jury regardless of the stage of the case at which it may have appeared or the particular party who introduced it. To do this in a negligence case he must show that the defendant was negligent and the negligence was the proximate cause of the injury complained of. *But if the accident was inevitable or unavoidable that is the same thing as to say that the defendant was not negligent, or that his negligence, if any, did not cause the accident. In other words, it is to say that the plaintiff has failed in his proof.*" *Jolley v. Clemens*, 28 Cal.App. 2d 55, 72, 73, 82 P.2d 51, 61; cited with approval in *Polk v. City of Los Angeles*, supra, 26 Cal.2d at page 543, 159 P.2d 931.

[7] Mrs. Parker asserts that the challenged instruction should not have been given because no evidence of any kind was offered by Womack tending to prove that something happened to cause the collision which he could not have avoided by the exercise of reasonable care. The argument erroneously assumes that the law imposed upon him the burden of defending a charge of negligence with affirmative proof of an unavoidable accident. The contrary is true. *Polk v. City of Los Angeles*, supra, 26 Cal. 2d at page 542, 159 P.2d 931.

[8,9] It is also suggested that where the evidence is such as that shown by the record in this case, an instruction upon the doctrine of unavoidable accident is improper because it may tend to divert the minds of the jurors from the decisive issues of the case; the defendants may escape liability because of some reason other than their freedom from negligence or the contributory negligence of the plaintiff. This contention might have some merit if the term "unavoidable accident" were limited to include only one caused by *vis major*. But a determination that an accident was unavoidable is also proper where the evidence merely shows " * * * that the plaintiff has failed in his proof".

Jolley v. Clemens, *supra*, 28 Cal.App.2d at page 73, 82 P.2d at page 61. Where an instruction defining such an accident is given at the request of the defendant, it cannot be said to have been harmful to the plaintiff "who in any event had the burden of proving that the collision was occasioned solely by the negligence of the [defendant] which, of course, would exclude unavoidable accident." Pearce v. Elbe, *supra*, 98 Cal.App. at page 106, 276 P. at page 391.

[10] In Hyman v. Market Street Ry. Co., 41 Cal.App.2d 647, 107 P.2d 485, and Scandalis v. Jenney, 132 Cal.App. 307, 22 P.2d 545, it was held that the giving of an instruction concerning the rule of unavoidable accident was prejudicially erroneous. However, in each of these cases, the evidence established the negligence of the defendant as a matter of law. Under the evidence there was no question of negligence for the jury to decide. Here no claim is made that Womack was negligent as a matter of law. Upon the evidence it was the duty of the jury to decide which, if either, of the drivers failed to use due care in entering the intersection and the Womacks were entitled to have the jury instructed in regard to the rule of unavoidable accident.

[11-13] As a general proposition, the determination as to whether an erroneous instruction was prejudicial and justifies the granting of a new trial is one which is left to the trial court's discretion, and where a motion is granted upon that ground, the order will not be disturbed unless it appears that there has been an abuse of that discretion. However, when no error has been committed, there is no basis for the exercise of discretion. The statutory ground for granting a new trial because of the charge to the jury is that there has been an " * * * Error in law, occurring at the trial * * *." Code Civ.Proc. § 657, subd. 7. It follows that where, as in the present case, a new trial has been granted because of a correct instruction which the court should have given, and was given, there is no basis for the exercise of discretion. Under such

circumstances, as a matter of law, there is no legal ground upon which a new trial may be ordered. Moran v. Abbey, 63 Cal. 56.

The order is reversed.

GIBSON, C. J., and TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent. The instruction on unavoidable accident should not have been given and the order granting a new trial should be affirmed on that ground.

The majority opinion states that, with relation to the evidence introduced in this case, an instruction on unavoidable accident is not improper because "the defense of unavoidable accident has not been limited to cases where the defendant relies upon evidence of a proximate cause beyond his control"; that "an accident is inevitable or unavoidable when it is not proximately caused by negligence." This argument proves too much. If an instruction on unavoidable accident does not add anything to instructions covering negligence, proximate cause, and the burden of proving those matters, there is no reason to give such an instruction, as pointed out in Barr v. Hall, 12 Cal.App. 2d 489, at page 492, 55 P.2d 1246, and that instruction is improper at least where, as here, the jury is not clearly advised that the subjects covered by the other specific instructions are being repeated in a general and abstract manner. The definition included in the questioned instruction—that the terms unavoidable or inevitable accident "simply denote an accident that occurred without having been proximately caused by negligence"—also shows that the instruction is not appropriate to this case. All the evidence here tends to establish that the collision was proximately caused by negligence of one or both of the drivers. The effect of the instruction is to apparently inject into the case a third element not specifically connected with the questions of negligence and contributory negligence.

In Polk v. City of Los Angeles, 26 Cal. 2d 519, 159 P.2d 931, and Jolley v. Clemens,

28 Cal.App.2d 55, 82 P.2d 51, the *defendants* questioned the propriety of instructions stating that the *burden of proving* that an accident was unavoidable rested upon the defendants and the statements in those cases concerning unavoidable accident were addressed to that question. Moreover, the statement that a finding of unavoidable accident merely means that the plaintiff has failed to prove his case, further illustrates that an instruction on that matter is wholly unnecessary and is confusing in cases such as the present one.

Hyman v. Market Street Ry. Co., 41 Cal.App.2d 647, 107 P.2d 485, is an analogous case in that the evidence therein indicated that negligence of one (or perhaps both) of the defendants proximately caused the accident. There the plaintiff, while a passenger on a street car owned and operated by one defendant, was injured by a collision with another street car owned and operated by the other defendant. It was held that the giving of an instruction on unavoidable accident was prejudicial error since there was no evidence of unavoidability. The majority opinion attempts to distinguish this case on the ground that "the evidence established the negligence of the defendant as a matter of law." But it is apparent from the following statement of the facts that *both* defendants were not negligent as a matter of law: "The motorman of each car testified that his car was at a complete stop when the other car ran into it. Passengers on each car corroborated the story of the motorman of their car." 41 Cal. App.2d at page 648, 107 P.2d at page 486. Had the doctrine announced in the majority opinion been adopted, it would have been held that the jury could have found that either of the defendants were free from fault and that therefore the accident was unavoidable as to such defendant.

In any event, we are not here concerned with whether or not the giving of the instruction would have required a reversal of the judgment and the comments in cases such as *Pearce v. Elbe*, 98 Cal.App. 101, 106, 276 P. 389, with respect to the

likelihood of prejudice to a plaintiff from the instruction are not pertinent for the reason that the determination of that question is primarily for the trial court in passing upon a motion for a new trial. As stated in *Mazzotta v. Los Angeles Ry. Corp.*, 25 Cal.2d 165, at page 169, 153 P.2d 338, 340: "Upon an appeal from an order granting a new trial, all presumptions favor the order as against the verdict [citations] and the order will be affirmed if it may be sustained on any ground [citations] *although the reviewing court might have ruled differently in the first instance.*" (Italics added.)

The opinion of the District Court of Appeal, Second Appellate District, prepared by Presiding Justice Shinn, correctly disposed of the issue presented on this appeal and I adopt that opinion, with some deletions, as follows (224 P.2d 25, 26):

"It is obvious that a finding that the collision was unavoidable would have had no support in the evidence. The only actors were the two drivers. No other car was involved, nor was the operation of either car impeded or influenced by any mechanical failure, obstruction, or extraneous force. If the accident could have been avoided by the exercise of ordinary care on the part of one driver or the other, or both, it was, of course, not unavoidable.

"An instruction on unavoidable accident is improper unless it is within the issues pleaded, and there is evidence of unavoidability. It is not enough that it be merely pleaded by a denial of negligence, or otherwise. In passing upon the sufficiency of the pleadings to warrant an instruction on unavoidable accident, it has sometimes been overlooked that there must also be supporting evidence.

"In the following cases it was held proper to instruct on unavoidable accident under defendant's denial of negligence, without considering whether there was evidence that would have supported a finding that the accident was unavoidable. *Pearce v. Elbe*, 98 Cal.App. 101, 276 P. 389; *Sitkei v. Ralphs Grocery Co.*, 25 Cal.App.2d 294, 77 P.2d 311; *Schubkegel*

v. Dunn, 31 Cal.App.2d 312, 87 P.2d 875; Stevenson v. Fleming, 47 Cal.App.2d 225, 117 P.2d 717; Martindale v. Atchison, T. & S. F. Ry. Co., 89 Cal.App.2d 400, 201 P.2d 48.

"In the following cases the instruction was held proper where there was evidence that the accident was unavoidable. *Graham v. Consolidated M. T. Co.*, 112 Cal. App. 648, 297 P. 617 (child ran into street); *Creamer v. Cerrato*, 1 Cal.App.2d 441, 36 P.2d 1094 (same); *Jolley v. Clemens*, 28 Cal.App.2d 55, 82 P.2d 51 (horse suddenly appeared on highway); *Zaferis v. Bradley*, 28 Cal.App.2d 188, 82 P.2d 70 (driver's foot became wedged between pedals); *Smith v. Harger*, 84 Cal.App.2d 361, 191 P.2d 25 (small boy pushing on back of dump truck); *Merry v. Knudsen Creamery Co.*, 94 Cal.App.2d 715, 211 P.2d 905 (brake failure).

"In *Jacques [Jaques] v. Southern Pac. Co.*, 8 Cal.App.2d 738, 48 P.2d 63, *Barr v. Hall*, 12 Cal.App.2d 489, 492, 55 P.2d 1246, and *D'Avanzo v. Manno*, 16 Cal.App. 2d 346, 60 P.2d 524, it was held proper to refuse the instruction where there was no evidence that would have supported a finding of unavoidable accident. In *Jacques [Jaques] v. Southern Pac. Co.*, supra, the court said 8 Cal.App.2d at page 741, 48 P.2d at page 64: 'There was no evidence upon which this instruction could be based. All the evidence tended to support the respective theories of the two parties—one that the accident was due to the careless and negligent operation of the train, the other, that it was due to respondent's negligence in running in front of the moving train. The evidence all tended to prove the respective theories—that the accident was not unavoidable, but that it could have been avoided by the other party.' This statement fits our case precisely. * * *

"In the present case, the instruction not only tended to divert the minds of the jurors from the decisive issues of negligence and contributory negligence, but suggested that under the evidence the

defendants might be held blameless for some reason other than their freedom from negligence or contributory negligence on the part of plaintiff. In view of the evidence we have stated we can conceive of no theory under which the accident could have been found to be unavoidable, unless it be that collisions at intersections, where the views of the drivers are obstructed, are bound to occur, and therefore may be deemed to be unavoidable. This would be a highly unreasonable theory, but appellants have suggested no better one. They say: 'From the evidence adduced, the jury could have found that defendant *Womack* exercised reasonable care in the control of his automobile,' and also, 'accepting plaintiff's version, it might well be that a jury could conclude her conduct was not negligent.' Without comment on these statements, we add that the jury could not reasonably have found both parties to have been free from negligence. Appellants' analysis of the evidence and their arguments tend to emphasize the fact that the accident was not unavoidable.

"Where a new trial is granted for the reason that an erroneous instruction was prejudicial to the rights of the moving party, the order will not be reversed unless it can be said that the ruling was an abuse of discretion. *Nance v. Fresno City Lines, Inc.*, 44 Cal.App.2d 868, 113 P.2d 244; *Middleton v. California St. Cable Ry. Co.*, 73 Cal.App.2d 641, 167 P.2d 239; *Mazzotta v. Los Angeles Ry. Corp.*, 25 Cal.2d 165, 153 P.2d 338; *Brown v. George Pepperdine Foundation*, 23 Cal.2d 256, 143 P.2d 929; *Copley v. Putter*, 93 Cal.App. 2d 453, 207 P.2d 876; *Jones v. Scurlock*, 96 Cal.App.2d 201, 214 P.2d 599. The order granting a new trial was not an abuse of discretion, but, upon the contrary, was a proper one for the court to make."

For the reasons stated I would affirm the order granting a new trial.

SHENK, J., concurs.

DALZELL v. KELLY et al.

Civ. 4313.

District Court of Appeal, Fourth District,
California.

May 4, 1951.

Rehearing Denied May 29, 1951.

Hearing Denied June 28, 1951.

Action by William Campbell Dalzell against Edward A. Kelly, and others, for damages for alleged conversion of certain cotton and potatoes belonging to plaintiff and situated on plaintiff's land. The Superior Court of Kern County, Norman F. Main, J., sustained demurrer to plaintiff's amended complaint, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that complaint stated sufficient cause of action in one of its counts for conversion of potatoes and cotton, and even though other counts were bad and although count which was sufficient contained superfluous material, judgment of dismissal could not be sustained.

Reversed.

1. Pleading ⚡417

Where amended demurrer was sustained to plaintiff's complaint for damages and plaintiff thereafter amended complaint, there was waiver of any possible error in connection with trial court's action in sustaining amended demurrer.

2. Appeal and error ⚡680(1)

Where plaintiff contended on appeal from order sustaining amended demurrer to his amended complaint that court had merely given defendant until certain date to answer and that defendant was thereby given no right to demur and that upon failure to answer default should have been entered, and it appeared that demurrer was filed on same day as amended complaint and record did not disclose any granting of extension of time by court, there was no error in refusing to strike demurrer and no conceivable prejudice to plaintiff.

3. Pleadings ⚡354(1)

If any cause of action is sufficiently pleaded in complaint, a judgment of dismissal cannot be sustained.

4. Trover and conversion ⚡32(1)

Complaint sufficiently stated cause of action for conversion of cotton and potatoes.

5. Appeal and error ⚡1169(2)

Where complaint in eight counts sufficiently stated cause of action in at least one count for conversion of cotton and potatoes and possibly for reasonable value of use of property of plaintiff for certain period, even though other counts were bad and sufficient count itself contained superfluous material, judgment of dismissal could not be sustained, since one valid count is sufficient to sustain complaint. Code Civ. Proc. § 1161.

William Campbell Dalzell, in pro. per.

Mack & Bianco, Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action for damages, in some form, the precise nature of which does not clearly appear. The complaint was filed on November 4, 1949. A general demurrer was filed on November 15, and an amended demurrer on November 17. On November 25, the plaintiff filed notice of a motion to strike the amended demurrer. On November 28, the motion to strike was denied and the demurrer was sustained with 30 days in which to amend. On January 3, 1950, an amended complaint was filed. On the same day, January 3, a general and special demurrer was filed. On January 16, 1950 the demurrer to the amended complaint was sustained with 20 days in which to amend.

On February 8, 1950, the plaintiff filed notice of four motions: (1) to direct the clerk to file a motion to strike the demurrer and a motion to enter the default of the defendants (claimed to have been sent to the clerk on January 12); (2) to vacate the ruling on the demurrer; (3) to enter the default of the defendants; and (4) to amend the ruling on the demurrer to show which of the "demurrer points" was sustained. These motions were heard on February 14, 1950, and an order was entered on March 13, 1950, granting the first motion by ordering these papers filed *nunc pro tunc* as of January 17, and denying the other three motions. The plaintiff declined to amend and a judgment of dismissal was subsequently entered. This appeal is from that judgment.

The appellant contends that the court committed reversible error (1) in denying his motion to strike the amended demurrer; (2) in sustaining the amended demurrer; (3) in directing the clerk to file his motions to strike and to enter default as of January 17, instead of as of January 12, the date it was mailed; and (4) in refusing to strike the demurrer to the amended complaint and to enter the default of the defendants. He states that he relies "primarily" on the fourth point.

[1,2] The first two of these points relate to the amended demurrer to the original complaint. Assuming, but not holding, that there was any possible error in this connection it was waived by filing the amended complaint. *Metzenbaum v. Metzenbaum*, 86 Cal.App.2d 750, 195 P.2d 492. The other two points are based on the contention that the court had, on December 27, 1949, given the defendants until January 11, 1950, to answer; that this gave them no right to demur; and that it necessarily follows that the default of the defendants should have been entered on January 12, 1950. Aside from other considerations, there is nothing in the record to sustain this contention. No order of court extending time appears. The amended complaint was not filed until January 3, 1950, and the demurrer was filed the same day. No reason appears for striking the demurrer or for entering a default. This would be equally true if the motions to strike the demurrer and enter the default had been actually filed on January 12, 1950. The record discloses no error in this connection, and no conceivable prejudice.

[3] Appellant's fifth point, that a judgment of dismissal should not have been entered, since some cause of action is sufficiently stated in the amended complaint, must be upheld. If any count or cause of action is sufficiently pleaded, a judgment of dismissal cannot be sustained. *Bacon v. Wahrhaftig*, 97 Cal.App.2d 599, 218 P.2d 144; *Shook v. Pearson*, 99 Cal.App.2d 348, 221 P.2d 757.

The amended complaint sets forth eight causes of action. In the first cause it is alleged that the Dalzells leased a certain

five acres of land to the defendant Kelly for five years ending on October 31, 1948, at an annual rental of \$37.50; that Kelly assigned or sublet to the defendant Wallis without the knowledge of the plaintiff; that on November 1, 1948, the plaintiff took possession of the land by posting a "No trespassing" sign at the entrance; that on November 6, plaintiff notified Kelly to vacate the property unless he would agree to a new lease at a higher rental; that on November 22, Kelly refused to lease the land on those terms; that between November 22, 1948, and December 31, 1948, defendants wrongfully entered the land and converted to their own use cotton belonging to the Dalzells, to their damage in the sum of \$2100; that by false representations made in 1945 the defendants had secured a reduction in the annual rent paid from \$37.50 to \$22.50 a year; that "on November 22, 1949," the defendants represented that they would not use or occupy said land at any time thereafter, and relying on that representation the plaintiff was lulled into the belief that the defendants were not using the land "after November 1948"; that on October 10, 1949, the defendants falsely represented that they were entitled to possession of the property for one year after November 1, 1948, under section 1161 of the Code of Civil Procedure; that knowing the Dalzells lived a long distance away, the defendants planned to secure the use of the property for nothing; and that ever since October 31, 1948, the defendants had unlawfully detained the property from the Dalzells. The second cause of action is to the same effect except it is alleged that between April 1, 1949 and June 1, 1949, the defendants entered the property and converted to their own use certain potatoes belonging to the Dalzells, to their damage in the sum of \$1000.00. The third cause repeats the allegations of the first cause except that it is alleged that between October 21, 1948 and November 1, 1949, the defendants entered the premises and converted to their own use cotton belonging to the Dalzells, to their damage in the sum of \$2100.00. The fourth, fifth and sixth causes allege, respectively, that the defendants converted to their own use cot-

ton and potatoes belonging to the Dalzells, to their damage in the sums mentioned in the first three causes of action. The seventh cause of action alleges that \$60 was unpaid on the rental called for by the original lease. The eighth cause of action alleges that on November 1, 1948, the defendants entered this land by stealth and with force and arms, and used the property for their own purposes to plaintiff's damage in the sum of \$1000.00.

A general demurrer was filed as to each cause of action, and also a special demurrer setting up ten grounds of uncertainty and ambiguity, and that several causes of action had been improperly joined.

[4, 5] Many things in the complaint were ambiguous and uncertain, and many would have been subject to a motion to strike. Beyond question, the complaint should have been amended. Much of the evidence to support appellant's apparent contentions would be inadmissible under the complaint as it stands. Among other things, it does not appear whether this land was used for agricultural purposes, whether any of the cotton and potatoes were grown on the land, or if so when they were harvested. If they were grown and harvested thereon the question of a holding over of agricultural lands, under section 1161 of the Code of Civil Procedure, might be important. If there was no such holding over, and if the crops were harvested, the measure of damages would be the value of the use and occupation of the land and not the value of the crops produced. While many of the uncertainties pointed out in the demurrer clearly appear, some of them relate to matters of defense which should have been raised by answer.

However, when the uncertainties and immaterial matters are eliminated, the complaint sufficiently states causes of action for conversion of certain cotton and potatoes and possibly for the reasonable value of the use of the property from November 1, 1948 to October 31, 1949. Whether or not these can be proved is another matter with which we are not here concerned. Since the complaint sufficiently states one or more causes

of action, the judgment of dismissal must be reversed.

The appellant deserves censure for the intemperate language and unfounded charges against the trial judge, the clerk and the opposing counsel, which appear in his briefs. Most of the things of which he complains in this manner are matters for which he is himself to blame. The appellant, as a former lawyer, *Dalzell v. State Bar*, 6 Cal.2d 433, 57 P.2d 1300, is not to be excused on the ground of ignorance of proper procedure. In reversing the judgment we are not to be understood as condoning appellant's conduct, or approving the manner in which he has handled the case, either in the trial court or here.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.



104 Cal.App.2d 44

BLAIR v. MAHON et al.

Civ. 17948.

District Court of Appeal, Second District,
Division 3, California.

May 4, 1951.

Hearing Denied June 28, 1951.

Bruce Blair sued Richard H. Mahon, executor for the estate of Florence Z. Mahon (substituted in lieu of Florence Z. Mahon, deceased), and others to impress a trust on certain corporate shares bequeathed to plaintiff by his paternal grandfather and distributed to Florence Z. Mahon, executrix of the grandfather's estate, and another. The Superior Court, Los Angeles County, William B. McKesson, J., sustained defendants' demurrer to the complaint, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that the complaint had stated facts sufficient to establish a fraudulent concealment by the executrix and to constitute a cause of action for the establishment of a constructive trust.

Reversed with directions.

1. Executors and administrators Ⓒ75

A confidential relation existed between executrix of will and legatee thereunder, and therefore she was bound to utmost good faith in her transactions with legatee and owed him duty to disclose all facts and to refrain from taking unfair advantage of him.

2. Trusts Ⓒ94½

Where there is duty to speak because of trust or confidential relation, failure to do so is species of fraud for which equity may afford relief.

3. Trusts Ⓒ371(2)

In suit by legatee to impress trust upon shares of stock allegedly bequeathed to legatee but erroneously distributed in probate of estate and acquired by executrix, where it was alleged that while legatee had been in England and about to depart for combat in France executrix had, without revealing that value of stock bequeathed to him was \$13,475, sent legatee document by which he agreed to receive \$5,000 in stocks and cash as his share of estate, facts alleged showed fraudulent concealment on part of executrix, and complaint stated facts sufficient to constitute cause of action. Civ. Code, §§ 2217, 2223, 2224, 2228, 2229, 2237, 2243.

4. Executors and administrators Ⓒ315(6)

A suit by legatee seeking to impress a trust upon certain shares of stock allegedly bequeathed to legatee but erroneously distributed pursuant to probate decree and acquired by executrix was not a collateral attack on decree of distribution and decree of distribution would remain effective to give legal title to executrix. Civ. Code, §§ 2217, 2223, 2224, 2228, 2229, 2237, 2243.

5. Limitation of actions Ⓒ102(11)

Ordinarily, in suit to establish involuntary trust, statute of limitations begins to run when trust relation is terminated. Code Civ.Proc. § 338, subds. 3, 4, 343.

6. Limitation of actions Ⓒ102(8)

Executrix' possession of corporate shares in decedent's estate up to time of distribution would be taken to have been in her capacity as executrix, and statute of

limitations would not begin to run against legatee's suit to establish involuntary trust as to shares until distribution was had. Code Civ.Proc. §§ 338, subds. 3, 4, 343.

7. Limitation of actions Ⓒ102(8)

Where complaint in suit by legatee seeking to impress trust upon shares of stock allegedly bequeathed to legatee but erroneously distributed under probate decree and acquired by executrix was filed on October 28, 1948, and distribution of shares had been had on January 8, 1945, action was not barred by statute of limitations. Code Civ.Proc. § 343.

8. Limitation of actions Ⓒ100(7)

Where legatee first discovered fraud on part of executrix in June, 1948, and he commenced his action to impress trust as to shares of stock bequeathed to him and distributed to executrix and another in October, 1948, action was not barred by statute of limitations applicable to suits grounded in fraud. Code Civ.Proc. § 338, subd. 4.

9. Trusts Ⓒ371(7)

In suit by legatee to impress trust on shares of stock bequeathed to legatee and distributed to executrix and another, denial to legatee of leave to amend complaint was abuse of discretion, even if demurrer on ground of uncertainty was well taken.

10. Trusts Ⓒ371(2)

In suit by legatee to impress trust on shares of stock bequeathed to legatee and distributed to executrix and another, complaint was not demurrable for uncertainty.

George W. Rochester, Los Angeles, for appellant.

Cyril Moss, Hollywood, George Appell, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of dismissal entered pursuant to an order sustaining the demurrer of Florence Z. Mahon, referred to as defendant, to the second amended complaint without leave to amend in a suit to establish a constructive trust. Florence Z. Mahon died after the com-

mencement of the action and the executor of her will was substituted in her stead.

The complaint alleged:

Plaintiff at all times mentioned prior to October 1, 1945, was in the army. In July, 1944, he was in England preparing to depart for France for combat. While in England, between July 3 and 24, 1944, he received a document dated July 31, 1944, by which he agreed that the sum of \$5000, in stocks and cash, should be distributed to him from the estate of Herman Zuber,

his paternal grandfather, and by which he assigned to Grace A. Zuber, his maternal grandmother, Lucile Blair, his mother, and Florence Z. Mahon, his maternal aunt, such additional amounts as he "might have been entitled to if distribution were made in accordance with the terms of the Will." The document in full is set forth in the margin.¹ When plaintiff received the document it was signed by Cecilia Blair, his sister, Donald Blair, his brother, and Lucile Blair, his mother, and blank spaces were provided for his signature and those of

1. "Cyril Moss,
706 Garfield Building,
Los Angeles 14, California,
TRinity 9019.
Attorney for Executrix

In The Superior Court Of The State Of California
In And For The County Of Los Angeles

"In the Matter of the Estate of

No. 231,623.

Herman Zuber,
Deceased. }

Agreement As To The Dis-
tribution Of Estate

"The undersigned, being the widow, and all of the legatees under the Will of the above named decedent, whose estate is being probated herein, agree that the said estate shall be distributed as follows:

"1. To Cecilia Blair, Donald Blair and Bruce Blair the sum of \$5,000.00 each, free and clear of all inheritance or other taxes. Said persons hereby assign to Grace A. Zuber, Florence Z. Mahon and Lucile Blair, such additional amounts as they might have been entitled to if distribution were made in accordance with the terms of the Will. Said amounts shall be distributed to them in the form of a rateable proportion of the stocks or bonds bequeathed to them in the Will, to be determined by the Executrix of this estate, and if the value of said stocks nearest to the amount of \$5,000.00 each does not exactly equal \$5,000.00, the Executrix shall distribute to them the difference in cash.

"2. The balance of the estate after payment of all claims, administration expenses and inheritance and other taxes, shall be divided equally between Grace A. Zuber, Florence Z. Mahon and Lucile Blair. At such time as said balance can be determined, a supplemental agreement shall be entered into by and between said Grace A. Zuber, Florence Z. Mahon and Lucile Blair, specifying the manner and form in which the balance of said assets of this estate shall be distributed to them in equal proportions. Each of the said persons hereby assigns the one to the other, such sums or assets of the estate to which they would otherwise be entitled to if said estate were distributed in accordance with the terms of the Will.

"Dated this 31st day of July, 1944.

"/s/

Grace A. Zuber

/s/

Grace A. Zuber

/s/

Florence Z. Mahon

/s/

Florence Z. Mahon

/s/

Lucile Blair

/s/

Lucile Blair

Cecilia Blair

Cecilia Blair

Donald Blair

Donald Blair

Bruce Blair

Bruce Blair"

Grace Zuber and defendant Florence Z. Mahon.

Plaintiff signed and mailed the document prior to July 24, 1944. He became 21 years of age on July 24, 1944, and left for France on that day.

The document was mailed to plaintiff by Florence Z. Mahon or her agent. It was not accompanied by any letter or explanation, or any disclosure of information with reference to the death of Herman Zuber or as to the terms of his will, or any information or facts as to any distributive share plaintiff was entitled to receive under the will. Because he was in the army and about to depart for France for combat, he was unable to acquire any information or knowledge of his rights. Defendant knew plaintiff's incapacity to gain any independent information or knowledge in reference to his interests or rights under his grandfather's will. Placing trust and confidence in Florence Z. Mahon and Grace Zuber and in the fact that the document was signed by his mother, sister, and brother, and being in no position to seek or obtain advice from any other person, being entirely ignorant of the facts, except as informed by the document, believing that his relatives would deal fairly and justly with him, believing that his interest in his grandfather's estate was \$5000 in stocks and cash, knowing nothing of his rights under his grandfather's will, and without any consideration to him, he signed the document and returned it to defendant through the Army Post Office.

Plaintiff returned to Los Angeles on October 12, 1945, and thereafter resided with his mother. In June, 1948, in a conversation with his mother, Lucile Blair, he learned for the first time that his mother, his grandmother, Grace Zuber, and defendant Florence Z. Mahon, on May 13, 1944, five days after the death of his grandfather, agreed to sign the document and agreed to have plaintiff, his sister Cecilia and his brother Donald "hand over their respective inheritances" in the estate of their grandfather for \$5000 each in stocks and cash, and that defendant, his grandmother, and his mother would divide the remainder of the estate equally between them. His mother did not know how much he was entitled

to receive under the will of his grandfather but she relied on her mother, Grace Zuber, and her sister, defendant Florence Z. Mahon, "for all information, and that they would protect and deal justly with the plaintiff, his sister and his brother." The will was in the possession of defendant Florence Z. Mahon.

Immediately upon receiving the foregoing information, plaintiff consulted with an attorney, inspected the file in his grandfather's estate in the office of the county clerk, and learned that 1) Herman Zuber died in the county of Los Angeles on May 8, 1944, leaving a will in which he bequeathed to plaintiff 700 shares of Union Oil Company stock; 2) defendant Florence Z. Mahon had petitioned for probate of the will; it had been admitted to probate, and defendant had been appointed executrix.

Defendant prepared the document knowing that plaintiff had been bequeathed 700 shares of Union Oil Company stock and that they would be distributed to him. Defendant, as executrix, maintained a fiduciary relationship to plaintiff as a legatee under the will. She violated her trust when, with knowledge of the contents of the will and plaintiff's inability to gain independent information respecting his interests and rights under the will, she failed to disclose to him that his grandfather had bequeathed to him 700 shares of the capital stock of the Union Oil Company, having an appraised value of \$19.25 per share, or \$13,475, as of May 8, 1944.

If plaintiff had known the true facts, he would not have signed the document or consented to receive 259 shares of Union Oil Company stock.

Defendant "became and still is unjustly enriched by the use and benefit of plaintiff's said stock she now holds, contra to her trust and duty imposed upon her as Executrix of said Will, to deal fairly and communicate all material facts in connection with a transaction between herself and plaintiff, a beneficiary under said Will."

The file in his grandfather's estate in the office of the county clerk contains a receipt purportedly signed by plaintiff on January 9, 1945, acknowledging receipt of 259 shares

of Union Oil Company stock. On that date plaintiff was in combat in World War II in Europe. He did not sign the receipt.

Plaintiff informed his mother of the true facts and she transferred to him the 147 shares of Union Oil Company stock which had been bequeathed to him and which she had received from the estate.

The court, in the estate of Herman Zuber, acted on the document signed by plaintiff; and pursuant thereto, on January 8, 1945, distributed to defendant and to Grace Zuber, plaintiff's grandmother, 147 shares each of the 700 shares of Union Oil Company stock bequeathed to plaintiff by the will. In May, 1946, Grace Zuber transferred these 147 shares to defendant and they are now held by her "in her own name." Defendant now holds and has possession of 294 shares of said stock, registered in her name, which were bequeathed to and belong to plaintiff. Had it not been for the alleged violation and breach of trust on the part of defendant as executrix, said shares would have been distributed to plaintiff pursuant to the will.

The 294 shares are the property of plaintiff, and defendant "holds legal title to said shares of capital stock in trust for the plaintiff herein, and to his use and benefit."

The prayer is for a decree that 1) plaintiff is the sole owner of the 294 shares; 2) defendant holds them in trust for plaintiff; 3) defendant be directed to transfer them to plaintiff, or in the event of her failing so to do, for judgment for their value; 4) defendant be required to account for the dividends therefrom; 5) plaintiff be awarded general relief.

The grounds of demurrer were: 1) the second amended complaint does not state facts sufficient to constitute a cause of action; 2) the action is barred by the provisions of subdivisions 3 and 4 of section 338 and section 343 of the Code of Civil Procedure; 3) uncertainty.

As we have said, the demurrer was sustained without leave to amend. Following the prevailing practice in the court below, a practice which is not at all helpful to a reviewing court, neither the minute order

nor the judgment discloses the ground on which the court sustained the demurrer. We are unable to discern it.

[1,2] The obvious purpose of the suit is to impress a trust on the shares of stock bequeathed to plaintiff and distributed to defendant and Grace Zuber. A confidential relation existed between defendant as executrix of the will of Zuber and plaintiff as a legatee in the will. Defendant was an officer of the court and occupied the position of a trustee, holding the property devised and bequeathed for the benefit of the devisees and legatees. *Johnston v. Long*, 30 Cal.2d 54, 63, 181 P.2d 645; *Sears v. Rule*, 27 Cal.2d 131, 148, 163 P.2d 443; *Larrabee v. Tracy*, 21 Cal.2d 645, 650, 134 P.2d 265. She was bound to the utmost good faith in her transactions with plaintiff. It was her duty to disclose all the facts to him and to refrain from taking an unfair advantage of him. *Sears v. Rule*, supra, 27 Cal.2d 148, 163 P.2d 443. See also *Allen v. Meyers*, 5 Cal.2d 311, 315, 54 P.2d 450; *Rest., Trusts*, § 170(2); *Scott on Trusts*, 909, § 170.25. If there is a duty to speak because of a trust or confidential relation, a failure to do so is a species of fraud for which equity may afford relief. *Larrabee v. Tracy*, 21 Cal.2d 645, 651, 134 P.2d 265. On the facts alleged it would be unconscionable for a court of equity to hold that defendant fulfilled her obligations.

Civil Code section 2217 reads: "An involuntary [constructive] trust is one which is created by operation of law." Civil Code section 2223 reads: "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." Civil Code section 2224 provides: "One who gains a thing by * * * the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Civil Code section 2243 reads: "Everyone to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration." In *Bainbridge v. Stoner*, 16 Cal.2d 423,

428, 106 P.2d 423, 427, the court stated: "The theory of a constructive trust was adopted by equity as a remedy to compel one to restore property to which he is not justly entitled, to another. The person holding the property may have acquired it through fraud, undue influence, *breach of trust*, or *in any other improper manner* and he is usually personally liable in damages for his acts. But the one whose property has been taken from him is not relegated to a personal claim against the wrongdoer, which might have to be shared with other creditors; he is given the right to a restoration of the property itself. The title holder is, therefore, said to be a constructive trustee holding title to the property for the benefit of the rightful owner, but he is not charged with responsibility based upon either the actual or presumed intention of the parties. (Sec. 2224, Civ. Code; *Burns v. Ross*, 190 Cal. 269, 212 P. 17; Restatement Restitution, sec. 160.)" (*Italics added.*) See also *Rankin v. Satir*, 75 Cal.App.2d 691, 695, 171 P.2d 78; *Scott on Trusts*, 2317, § 462.2.

Highland Park Inv. Co. v. List, 27 Cal. App. 761, 763, 151 P. 162, 163, says that "A fundamental obligation of trusteeship is that a trustee may not obtain any benefit or advantage over his *cestui que trust*. The law looks with strictness amounting to suspicion upon all transactions had by a trustee respecting the trust property, and the burden is generally cast upon the trustee in such a case to make a clear showing of the absence of fraud and [that there was no] lack of good faith."

Civil Code section 2228 provides: "In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest * * * concealment * * *." Civil Code section 2229 reads: "A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner." And Civil Code section 2237: "A trustee who uses or disposes of the trust property, contrary to section two thousand two hundred and

twenty-nine, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds with interest."

[3] According to the allegations of the second amended complaint, while plaintiff, a minor, was in a strange land, far from his home and family, about to leave for France for combat, defendant, without disclosing to him the fact that he was entitled to receive 700 shares of stock of a value of about \$13,475 from his grandfather's estate, sent him a document by which he agreed to receive \$5000 in stocks and cash as his share of the estate, and, without any consideration to him, secured to herself from him 294 shares of the stock which was bequeathed to him by his grandfather's will and which would have been distributed to him. Her failure to disclose all of the facts amounted to fraudulent concealment. We think it clear on these facts that defendant violated her trust as executrix, that she holds the 294 shares as an involuntary trustee for plaintiff, and that the complaint states facts sufficient to constitute a cause of action.

[4] Defendant claims that the suit is a collateral attack on the decree of distribution in the estate of Herman Zuber. The contention is without merit. The issues in the present suit do not affect the decree of distribution. The decree remains effective to give legal title to Grace Zuber and defendant, but an involuntary trust is enforced in a separate suit in equity without attack on the probate proceedings. *Sears v. Rule*, 27 Cal.2d 131, 139, 163 P.2d 443.

[5-8] One of the grounds of the demurrer was that the action is barred by the provisions of subdivisions 3 and 4 of section 338 and section 343 of the Code of Civil Procedure. Ordinarily in a suit to establish an involuntary trust the statute of limitations begins to run when the trust relation is terminated. *Knapp v. Knapp*, 15 Cal.2d 237, 241, 100 P.2d 759. As defend-

ant was the executrix of the will of Herman Zuber, her possession of the shares of stock up to the time of distribution must be taken to have been in her capacity as executrix, and the statute did not begin to run until distribution was had. *Brazil v. Silva*, 181 Cal. 490, 499, 185 P. 174. An involuntary trust arose when the stock was distributed by the probate court. *Sears v. Rule*, 27 Cal.2d 131, 139, 163 P.2d 443. Distribution was had on January 8, 1945. The complaint was filed October 28, 1948. Thus the action was commenced within the four-year period prescribed by section 343. If, as defendant argues, the suit is grounded in fraud, the applicable statute is subdivision 4 of section 338 and, under the principles stated at length in *Hobart v. Hobart Estate Co.*, 26 Cal.2d 412, 436-444, 159 P.2d 958, which need not be repeated, the statute of limitations began to run in June, 1948, at the time plaintiff discovered the fraud.

Plaintiff has shown by the allegations of the second amended complaint that he had no notice or knowledge of any suspicious facts or circumstances prior to June, 1948; that at that time he was first put on notice of possible fraud; that immediately thereafter he made an investigation, discovered the fraud, and commenced the action. It follows that the action is not barred by subdivision 4 of section 338 of the Code of Civil Procedure.

[9,10] The second amended complaint states facts sufficient to constitute a cause of action, and the action is not barred by the statute of limitations. Denial of leave to amend was an abuse of discretion even if the demurrer on the ground of uncertainty was well taken. *Hancock Oil Co. v. Hopkins*, 24 Cal.2d 497, 510, 150 P.2d 463. Defendant does not argue this ground. We have, however, examined the points of claimed uncertainty and find them to be untenable.

The judgment is reversed with directions to overrule the demurrer and permit defendant to answer.

SHINN, P. J., and WOOD, J., concur.

CAMERON v. CITY OF GILROY.

Civ. 14371.

District Court of Appeal, First District,
Division 2, California.

May 8, 1951.

Hearing Denied July 5, 1951.

Annie Cameron brought action against City of Gilroy for personal injuries sustained when she slipped and fell on curved pedestrian ramp constructed by city, leading from sidewalk to state highway. The Superior Court in and for the County of Santa Clara, John D. Foley, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Dooling, J., held that where state highway department delegated to city authority over areas outside curb lines of state highways within city, city was liable for negligent design and construction of ramp.

Judgment affirmed.

1. Highways ⇨105(2)

Purpose of contract between state highway department and city, delegating to city maintenance of areas between curb lines and right of way lines and authority over areas outside curb lines of state highways within city, was to reserve to highway department control over and maintenance of roadway, that portion of highway designed for and used by vehicular traffic, and to delegate to city like powers and duties over sidewalk area, that portion of highway reserved exclusively for pedestrian use.

2. Highways ⇨105(2)

Under contract delegating to city from state highway department, maintenance of areas between curb lines and right of way lines and authority over areas outside curb lines of state highways within city, term "curb lines" would mean line which divides roadway from sidewalk.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Curb Lines".

3. Municipal corporations ⇨761(1)

Under contract whereby state highway department delegated to city maintenance of areas between curb lines and right of way lines and authority over areas outside curb lines of state highways within city, pedestrian ramp leading from sidewalk and

extending into highway was outside street curb line, and city was liable for pedestrian's injuries sustained in fall caused by defective or dangerous design and construction of ramp.

4. Evidence ⇨83(2)

Where state highway department delegated to city maintenance of areas between curb lines and right of way lines and authority over areas outside curb lines of state highways within city, it would be presumed in absence of contrary evidence that city acted legally in extending a pedestrian ramp from sidewalk into highway and with full consent of highway department if such was required, especially when ramp had been in place for a number of years before contract was made. Code Civ.Proc. § 1963, subd. 15.

5. Municipal corporations ⇨788(3)

Where curved pedestrian ramp was constructed and planned by city, but form of ramp as designed and constructed was such as to render it dangerous or defective, city would be charged with notice of ramp's condition.

6. Municipal corporations ⇨819(1, 7)

In pedestrian's action against city for injuries sustained when she fell on curved pedestrian ramp constructed by city, evidence did not compel finding that pedestrian was guilty of contributory negligence or that she voluntarily assumed the risk of injury.

7. Municipal corporations ⇨806(3)

Pedestrian's use of curved pedestrian ramp designed for pedestrian traffic, was conduct of a person of ordinary prudence, though ramp was defectively designed and constructed.

8. Municipal corporations ⇨812(6)

Though pedestrian's claim filed against city did not state address of claimant but did give office address of her attorney, there was sufficient compliance with claims statute. Government Code, § 53053.

Niland, Santa Clara, of counsel), for appellant.

Harold Holden, Morgan Hill, R. G. Wilkins, San Jose, for respondent.

DOOLING, Justice.

Respondent, Annie Cameron, received personal injuries when her foot slipped while she was entering a marked crosswalk leading across Monterey Street in the City of Gilroy. The City of Gilroy had constructed some years before an approach to the crosswalk leading from the theretofore existing sidewalk into the street. The sidewalk level at that point is ten inches above the street level and the approach, in the form of an arc-shaped ramp, was flush with the sidewalk at its higher end and, in a length of 33 inches, curved downward with an increasing pitch to meet the street level at its lower end. Aptly described by some witnesses as "barrel-shaped", it was constructed of a surface of concrete poured over a curved iron frame. The plaintiff's fall was caused by her foot slipping from under her when she placed it upon the curved surface of the ramp. The court, sitting without a jury, gave plaintiff judgment for damages against the City of Gilroy and the city has appealed.

Photographs of the ramp are in evidence and from a side view it seems obvious that its curved surface as it sloped into the street was not well designed to secure a sure footing for pedestrians. This is supported by the testimony of witnesses that prior to respondent's mishap other persons, particularly women, seeking to use it had lost their footing on its curved surface.

Monterey Street is a state highway and appellant seeks to escape liability on the ground that this ramp being located upon, and a part of, a state highway, respondent city had no legal authority to repair or remove it. In support of this argument appellant relies heavily upon *Gillespie v. City of Los Angeles*, 36 Cal.2d 553, 225 P.2d 522. We have concluded that on its facts this case is not controlled by the *Gillespie* case.

Campbell, Hayes & Custer and Robert E. Hayes, all of San Jose (Edward J.

The ramp in this case was admittedly constructed by the City of Gilroy under the

direction of its superintendent of streets. By reason of its shape it was neither designed, nor could it be used, for vehicular travel. The sides of the ramp are vertical and, rising in a curve to a height of ten inches, it presents an obstacle to vehicular traffic, rather than being designed for its use. It was obviously designed and intended solely for pedestrian travel. A contract between the State Highway Department and appellant city, entered into long after the ramp was in place, was introduced into evidence. This contract is similar in form to the contract considered in the Gillespie case and contains the following provisions:

"There is hereby delegated to the city the maintenance of the areas between curb lines and right of way lines * * *.

"The Department of Public Works hereby delegates to the city such administrative powers, jurisdiction, and authority as are vested by law in the department to regulate and control the streets constituting the designated State highway routes within the city, in so far as the areas outside the curb lines are concerned."

The crucial question lies in construing the language "between curb lines and right of way lines" and "outside the curb lines". If the ramp upon which respondent fell lay within the area over which "administrative powers, jurisdiction, and authority" and "maintenance" were delegated by the contract to the City of Gilroy the legal authority of the city to remedy the defect is established.

[1,2] In the Gillespie case a majority of the court found similar contract language inapplicable to a mountain highway without sidewalks, saying, 225 P.2d at page 527: "Route 156 is a mountain road, lacking the sidewalk area whose maintenance could reasonably be separated from that of the roadway." In this sentence the court recognizes that the purpose of these contracts is to reserve to the State Highway Department the control over and maintenance of the roadway, that portion of the highway designed for and used by vehicular traffic, and to delegate to the city like powers and duties over the side-

walk area, that portion of the highway not designed for or used by vehicular traffic but reserved exclusively for pedestrian use. The "curb line" as used in these contracts is the line which divides the roadway from the sidewalk, the area used for vehicular traffic from the area set apart exclusively for pedestrian use.

[3] A glance at the photographs in evidence makes it clear beyond a doubt that the ramp in question is no more than an extension of the sidewalk. It is neither designed for nor could it be used by vehicles passing along the roadway. Instead it effectively cuts off from vehicular use the area which it occupies. It was clearly designed and constructed solely for pedestrian use. These facts make it clear that it is "outside the curb line" in the sense of those words in the contract between the State Highway Department and appellant city.

[4] There is a statutory presumption "That official duty has been regularly performed" Code Civ.Proc. § 1963, subd. 15, and we must presume in the absence of contrary evidence that in thus extending the pedestrian or sidewalk area by the construction of this ramp the city officials were acting legally, and with the full consent of the State Highway Department, if the law required such consent. When the contract in evidence was made the ramp had been in place for a number of years and the contract must be construed in view of that fact, which we must assume to have been within the knowledge of the contracting parties.

[5] The fact that the negligence of appellant city inhered in the form of the ramp as designed and constructed is sufficient to charge appellant with notice of its dangerous or defective condition. "The rule is well established that when it is shown that a certain street and sidewalk improvement has been planned by city officers and constructed in accordance with such plan, and that by carrying out the plan a dangerous or defective condition has been created, no further proof is needed to charge the city with notice of that condition." *Fackrell v. City of San Diego*, 26

Cal.2d 196, 203, 157 P.2d 625, 629, 158 A.L.R. 773.

[6, 7] The evidence did not as a matter of law compel the court to find that respondent voluntarily assumed the risk of injury or was guilty of contributory negligence. Respondent testified that she was not in the habit of using this ramp and had not heard of any person who had slipped in attempting to walk on it. The ramp was patently designed for pedestrian traffic and for that purpose alone, and the casual pedestrian would be readily persuaded, without giving the matter further thought, that he might safely use a facility obviously supplied by public authorities for his convenience as a member of the public. The appellant city is in the position of asserting that every pedestrian who accepted its invitation to use this ramp which it designed and constructed for that very use must be held as a matter of law to have assumed the risk of injury. The conduct of a person of ordinary prudence is the legal standard in such cases and the court was well within the bounds of its fact finding power in determining that a person of ordinary prudence would have used this facility under the circumstances. See *Scholey v. Steele*, 59 Cal.App.2d 402, 406, 138 P.2d 733; *Singer v. Eastern Columbia, Inc.*, 72 Cal.App.2d 402, 412-413, 164 P.2d 531; *Restatement of the Law of Torts*, Vol. II, sec. 360, illustration 2.

[8] The claim filed with appellant city did not state the address of the claimant. However it did give the office address of her attorney. This has been held to be a sufficient compliance with the claims statute in that particular. *Government Code*, § 53053; *Anderson v. County of San Joaquin*, 97 Cal.App.2d 330, 217 P.2d 479; *Stewart v. City of Rio Vista*, 72 Cal.App.2d 279, 164 P.2d 274; *Uttley v. City of Santa Ana*, 136 Cal.App. 23, 28 P.2d 377.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J.,
concur.

230 P.2d—53½

* Subsequent opinion 241 P.2d 4.

HALE v. DOLLY VARDEN LUMBER CO.

Civ. 7827. Sac. 6096.

District Court of Appeal, Third District,
California.

May 8, 1951.

Rehearing Denied June 6, 1951.

Hearing Granted July 5, 1951.*

Action by Roy L. Hale against Dolly Varden Lumber Company, a corporation, for breach of contract. The Superior Court, Humboldt County, Delos A. Mace, J., entered an order denying defendant's motion for change of venue, and the defendant appealed. The District Court of Appeal, Van Dyke, J., held that trial court was justified in holding that obligation under contract, breach of which caused action to be filed, was performable in county of original venue.

Order affirmed.

1. Corporations ⇨503(3)

Where corporation's principal place of business was in San Mateo county, corporation was entitled to have action instituted against it by contractor in Humboldt county for breach of contract moved unless action was upon contract made or to be performed in Humboldt county or unless obligation or liability arose or breach occurred therein. *Const. art. 12, § 16.*

2. Appeal and error ⇨912

Where motion for change of venue was determined on allegations of verified complaint and affidavits and counter affidavits of respective parties, all conflicts would have to be resolved in favor of prevailing party and all reasonable inferences which were to be drawn would have to be in support of trial court's order denying motion.

3. Contracts ⇨32

Where minds of parties have met respecting terms and conditions of mere formal writing that is to be executed by them and agreed terms of contract thereafter to be executed are certain and in all respects definitely understood and agreed upon in advance, either orally or by informal writing, there is an obligatory contract dating from making of earlier agreement.

4. Contracts ⇨15, 39

It is essential to validity of a contract that parties should have consented to same subject matter in same sense, and to be final, agreement must extend to all terms which parties intend to introduce and material terms cannot be left for future settlement.

5. Contracts ⇨15

There can be no contract unless minds of parties have met and mutually agreed.

6. Contracts ⇨32

Where detailed facts of preparation, discussion and execution of formal written instrument were not denied by contractor he destroyed his position that essential terms of written contract were orally agreed to and minor and incidental matters were left to be embodied in terms of written instrument thereafter to be prepared and executed, and had admitted in effect, that contract was not completed one when oral negotiations of parties had ended.

7. Contracts ⇨32, 145

Even if there was a completed oral agreement made in certain county between parties to contract, it was competent for parties when they embodied agreement into a subsequent written contract to agree that prior oral agreement should have no force or effect and should stand as cancelled and abandoned, and accordingly, where they did this by stipulation, it could not be claimed that written contract sued upon was made in county wherein that previous, but later abandoned and voided oral understanding, was made, if it was in fact made. Const. art. 12, §§ 16.

8. Corporations ⇨503(2)

Under constitutional provision authorizing corporation to be sued in county where contract is made or to be performed, or where obligation or liability arises, or breach occurs, reference to place of performance, place obligation arises, and place breach occurs, is concerned with that obligation of contract, breach whereof is cause for action's being filed. Const. art. 12, § 16.

9. Appeal and error ⇨1024(3)

Where contract is silent as to place of performance, determination by trial court in action against corporation for breach, on motion for change of venue, is a determination of fact, and upon appeal trial court's ruling will be upheld unless there is a lack of evidence to support it. Const. art. 12, § 16.

10. Contracts ⇨208

In a suit upon contract of a corporation, where no place of performance is expressly stipulated, it ought to be held performable in place where circumstances, viewed in light of pertinent Code provisions, indicate that parties expected or intended it to be performed. Const. art. 12, § 16.

11. Corporations ⇨503(1)**Logs and logging** ⇨8(3)

Where timber owner executed contract with corporation which fixed main theater of performance in county of owner's residence wherein owner's timber lands and rights were situated, and wherein owner was to perform certain managerial services, when moneys became due under contract, relation of debtor and creditor arose between corporation and owner and when contract did not provide for place of performance, it was incumbent upon corporation to seek out owner, make payment or tender where he was known to reside, and accordingly owner's action for breach was properly maintained in county of owner's residence. Const. art. 12, § 16; Civ. Code, §§ 1488, 1489.

12. Corporations ⇨503(2)

In action by owner of certain timber lands and rights against corporation for breach of contract, evidence sustained findings that obligation arising under contract, breach of which caused owner to file action, was performable in county of original venue. Const. art. 12, § 16; Civ. Code, §§ 1488, 1489.

13. Corporations ⇨503(2)

Statute which declares that when defendant has contracted to perform obligation in particular county then defendant can be sued either in county where obliga-

tion is to be performed or in county in which contract was entered into or in county of residence of defendant, and which further declares that county in which obligation is incurred shall be deemed to be county in which it is to be performed, unless special contract in writing to contrary, does not apply to a corporate defendant. Const. art. 12, § 16; Code Civ. Proc. § 395.

14. Constitutional law ☞29

Constitutional provision authorizing corporation to be sued in county where contract is made or to be performed, or where obligation or liability arises or breach occurs, or in county where principal place of business of corporation is situated, is self-executing. Const. art. 12, § 16.

15. Constitutional law ☞29

Even though a constitutional provision is self-executing, legislation may be enacted to facilitate its operation and may be desirable by way of providing convenient remedies for protection of rights secured or of regulating claim of rights so that its exact limits may be known and understood, but all such legislation must be subordinate to constitutional provision and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it.

Kenneth D. Sevier, Eureka, McEnerney & Jacobs, San Francisco, for appellant.

Stanley Woodman, Eureka, for respondent.

VAN DYKE, Justice.

Plaintiff, respondent here, brought this Superior Court action in the County of Humboldt. The defendant is a corporation, with its principal place of business in the County of San Mateo. Defendant moved for a change of place of trial from the County of Humboldt to the County of San Mateo, which motion was denied. This appeal followed.

Respondent's complaint alleged in substance as follows: That on April 1, 1947, the parties hereto entered into a written

contract, a copy of which is annexed to the complaint and by reference made a part thereof; that under the terms of the contract appellant agreed to pay respondent compensation for services and also to pay the purchase price of certain personal property consisting in the main part of logging equipment; that certain moneys had become due for services and remained unpaid; that the purchase price of the personal property had become due and was unpaid. The complaint prayed for a judgment for such amounts. The written contract, after reciting the ownership of timber lands by appellant and the right to log other lands, provided for the employment of respondent, under the direction of appellant's president, as superintendent of the prospective logging operations of respondent. Attached to the contract as an exhibit thereto was a long list of materials, equipment and supplies appropriate for such operations, owned by respondent. By the contract he sold this property to appellant. Payment for the personal property so sold to appellant was to be made at the rate of 20% of the net profits earned by the appellant, during the existence of the agreement. The contract contains detailed and extensive provisions for determination of net profit.

In support of its motion the appellant presented the affidavit of its president. Therein he averred that the principal place of business of the appellant was, at all times material here, in the County of San Mateo. It may be said that this is not controverted. Respondent filed an affidavit in opposition to the motion, wherein he stated that he was at all times a resident of the County of Humboldt, that the contract sued upon was orally made and agreed to between himself and the corporation in Humboldt County, that it was to be performed in that county by both parties thereto, that the obligations and liabilities of the parties thereunder arose in said county, that such moneys as had been paid him under the contract were paid to him in Humboldt County, and that the breach of the contract for which the action was brought occurred in said county. Appellant filed a supplemental affidavit of

its president, wherein he asserted to be untrue the respondent's averment that the contract had been orally made in the County of Humboldt. He further averred that, although a portion of the provisions of the contract were discussed and partially negotiated between himself, as president of appellant, and respondent, in Humboldt County, the contract was not completely negotiated or agreed to therein; that many of the provisions of the contract were not discussed or agreed to in Humboldt County and that subsequently, and for the purpose of completing negotiations and executing such contract as might be finally agreed to, a meeting was had in San Mateo County at the office of appellant, where at first a tentative draft of the proposed contract was made, discussed and changed in certain particulars, and then the contract was completely typewritten and executed by the parties thereto. He averred somewhat in detail that the extensive inventory of personal property attached to the written agreement was there presented by respondent and upon his assurances that the same was true and correct the same was accepted by the corporation as correct and made a part of the agreement. He said further that at that meeting copies of the signed contract were delivered by each party to the other. Respecting moneys paid, he denied the averments of respondent in respect thereto and stated that the sums were paid under the contract by eleven checks drawn and signed by the appellant at its office in San Mateo County on bank accounts maintained by it in Humboldt County; that with the exception of one check personally given to respondent in San Mateo County, all were mailed to him from San Mateo County to his address at Arcata in Humboldt County. It was further averred that for a period of a year prior to the making of the contract respondent had been employed by appellant as its logging superintendent under a previous arrangement and all moneys paid under that arrangement were handled in the same way and that no objection was ever made by respondent to this method of performance by the corporation. The affidavit contained

denials of appellant's averments as to the place of performance and the place where the obligations arose, the place where the alleged breach occurred, terming such averments inconsistent with fact and bare, unsupported conclusions of respondent. Respondent also filed a supplemental affidavit. Therein he reiterated his statements that there had been a complete oral contract made in Humboldt County "with only a written memorandum made and signed in the County of San Mateo". He averred that the meeting in San Mateo County was not called for the purpose of completing an incomplete contract, but that he was merely present thereat on an unrelated matter and while there a written record of the prior oral contract was made. He then said "that the essential terms of the contract shown as Exhibit 'A' to the complaint in this action were orally agreed to by the plaintiff and David D. Bohannon, the president of the defendant corporation in Humboldt County and only leaving minor and incidental matters and the embodying of the terms of the contract in written form which were by convenience done in the County of San Mateo." He averred that any changes made in the written draft were to make it conform to the previous oral agreement. He said that there had been an understanding that the oral agreement entered into previous to the date of the written agreement would be embodied in a written instrument drawn by the attorney of the appellant and then brought to Humboldt County for his signature, which latter was not done merely because of his presence in San Mateo County for other purposes. He re-alleged his statements that the place of performance was in Humboldt County "by means of payment of the money due to the plaintiff" and that the breach took place therein; that the parties intended the performance of both should be in Humboldt County. He concluded by stating that the checks sent to him had not been accepted as "absolute payment of the amount due" for services or property sold and that there had never been any special agreement that they were to be so accepted but

that he had accepted them "in the ordinary course of business."

Article XII, Section 16, of the Constitution of this State provides: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

[1,2] Since admittedly the principal place of business of appellant is in San Mateo County, appellant was entitled to have the cause moved unless the action is upon a contract made or to be performed in Humboldt County or unless an obligation or liability arose or breach occurred therein. *Clary v. Basalt Rock Co.*, 99 Cal.App.2d 458, 222 P.2d 24; *Hammond v. Ocean Shore Dev. Co.*, 22 Cal.App. 167, 133 P. 978. Since the motion was made and determined on the allegations of the verified complaint and the affidavits and counter-affidavits of the respective parties, all conflicts must be resolved in favor of the prevailing party and all reasonable inferences which are to be drawn must be in support of the trial court's order. *C. H. Parker Co., Inc. v. Exeter Refining Co.*, 26 Cal. App.2d 610, 611, 79 P.2d 1114; *Gordon v. Perkins*, 203 Cal. 183, 263 P. 231; *Marston v. Watson*, 20 Cal.App. 465, 129 P. 611.

[3-6] It has been noted that the parties are in disagreement as to where the contract was made. It is undisputed that the formal written contract, dated April 1, 1947, and made a part of respondent's complaint, was executed in San Mateo County, but respondent takes the position that this was a mere reduction to writing of a previous oral contract made in Humboldt County and did not constitute the making of a new contract. We think this position of respondent cannot be sustained. The bare averment of respondent that the contract was made in Humboldt County is but a conclusion. The detailed facts of the preparation, discussion and execution of the formal written instrument are not denied by the respondent and he destroys his position when he says

that the essential terms of the contract embodied in the written instrument were orally agreed to and minor and incidental matters were left to be embodied in the terms of the written instrument thereafter to be prepared and executed. He makes no attempt to define what is meant by "the essential terms of the contract" but he admits, in effect, that the contract was not a completed one when the oral negotiations of the parties in Humboldt County had ended.

"It may be conceded that where the minds of the parties have met respecting the terms and conditions of the more formal writing that is to be executed by them, and the agreed terms of the contract thereafter to be executed are certain and in all respects definitely understood and agreed upon in advance, either orally or by informal writing, there is in such case an obligatory contract dating from the making of the earlier agreement. 13 C.J. p. 290 et seq. But it also is elementary law that, unless the agreement to execute the future contract be definite and certain upon all the subjects to be embraced, so that nothing is left for future negotiation, it is nugatory. * * *

"The principle, which respondent claims is here decisive, is aptly expressed in the following language taken from *Dillingham v. Dahlgren*, 52 Cal.App. 322, 329, 198 P. 832, 835:

"It is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense. They must have contracted *ad idem*.' * * * 'To be final, the agreement must extend to all the terms which the parties intend to introduce, and material terms cannot be left for future settlement'". *Toms v. Hellman*, 115 Cal.App. 74, 77, 1 P.2d 31, 32.

"There can be no contract unless the minds of the parties have met and mutually agreed. Consent is not mutual unless all the parties agree upon the same thing in the same sense. The minds of contracting parties must draw together and become as one touching the subject matter and the terms and conditions before a contract can be consummated." 6 Cal.Jur., sec. 24, pp. 43, 44.

The end result of respondent's own affidavit in this respect is that the parties had not made a complete oral agreement or any oral agreement and that no contract existed between them until the written contract was executed in San Mateo County.

[7] There is another reason why respondent's claim that he sues upon a pre-existing oral agreement made in Humboldt County and merely integrated in San Mateo County by the execution of the written instrument cannot be maintained. That document contains the following stipulation of the parties: "This instrument contains the entire agreement between the parties hereto and shall supersede and control any and all prior understandings, whether written or oral." Supersede means: "To make void or useless; to make unnecessary or superfluous; to cause to be set aside * * * to render obsolete; to cause to be abandoned." Webster's International Dictionary. It means "to set aside, to displace, to make void, inefficacious, or useless." *Dick v. King*, 73 Mont. 456, 236 P. 1093, 1095. The word means "obliterate," "annul," "make void," "repeal." *City of Los Angeles v. Gurdane*, 9 Cir., 59 F.2d 161, 163. It means "To replace or set aside and put another in the place of; To supplant; To make void, useless or unnecessary by superior power, or by coming in the place of." *Willbanks v. Montgomery*, Tex.Civ.App., 189 S.W.2d 337, 339. Assuming that there was a completed oral understanding or agreement made in Humboldt County, it was competent for the parties when they embodied it in a subsequent written contract to agree that the prior oral agreement should have no force or effect and should stand as cancelled and abandoned. This they did by the plain stipulation they inserted in the written instrument and it cannot now be said that the contract here sued upon was made in the county wherein that previous, but now abandoned and voided oral understanding, was made, if it was made.

[8-10] But regardless of the fact that the contract sued upon was made in San Mateo County, the venue may still be retained in Humboldt County if plaintiff

can bring his case within any of the provisions of the Constitution authorizing suit in that county. Respondent contends, and appellant resists the contention, that the contract was to be performed in Humboldt County. It appears to have been held that the constitutional provision under discussion, when it refers to the place of performance, the place where the obligation arises and the place where the breach occurs, is concerned with that obligation of the contract the breach whereof is the cause for the action's being filed. *Union Oil Co. v. Basalt Rock Co., Inc.*, 30 Cal. App.2d 317, 86 P.2d 139. See, also, *Burr v. Western States Life Ins. Co.*, 211 Cal. 568, 576, 296 P. 273, 276, wherein the court said: "The defendant's breach of contract, if any, occurred at the place where payment was agreed to be made."

Respondent does not contend that the law is otherwise than above stated, but says that the action upon the contract is to recover moneys due and owing to respondent, that the contract contains no specific provision as to where these sums were to be paid, that the trial court, therefore, was at liberty to find that it was the intention of the contracting parties that the moneys should be paid at the residence of respondent in Humboldt County. It is true that when the contract is thus silent the determination by the trial court on motion for change of venue is a determination of fact and that upon appeal the trial court's ruling will be upheld, unless there is a lack of evidence to support it.

"It is the rule that the question of where the contract was to be performed is one of fact, and the determination by the trial court of that question will not be disturbed if there is any substantial evidence in the record to support it, and all conflicts must be resolved in favor of the prevailing party. If, therefore, the facts upon which the present motion was heard and determined reasonably support the inference that the contract was to be performed in Stanislaus county, the order must be affirmed. *Parker Co., Inc. v. Exeter Refining Co.*, 26 Cal.App.2d 610, 79 P.2d 1114." *Gallo v. Boyle Manufacturing Co.*,

Inc., 35 Cal.App.2d 168, 169, 170, 94 P.2d 1010, 1011.

In *Swartz v. California Olive Growers' Packing Corp.*, 56 Cal.App.2d 168, 170, 171, 133 P.2d 20, 22, the court said: "Such a wide degree of latitude is allowed the trial court in deciding this ever-recurring controversy that the appellate courts will not disturb the order made upon conflicting evidence unless it is clear that the order was the result of arbitrary action. [Citing cases.] It follows that in case of such a conflict the averments of the affidavits of the prevailing party may be deemed to be the findings of the court below upon the issue of change of venue. [Citing cases.] Inasmuch as the contract specifies no place of performance it was performable in the county in which the circumstances attendant upon the execution of the writing indicate that the parties intended as the theater of its performance."

See, also, Civil Code, Sections 1488 and 1489, and *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 315, 316, 74 P. 855, 65 L.R.A. 90. In the *Bank of Yolo* case the court said: "But, if the contract was to be performed in Yolo county, the action was rightly commenced there, wherever it was made, and we think the place of performance was in Yolo county. The plaintiff is a banking corporation doing business at Woodland, the county seat of Yolo, and a promise to repay money advanced by it—no other place of payment being stipulated—must be deemed a promise to pay at its bank, the only place where it can be found. This, we think, is a reasonable deduction from the provisions of the Civil Code (sections 1488, 1489) in regard to the place where an offer of performance may be made; * * *. In a suit upon the contract of a corporation, where no place of performance is expressly stipulated, it ought to be held performable in the place where the circumstances, viewed in the light of pertinent code provisions, indicate that the parties expected or intended it to be performed."

[11, 12] See, also, *Nakanishi v. Policy Holders' Life Ins. Ass'n*, 129 Cal.App. 747, 19 P.2d 287, and *Clark v. Policy-Holders'*

Life Ins. Ass'n, 138 Cal.App. 505, 32 P.2d 653, 655. In the last case cited an insurance contract made in Los Angeles County resulted in money being payable to the assured who lived in Tulare County where he began action to collect moneys alleged to be due under the policy. After quoting 48 Corpus Juris, pages 592, 593, as to the general rule governing the place of payment, in the absence of any agreement or stipulation to the contrary, as stated above, and after referring to the code sections hereinbefore referred to, the court said: "Having failed to make tender of payment at the creditor's place of residence, a breach of the debtor's promise to pay occurred at that place, and under section 16 of article 12 of the Constitution the defendant could be sued at that place, no other place of payment being stipulated." See also 70 C.J.S., Payment, § 6.

In this case the contract is silent as to the place where the money, which from his performance of the contract would become due to the respondent, was to be paid. Then we must determine where, from the circumstances viewed in the light of pertinent code provisions, the parties expected or intended this obligation of the contract to be performed. The trial court must be held to have found as a fact that this was in Humboldt County. We think that upon the record here this finding must be sustained. The contract itself fixes the main theater of performance clearly in Humboldt County, where the timber lands and timber rights of the appellant were situated. There was the place of operation, as indicated clearly by the contract, and there, under the undisputed averments of the affidavits, was where plaintiff was to perform his managerial services; there also was the operation out of the net profits of which the purchase price of the personal property was to be paid to respondent; there was the residence of respondent, and there it had been for a considerable period of time before the contract was made. When moneys became due under the contract, as it is alleged in the complaint they did, the relation of debtor and creditor in respect of the sums so due arose between appellant and respondent, and

the contract not otherwise providing, it was incumbent upon appellant, in order to discharge that obligation, to seek the respondent and make payment or tender of the same where he might be found and where he was known to reside. If the payment was to be made in Humboldt County, then of course the breach alleged—the failure to make such payment—also occurred in that county. *Clark v. Policy Holders' Life Ins. Ass'n*, supra. We conclude that the trial court was justified in holding that the obligation, the breach of which caused this action to be filed, was performable in the county of original venue and that in that county also the breach thereof occurred.

Appellant contends that the practice of appellant, acquiesced in by respondent, of making payment of sums coming due to respondent by mailing checks in payment thereof from the office of the appellant in San Mateo County to the residence of respondent in Humboldt County compels a finding that payment was to be made in San Mateo County. Respondent counters by insisting that the mailing of the checks did not constitute payments of the debts and same were not made until and unless the checks were accepted by respondent as payment. We think it unnecessary to discuss these contentions since, assuming those of the appellant to be correct, no more would result than the raising of a conflict as to the factual issue of where the moneys were to be paid.

Appellant contends that if, as we have held, the contract was made in the County of San Mateo, then the obligation here sued upon was incurred there and by the force of certain provisions in Section 395 of the Code of Civil Procedure it must follow that the obligation was to be performed there and hence the motion of appellant for change of venue ought to have been granted.

[13-15] Section 395 declares that when a defendant has contracted to perform an obligation in a particular county then such defendant can be sued either in the county where the obligation was to be performed or in the county in which the contract was entered into or in the county of the

residence of the defendant. Thus far the section is in accord with the Constitution, for the Constitution says that a corporation defendant may be sued where a contract is made or where it is to be performed or where the principal place of business is situated and the principal place of business of a corporation has been held to be its residence within the meaning of venue statutes. The section then further declares that the county in which the obligation is incurred, and that is the county where the contract is made, *Campbell v. Clifford*, 52 Cal.App.2d 615, 618-619, 126 P.2d 887, shall be deemed to be the county in which it is to be performed, unless there is a special contract in writing to the contrary. The Constitution does not contain such language and we think this provision of the section cannot be applied to corporations. To give it such application would place it in conflict with the Constitution. The constitutional provisions are self-executing. *Buck v. James McClatchy Pub. Co.*, 105 Cal. App. 248, 254, 287 P. 364; *Miller & Lux v. Kern County Land Co.*, 134 Cal. 586, 587, 66 P. 856. Notwithstanding that a constitutional provision is self-executing, legislation may still be enacted to facilitate its operation and may be desirable by way of providing convenient remedies for the protection of the rights secured "or of regulating the claim of the right so that its exact limits may be known and understood; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it." *Chesney v. Byram*, 15 Cal. 2d 460, 463-464, 101 P.2d 1106, 1108. To apply the particular provision of Section 395 we are discussing to corporations would certainly result in narrowing and embarrassing the purpose of the constitutional provision. We fail to see how the legislation under discussion in any way furthers the purpose of the constitutional provision with respect to corporations and the venue of actions against them. The constitutional provision is clear and needs no legislation in its aid either in the way of interpretation of its meaning or the application of it to cases as they arise. We

further think that to give this particular legislation application to corporations would tend to narrow and embarrass the exercise of the constitutional privilege. We believe it was never intended by the legislature that this particular provision should apply to corporations. This is not to say that the section may not in other respects so apply, but is to say that so long as the Constitution gives the right to a plaintiff in a suit against a corporation to sue it where the obligation is to be performed the right must be fully accorded.

The order is affirmed.

ADAMS, P. J., and DEIRUP, Justice pro tem., concur.



103 Cal.App.2d 806

UNITED STATES CREDIT BUREAU, Inc.
v. SANDERS et al.

SANDERS et al. v. SEABOARD
FINANCE CO.
Civ. 17892.

District Court of Appeal, Second District,
Division 3, California.
April 26, 1951.

As Modified May 4, 1951.

Hearing Denied June 18, 1951.

United States Credit Bureau, Inc., as assignee of Seaboard Finance Company, brought action against James R. Sanders and another to recover deficiencies on two promissory notes secured by chattel mortgages on trucks and trailers, after foreclosure and sale of security by the assignor. Defendants filed a cross-complaint bringing in as cross-defendant, Seaboard Finance Company, a corporation, and seeking to recover sums paid on the purchase prices of trucks and trailers. The Superior Court of Los Angeles County, Charles P. Johnson, Judge Assigned, awarded judgment to cross-complainants, and plaintiff and the cross-defendant appealed from the judgment, and cross-complainants appealed claiming that the judgment should have included interest. The District Court

of Appeal, Shinn, P. J., held that cross-defendant was a seller of the trucks and trailers within the conditional sales law and that failure to comply with statutory form and requisites had rendered the notes and mortgages void and entitled buyer to recover sums paid, but held that the judgment for the buyers should have included interest.

Judgment modified and cause remanded with directions.

1. Sales ⇨52(7)

In buyers' action to recover sums paid on purchase prices of trucks and trailers, evidence sustained finding that condition of trucks had not been falsely represented to buyer by seller, even though one truck had been practically useless and the other in need of expensive repairs.

2. Chattel mortgages ⇨41

In buyers' action to recover sums paid on purchase prices of trucks and trailers, evidence sustained finding that chattel mortgages did not comply with requirements of Conditional Sales Law. Civ.Code, § 2932.

3. Trial ⇨395(1)

A trial court's findings should be confined to the ultimate issues involved.

4. Chattel mortgages ⇨41

Statute requiring a conditional sales contract to comply with a certain form and requisites imposes the same duty, to comply with certain form and requisites, upon a seller who takes back a chattel mortgage. Civ.Code, § 2982.

5. Sales ⇨452

Though a seller is ordinarily an owner who parts with title for consideration, the term "seller" does not have a single, exclusive meaning, and where that term is used in a statute legislative intent determines in which sense it was employed. Civ.Code, §§ 2981, 2982.

6. Sales ⇨452

One who voluntarily places himself in position where it becomes his duty to render compliance with legal requirements which rest upon a seller should not be heard to say he is not a seller.

7. Sales ⇨452

Where finance company held mortgage on trucks and trailers and mortgagor sur-

rendered possession of trucks and trailers to finance company with understanding that finance company was to sell them and credit mortgagor's debt with proceeds, and mortgagor furnished endorsed registration certificates, but finance company conducted all negotiations and took, in its own name chattel mortgage and note from buyers of one truck and trailers, finance company was a "seller" within Conditional Sales Law. Civ.Code, §§ 2981, 2982.

See publication Words and Phrases, for other judicial constructions and definitions of "Seller".

8. Appeal and error ⇐996

Factual deductions are for the triers of facts and are binding upon a reviewing court unless deemed unreasonable.

9. Sales ⇐452

Where finance company negotiated with buyer for sale of third party's truck and trailer, and buyer was not told that finance company did not own the truck and trailer, and note and chattel mortgage were executed in favor of finance company by buyer, finance company acted as undisclosed agent of owner in making the sale, and therefore, finance company was a "seller" within Conditional Sales Law. Civ. Code, §§ 2981, 2982.

10. Principal and agent ⇐146(3)

Where finance company had sold its principal's truck and trailer while acting as undisclosed agent, and buyer subsequently was held entitled to rescind and to recover sums paid on purchase price, finance company would be liable to buyer for sums received on account of note and mortgage, but not for down payment which buyer had paid to a third party and which had not benefited finance company. Civ.Code, §§ 2981, 2982.

11. Sales ⇐130(4)

Where finance company had sold truck and trailers owned by delinquent mortgagor under arrangement whereby finance company was to credit proceeds of sale against mortgagor's debt, finance company was liable to buyers for down payment which it had received for credit on mortgagor's debt, as well as for other sums received, when buyers were held entitled to rescind

and to recover sums paid on purchase price. Civ.Code, §§ 2981, 2982.

12. Sales ⇐130(4)

Where buyers of trucks and trailers were held, in rescission action, to be entitled to recover sums paid on purchase price, buyers were chargeable with reasonable value of use of trucks and trailers while they were in their possession. Civ. Code, §§ 2981, 2982.

13. Pleading ⇐127(2)

Denial only as to specific sum alleged in averment of complaint is admission of the specific proposition embraced in averment to which it is directed, and is insufficient to raise an issue as to the specific proposition.

14. Pleading ⇐127(2)

Where separate paragraphs of buyers' cross-complaint to recover sums paid for trucks and trailers under invalid notes and mortgages alleged reasonable value of use while in buyers' possession, seller's answer denying allegations of paragraphs but making no contradictory allegation as to value constituted admission that value of use was substantially the same as amounts alleged. Civ.Code, §§ 2981, 2982.

15. Sales ⇐130(4)

Where buyers of trucks and trailers were entitled to recover sums paid on purchase price because of invalidity of chattel mortgages, buyers could recover interest on the sums from date they ceased to use the trucks and trailers to date of judgment. Civ.Code, §§ 2981, 2982, 3287.

Hayes, Bletz & Lawson, Los Angeles, for appellant United States Credit Bureau, Inc.

Bromley, Ritter & Lindersmith, H. E. Lindersmith, Los Angeles, for appellant, cross-defendant and cross-respondent Seaboard Finance Co.

Hiram McTavish, Wm. B. Gilroy and A. W. Brunton, Los Angeles, for respondents and cross-appellants James R. Sanders and Marion E. Sanders.

SHINN, Presiding Justice.

United States Credit Bureau, Incorporated, a corporation, as assignee of Seaboard

Finance Company, brought this action to recover the amount of alleged deficiencies remaining on two promissory notes given by James R. Sanders and Marion E. Sanders to Seaboard secured by two chattel mortgages on motor vehicles they had purchased, after foreclosure, and sale of the security by Seaboard. Defendants Sanders answered and filed a cross-complaint bringing in as a cross-defendant, Seaboard Finance Company, which answered the cross-complaint. Cross-complainants sought to recover all sums they had paid on the purchase prices of the vehicles, including sums paid on the mortgages, claiming the transactions to have been illegal.

[1] The pleadings raised the following issues: (1) Whether Seaboard was a "seller" of the motor vehicles upon which Sanders and wife gave the chattel mortgages; (2) whether Seaboard fraudulently represented that the motor vehicles or some of them were in good condition when they were in a defective condition; (3) whether Seaboard gave Sanders and wife the notices they were entitled to receive before the security was sold, and (4) whether the amounts of the sales represented the reasonable value of the mortgaged property. The views we entertain with respect to the first issue render it unnecessary to consider the others. The findings, however, were against cross-complainants on the fraud issue. Although it was clearly shown that one of the trucks purchased by Sanders was practically useless and the other required expensive repairs, the court found that Seaboard did not falsely represent their condition and this finding has support in the evidence.

[2] The cross-complaint alleged that Seaboard was the owner of the vehicles and sold them to cross-complainants. The court found that Seaboard was not the owner but that it had the power to and did sell the equipment, and was a "seller" thereof. The significance of this finding is that if Seaboard was a "seller" of the vehicles and took the notes and chattel mortgages as security, it was required by section 2982 of the Civil Code to set forth therein the following items: (1) The cash price of the personal property described in the condi-

tional sale contract (chattel mortgage); (2) the amount of the buyer's down payment, and whether made in cash or represented by the net agreed value of described property traded in, or both, together with a statement of the respective amounts credited for cash and for such property; (3) the amount unpaid on the cash price, which is the difference between items 1 and 2; (4) the cost to the buyer of any insurance, the premium for which is included in the contract balance; (5) a description and itemization of amounts, if any, which will actually be paid by the seller or his assignee to any public officer as fees in connection with the transaction, which are included in the contract balance; (6) the amount of the unpaid balance, which is the sum of items 3, 4 and 5; (7) the amount of the time price differential; (8) the contract balance owed by the buyer to the seller, which is the sum of items 6 and 7; (9) the number of installments required to pay the contract balance, the amount of each installment, and the date for payment of the installments. The finding was that the chattel mortgages did not set forth these statements. The evidence supports this finding. The court concluded that the notes and chattel mortgages were void and awarded cross-complainants judgment for the amounts they had paid in the transactions in the total principal sum of \$6,824.38. United States Credit Bureau and Seaboard Finance Company appeal from the judgment. Cross-complainants also appeal, claiming the judgment should have included interest.

[3] Although the issues of fact were quite simple, the court made 49 findings, at least 40 of which were unnecessary. There were findings on all the allegations of the pleadings that were not controverted, as well as those that were, and upon any number of evidentiary matters. A great deal of labor on the part of counsel and the court would be avoided if findings were confined to the ultimate issues, as they should be.

[4] The principal question on the appeal of Seaboard and plaintiff is whether there was evidence to support the finding that Seaboard was a "seller" of the vehi-

cles. The duty is the same where a seller takes back a chattel mortgage as where he sells on a conditional sale contract. *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 203 P.2d 758. "Seller" is defined by section 2981 of the Civil Code as "the person who sells or leases the property under a conditional sale contract." Seaboard did not own the vehicles or any of them. It did, however, hold a blanket chattel mortgage on one of them and four other vehicles of the same owner. Also, through its agent, Brace, it assisted the owners in selling the property and it advanced the amounts of the two promissory notes to the Sanders to finance their purchases.

On September 17, 1946, Sanders purchased an International truck and Challenge trailer for \$10,628, including the cost of insurance. The truck had formerly belonged to System Freight Service and had been sold with several other pieces of equipment to Charles Moose. At that time Pacific Finance was registered as legal owner and System Freight Service as registered owner. Both signed releases, and the pink slip on the International was placed by Moose with Bank of America, which financed the purchase. The truck was placed by Moose for sale with truck dealers Maloney and Temple on the dealers' lot, where Seaboard had 25 or 30 other trucks for sale. Sanders, who was not a trucking man, decided to go into the business and inspected a truck on the lot of one "Honest John." He was referred to Mr. Brace, manager of Seaboard's truck department. Brace was unwilling to finance purchase of the "Honest John" truck but told Sanders he had one of his own which he would finance. He put a price of \$9,500 on the International truck and a new Challenge trailer. Neither Brace nor Moose informed Sanders that the truck belonged to Moose. At Brace's direction, Sanders inspected the two vehicles at the Maloney and Temple lot where he discussed the deal with Maloney and Brace. He then went to the Seaboard office where the terms of the deal were worked out. Brace arranged with Moose, who was an insurance man, to insure the truck and trailer for a premium of \$890.50. This and other sums were included in the price of the vehicles of \$10,-

628. Sanders gave Maloney and Temple a check for \$2,500 and executed a note and chattel mortgage to Seaboard for \$6,128. On instructions from Sanders, Seaboard paid Maloney and Temple \$7,237.50 and Moose \$890.50. On September 20, 1946, the International was registered with the Department of Motor Vehicles in the name of Seaboard as legal owner and Sanders as registered owner. The Challenge trailer was registered in the same names and the two sales were reported as having been made by Maloney and Temple, dealers, to Sanders. There was no evidence that Seaboard had any interest in either of these vehicles until it took the chattel mortgage from Sanders.

The second transaction was entered into October 7, 1946. Seaboard held a chattel mortgage on several trucks and trailers which belonged to one Gannon, who was delinquent in his payments and had arranged with Brace that he would sell most of the equipment and reduce his debt. Brace proposed to Sanders that he take over the Gannon trucks. Sanders was unable to finance the deal. Brace put a price of \$8,500 on a White tractor, two Freuhauf trailers and a dolly for \$1,000 down and \$7,500 on a note and mortgage in favor of Seaboard. He directed Sanders to a lot where trucks in which Seaboard was interested were kept. Sanders inspected the equipment and returned to Brace's office where Mrs. Sanders gave a check for \$1,000 payable to Gannon, and Mr. and Mrs. Sanders executed in favor of Seaboard their note and chattel mortgage on the truck and trailers for \$7,500. The check was endorsed by Gannon and deposited to the account of Seaboard. Gannon was given credit upon his account with Seaboard for the amount of the sale to Sanders. Brace did not represent to Sanders that either he or Seaboard owned the White truck and trailers. He stated they were owned by Gannon, but that Gannon was in financial difficulties and that the equipment would have to be sold. Although he had made an arrangement with Gannon that most of it would be sold, no prices had been agreed upon for the different units. However, at the request of Brace, the White truck and trailers had been placed on

a lot for sale, and Gannon testified that he had surrendered possession of them to Seaboard for the purpose of sale. He also testified that he understood they had been repossessed and that Brace had authority to sell them, although it was understood that the prices would be agreed upon. Brace fixed the price on the White truck and trailers and Gannon agreed to it.

It is earnestly insisted by appellants that Seaboard was not a "seller" in either transaction within the meanings of sections 2981 and 2982, Civil Code.

[5-7] We shall consider first the sale of the White truck and equipment. In the sale to Sanders, Seaboard received \$1,006 in cash and a separate chattel mortgage covering the equipment which Sanders bought. Six dollars of this sum was for a registration fee. Whether Seaboard acted as a seller depends upon what constitutes one a seller of a motor vehicle with respect to compliance with the statute. The term "seller" is not one which has a single, exclusive meaning. Ordinarily a seller is the owner of the property sold, and a sale means the parting with title to personal property for a consideration, usually money. But where the term is used in a statute we must look to the legislative intent for enlightenment as to the sense in which the word was employed. In *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 203 P.2d 758, Seaboard was held to be the seller of a Sterling truck and Freuhauf trailer, within the meaning of the Civil Code sections, although it was not the owner. It had repossessed the vehicles and had given the five days notice required by the mortgage of its intention to sell them. In holding that one need not be the owner to be a "seller" of motor vehicles, the court said, 33 Cal.2d at page 572, 203 P.2d at page 763: "Its interest was tantamount to complete ownership as far as its power to deal with the vehicles was concerned. Houston the mortgagor was not involved. He received no money, did not participate in the sale and had no knowledge of or any apparent interest in the transaction. The defendant's agent, Brace handled it and made all necessary arrangements." In the present case the court found that Seaboard had

the power to make a binding sale of the White truck and trailers which would and did pass title. Seaboard insists that the evidence does not show that it had authority to make a sale that would be binding on Gannon, as it had in the *Carter* case, and argues that without such authority it could not have been a seller. We cannot agree. The evidence that Gannon had surrendered possession of the property, and that Seaboard did negotiate and effect a sale pursuant to its understanding with Gannon, warranted the trial court in finding that Seaboard had sufficient authority in the matter to constitute it a "seller," even if it could not convey title. It would have been an idle act for Seaboard to declare a forfeiture and give notice of sale when the vehicles were virtually in its possession and were being offered for sale. The evidence was conclusive to the effect that Gannon had authorized Brace to find buyers for the mortgaged property. The Gannon mortgage was not in evidence, but if we assume, as the parties do, that it called for notice of foreclosure and sale, it is clear that Gannon had waived such notice. In determining whether Seaboard was a "seller" consideration should be given to the duties which the law imposes upon a seller and to the responsibilities which Seaboard assumed in the transaction. The word should be given an interpretation consistent with the purpose of the act rather than one which would tend to defeat the purpose. The requirement that the seller must cause to be set forth in the conditional sale contract or chattel mortgage all the items which go to make up the total price was stated in the *Carter* case to be "to protect purchasers of motor vehicles against excessive charges by requiring full disclosure of all items of cost." With respect to the sale of the White truck and trailers, Seaboard's agent, Brace, set a flat price which included all items of cost, and prepared the chattel mortgage without stating therein any of such items. This was done with knowledge that the owner, Gannon, would be paid \$1,006 in cash, which would be turned over to Seaboard, and receive credit upon his indebtedness, and that he was furnishing nothing but the registration certificates endorsed by those who were on

record with the Department of Motor Vehicles as registered and legal owners. He had nothing to do with the negotiations. It was to be inferred that the price and terms of the sale had been agreed on by Gannon and Brace before they were quoted by Brace to Sanders. Thus, Seaboard, through the manager of its truck department, assumed the responsibility which rested upon a seller to set forth in the chattel mortgage the items which were included in the sale price of the vehicles. In reality Sanders was making an installment purchase, although the balance of the price above the down payment was represented by a chattel mortgage instead of a conditional sale contract. Gannon was not interested in the items of charges that were included in the chattel mortgage and was not shown to have had knowledge of them. He was selling for cash, except for his participation with Seaboard in the transaction, with full knowledge of the taking of the mortgage. If neither he nor Seaboard was required to set forth the items of the indebtedness a common class of transactions would be beyond the reach of the law. But we think the form the transaction took did not excuse compliance with the statute on the part of either of them. One who voluntarily places himself in a position where it becomes his duty to render compliance with legal requirements which rest upon a seller should not be heard to say he was not a seller. And so, when an owner of a motor vehicle permits another to find a buyer, point out the property, negotiate the price and terms of a time sale, prepare the papers, attend to their execution, receive and apply the money paid to incidental expenses and to a debt due the agent from the owner, and on behalf of the owner report the sale to the public authorities as required by law, the owner in the meantime having nothing to do with the transaction except to agree to the price and sign an instrument of transfer, the agent should be regarded as a seller within the meaning of the code sections. It was not necessary here for Seaboard to have acted under the power of sale conferred by the mortgage. When it is considered that Gannon had waived the formalities of foreclosure and sale of his vehicles by Seaboard, the White truck

transaction comes within the reasoning and holding of the Supreme Court in the Carter case that Seaboard was a seller with respect to the Sterling truck and Freuhauf trailer there involved.

As to the sale of the International it is said, correctly, that Seaboard had no interest whatever in the truck and trailer except to finance the purchase of the same by Sanders. Moose testified that he was the owner and received the entire sum for which the vehicles were sold to Sanders. Bank of America released its interest when Seaboard took its mortgage. There was conflicting evidence as to whether Brace at one time had some interest in the equipment purchased from System but in view of the findings this question becomes immaterial. There was no evidence that the amount of \$2,500, which was the cash payment, included any items which were to be paid out by Moose for insurance or any other charges. Presumably these charges, such as they were, in addition to the insurance, went into the note that was payable to Seaboard.

[8, 9] Brace and Moose had previously engaged in a similar transaction. When Moose purchased the International he acquired, among other vehicles, a General Motors truck. Brace negotiated the sale of this truck and trailer to one Austin Carter, who was the plaintiff in *Carter v. Seaboard*, supra. Seaboard financed the sale to Carter on a chattel mortgage. It was determined in the trial court that Seaboard was not a seller of the General Motors truck and on appeal it was held that the evidence supported this finding, since the trial court had impliedly found that Seaboard "was neither agent nor principal in the sale of that truck and trailer, but merely financed the purchase thereof by plaintiff." The decision is relied upon by appellant as if it had been held as a matter of law that Seaboard was not a seller. This was not the decision. The evidence in the case was stated in *Carter v. Seaboard Finance Co.*, Cal.App., 193 P.2d 985. The fact that one trial court found that Seaboard was not a seller of the General Motors truck and another trial court found, under somewhat comparable circumstances, that it was a seller of the International truck does not

prove that either finding was contrary to the evidence. Such factual deductions are for the triers of the facts and are binding upon a reviewing court unless deemed unreasonable. In the Carter case the trial court did not draw an inference from the conduct of Brace and Moose that Seaboard was represented to be the owner or was acting as the agent of Moose in negotiating the sale of the General Motors truck. In the present case it did draw such inferences with respect to the sale of the International and they were, in our opinion, reasonable inferences. We are, therefore, bound by the implied finding of the trial court that Seaboard acted as the undisclosed agent of Moose in making the sale, even though a contrary finding would not have been untenable. Moreover, Brace did not tell Sanders that Moose owned the truck nor did Moose tell him so when he and Sanders discussed the matter of insurance. Thus, Sanders was led to believe that he was dealing with Seaboard as owner of the vehicles. So far as he knew, Seaboard was the seller. The authority of Seaboard in this completed transaction could not be questioned by Moose, and we see no reason why Seaboard should be allowed to question its own authority so far as Sanders is concerned. It was Seaboard's financing which created the necessity for compliance with the statute. The chattel mortgage was the only instrument which called for an itemization of the amounts which added up to the amount of the note, and the sums that were included were all payable to Seaboard. We do not see how the agent, Seaboard, having voluntarily assumed the position of an owner and having thus assumed the duty of complying with legal requirements, could take a chattel mortgage which would be valid when it would have been unenforceable if it had run in favor of Moose.

There was support in the evidence for the finding that Seaboard was a seller of the International. So far as the sale of this truck is concerned, our approval of the finding that Seaboard was a seller rests upon a combination of the various evidentiary factors we have mentioned. They distinguish the case from one in which a lender of money on a chattel mortgage of a motor vehicle does not pretend to be the

owner of the property and does not negotiate and effect a sale of it.

[10, 11] There are other points to consider, although they are not mentioned in the briefs. The theory of the recovery is that there should be restoration of the sums paid by Sanders as for money had and received. Seaboard did not receive nor benefit by the down payment of \$2,500 on the sale of the International and is under no duty to restore that sum, or to see that it is restored. Its liability in that transaction is limited to the sums received on account of the note and mortgage. *Pollak v. Staunton*, 210 Cal. 656, 293 P. 26. In the sale of the White truck and trailers it did receive for credit on the Gannon mortgage the down payment of \$1,006, as well as the sums thereafter paid to it on the mortgage. The fact that Gannon, also, was a beneficiary of the down payment should not excuse Seaboard from making restoration.

[12-14] Cross-complainants were chargeable with the reasonable value of the use of the equipment while it was in their possession. In separate paragraphs they alleged these sums to be \$1,000 for the International truck and trailer, and \$750 for the White truck and equipment. In the answer there are denials of these paragraphs, without allegation as to the value of use in either case. In the maze of the confusing, redundant and inconsistent findings are findings that the allegations of the two paragraphs of the cross-complaint are untrue, without any finding as to the value of the use. The denial of a specific sum alleged is "an admission of the specific proposition embraced in the averment to which it is directed. It is evasive and insufficient to raise an issue." *Alberts v. American Casualty Co.*, 88 Cal.App.2d 891, 896, 200 P.2d 37, 40. The denials of the allegations of the two mentioned paragraphs were admissions that value of the use was substantially the same as the amounts alleged. If, upon a retrial, the parties wish to make an issue of the value of the use of the vehicles, and have it determined, and desire to amend their pleadings, they should be allowed to do so.

[15] We come now to the cross appeal by Sanders and wife. The judgment was

for the total amount paid on two contracts. It is contended that it should have carried interest on the several payments. The point is well taken. The amounts were readily ascertainable and interest on them should have been allowed. Civ.Code, sec. 3287; *Bare v. Richman & Samuels*, 60 Cal.App.2d 413, 140 P.2d 895; *Mary Pickford Co. v. Bayly Bros. Inc.*, 12 Cal.2d 501, 526, 86 P.2d 102. However, interest should run only from the respective dates when Sanders ceased to use the equipment.

The judgment should be for the amounts paid by cross-complainants in the two transactions less the sum of \$2,500, the down payment on the International purchase; if the value of the use of the vehicles is determined, those sums should be deducted and interest on the balance from the dates when Sanders ceased to use the equipment to date of a new judgment should be added.

The judgment is modified accordingly. The cause is remanded with directions to take further evidence if necessary and to render and enter judgment for cross-complainants against Seaboard Finance Company in accordance with the views herein expressed. No costs to either party on the appeal.

WOOD, J., concurs.

VALLÉE, J., being disqualified, did not participate.



104 Cal.App.2d 70

SANDERS v. RIVIERA REALTY
CO. et al.
Civ. 14616.

District Court of Appeal, First District,
Division 1, California.

May 7, 1951.

Rehearing Denied June 6, 1951.

Louis Sanders, who subsequently assigned his judgment to Jack P. Sanders, brought an action against Riviera Realty Co., F. O. Beut-

ke and another to recover money loaned and for other relief. The Superior Court in and for the City and County of San Francisco, Daniel R. Shoemaker, J., rendered judgment against named defendants and they appealed. The District Court of Appeal, Peters, P. J., held that finding that plaintiff had loaned to defendant realty company specified sum which company and its co-defendant secretary had agreed to repay within 90 days and that they had not done so was supported by substantial, though conflicting, evidence and that such finding could not be disturbed.

Judgment affirmed.

1. Appeal and error ⇐671(1), 1078(1)

Points for reversal set forth in brief but not supported by a proper record or not argued will not be considered on appeal.

2. Money lent ⇐7(3)

In action to recover money loaned to corporation and its secretary, finding that on stated date plaintiff had loaned to corporation specified sums which corporation and its secretary orally agreed to repay within 90 days and that they had not done so was supported by substantial, though conflicting, evidence.

3. Appeal and error ⇐1010(1)

Appellate Court could not disturb trial court's findings supported by substantial evidence which was not inherently improbable, though contradicted by other evidence.

4. Corporations ⇐413

Money lent ⇐4

Where money was loaned to corporation and its secretary at request and on the credit of secretary who promised to repay it, corporation and secretary were the principal debtors, though checks by which money was loaned were made payable to third person at secretary's request. Code Civ.Proc. § 1973, subd. 2; Civ.Code, § 1624, subd. 2.

5. Frauds, statute of ⇐159

Whether a promise is original or collateral within statute of frauds is a question of fact. Code Civ.Proc. § 1973, subd. 2; Civ.Code, § 1624, subd. 2.

6. Trial ⇨48

In action to recover money loaned to corporation and its secretary, trade acceptance drawn by and payable to lender and directed to and accepted by borrowers was admissible not as evidence of a promise to answer for the debt of another, but as corroborative evidence of primary obligation and as corroborative support for lender's testimony that trade acceptance was given as security for the loan.

7. Money lent ⇨6

There was no variance between pleading alleging that money was loaned to named corporation and its secretary and proof that at secretary's direction a third person was named as payee in checks by which loan was made, but that such checks were delivered to secretary.

8. Pleading ⇨430(2)

Any variance between pleading and proof was waived where defendants did not move for a nonsuit or object to admission of evidence on ground of variance.

John V. Copren, San Francisco, for appellants.

Edward J. Lynch, San Francisco, for respondent.

PETERS, Presiding Justice.

This appeal presents primarily factual questions. Louis Sanders (who subsequently assigned his judgment to Jack P. Sanders) is the plaintiff. His complaint contains three counts. Count one alleges that on June 7, 1948, plaintiff loaned to Riviera Realty Co., Beutke and Grace the sum of \$2,000, "which said sum defendants orally agreed to repay" to plaintiff and have not done so. The second and third counts are based upon two unpaid and overdue promissory notes payable to plaintiff and alleged to have been executed by Beutke and Grace. Apparently Grace was not served with process, the judgment does not run against him, he did not appear at the trial, and he is not involved on this appeal. Judgment was given against Riviera Realty Co. and Beutke on the first count, and against

Beutke on the second and third counts. Both of these defendants appeal from the entire judgment, but in their briefs concede its correctness in so far as it relates to the second and third counts of the complaint.

[1] It is somewhat difficult to ascertain the precise objections of appellants to the judgment disposing of the issues alleged in the first count of the complaint. Appellants set forth nine grounds of reversal in their opening brief, but several of the objections are unsupported by a proper record, and several are simply enumerated and not argued. Points unsupported by a proper record or not argued will not be considered on appeal.

The points properly argued are three in number:

1. That the evidence is insufficient to sustain the judgment;

2. That the court erred in admitting into evidence a certain trade acceptance; and

3. That there was a fatal variance between the allegations of the first count of the complaint and the evidence.

[2] The court found as true the allegation contained in count one of the complaint to the effect that on June 7, 1948, the plaintiff loaned to Riviera Realty Co. the sum of \$2,000, which sum defendants orally agreed to repay to plaintiff within 90 days, and did not do so. This is the key finding, and it is amply supported by substantial, although conflicting, evidence.

The record shows that Beutke is the secretary of the Riviera Realty Co., a corporation. No attack is made on that portion of the judgment making count one run against both of these defendants. In other words, if the judgment is valid against Beutke, it is impliedly conceded that it is valid against the corporation.

The plaintiff, Louis Sanders, was engaged in the real estate business, as was Beutke. Robert Popkin, who is not a party to this action, but who was an important actor in the legal drama involved, is also a man of wide business

experience. All three were well-known to each other, and had been engaged in several business deals together. In addition, Beutke and Sanders, and Sanders and Popkin had had several prior business deals together.

Sanders testified that on or about June 7, 1948, at the request of Beutke, he loaned the Riviera Realty Co. and Beutke the sum of \$2,000; that this loan was given in the form of two checks payable to the order of Popkin; that one check was for \$200, and the other for \$1,800; that the money was requested by and loaned to Beutke, but the checks, at Beutke's request, were made payable to Popkin; that these checks, which were introduced into evidence, were made out in the Crocker Bank in San Francisco and handed to Beutke there; that Popkin was not then present. Both checks were charged against Sanders' bank account, are dated June 10, 1948, and have the word "loan" written on the lower left corner. They are both endorsed by Popkin, and, in addition, the \$1,800 check bears an endorsement "for deposit only" to the Bank of America, Auburn, California, Robinson & Robinson, by K. W. Robinson, trust account.

Beutke and Popkin contradicted this testimony. Beutke denied ever seeing the two checks before the trial; denied ever giving Sanders any instructions to pay any money to Popkin; and denied ever being in the Crocker Bank with Sanders. Popkin testified that he got the two checks from Sanders, the \$200 in the bank, and the \$1,800 at Beutke's house. At one place in his testimony he apparently implied that the money was to be used to pay off several thousand dollars in labor claims against Sanders. Then he testified that the \$1,800 was paid to Robinson of Auburn on some deal for boilers. In another part of his testimony he stated that he and Beutke were involved in a timber deal in which they needed \$4,950, and that the \$2,000 from Sanders was to be used in this deal, but was not, because of his and Beutke's inability to raise the balance needed. He first stated that the money was advanced on a trade acceptance. Then he seemed to reverse this story, and testi-

fied that the trade acceptance was given for a conditional sales contract on some grading equipment. Then he stated that no portion of the money was given to Beutke or to Riviera Realty Co., but was used on the boiler deal; that Sanders was present when the money was paid over to Robinson in Auburn. This was denied by Sanders, who denied having any connection with the boiler deal; denied lending the money to Popkin to use on the boiler or any deal; denied any connection with any labor claims; and denied knowing Robinson or ever being in his office.

[3] The trial judge saw these three witnesses and heard them testify. He elected to believe Sanders and to disbelieve Beutke and Popkin. Sanders' testimony is not inherently improbable. This being so, this court has no power to disturb the finding. Sanders' story is that he loaned the money to Beutke and Riviera Realty Co. at the request and on the credit of Beutke, and at Beutke's request made the checks payable to Popkin. This evidence amply supports the challenged finding.

Appellants next object to the introduction into evidence of a certain trade acceptance, dated June 7, 1948, drawn by and payable to Louis Sanders, and directed to and accepted by Beutke and Riviera Realty Co. It is made payable September 7, 1948, and is in the sum of \$4,950. Sanders testified that the trade acceptance was given to him by Beutke as security for the \$2,000 loan, at the time the two checks were delivered by Sanders to Beutke; that Beutke originally wanted to borrow \$4,950, but Sanders could only raise the \$2,000; that when the checks were delivered to Beutke the latter agreed to repay the \$2,000 within 30 or 60 days; that the only writings he had as evidence of the loan were the two checks and the trade acceptance given as security.

Beutke's version of the origin and function of the trade acceptance was entirely different from that testified to by Sanders. He testified that it was issued in connection with a transaction involving some road equipment which was supposed to

be delivered to Riviera Realty Co. by Sanders and Popkin. A conditional sales contract dated May 15, 1948, between Popkin as seller and the Riviera Realty Co. as buyer was introduced into evidence. Sanders is not named in the document. This contract calls for the sale of two pieces of equipment to Riviera for \$4,950. Typed in the document appears the following:

"The above paid for in full by Trade Acceptance No. 3 dated ##### June 7th 1948 Payable to Louis Sanders, 3055 Gough St. S.F."

Beutke testified that originally the portion typed over with the "##" marks contained the date of another trade acceptance which was improperly made out, and that the date of the second one was typed in later. It is quite apparent that the portion of the quotation following the word "dated" was typed in after the first portion of the quotation had been typed. According to Beutke this equipment had an encumbrance on it which Sanders agreed to pay off by advancing money to Popkin. Beutke testified that he never received this equipment, and Popkin admitted that he never delivered it.

[4-6] It seem to be the theory of appellants that the trade acceptance was produced by Sanders to satisfy the statute of frauds—section 1973, subd. 2, of the Code of Civil Procedure and section 1624, subd. 2 of the Civil Code—requiring a special promise to answer for the debt, default, or miscarriage of another to be in writing. Appellants argue that the document cannot be used for that purpose because it was between Popkin and Beutke and had nothing to do with any loans made by Sanders to Popkin. Appellants seem to be of the opinion that the trial court held Beutke as a surety for Popkin, and that the trade acceptance was the writing upon which Sanders relied to take the case out of the statute of frauds. The trade acceptance was not offered or admitted into evidence on any such theory. When it was offered by Sanders, and appellants had objected, the trial court admitted it "only as corroborative support of what went on between them, solely for that

purpose." It was not the theory of Sanders or of the trial court that Sanders loaned the money to Popkin and that Beutke was surety for Popkin. It was their theory that the money was loaned directly to Beutke, but at his direction the checks were made payable to Popkin. The mere fact that the consideration passed to a third party does not prevent appellants from being the principal debtors. *Merz v. Poole*, 82 Cal.App. 12, 254 P. 914. Whether a promise is original or collateral is a question of fact. *Ackley v. Prime*, 99 Cal.App. 534, 278 P. 932. The trial court having found that the promise was an original one, and that finding being supported, the issue of surety disappears from the case. The trade acceptance was admitted not as evidence of a promise to answer for the debt of another, but as corroborative evidence of the primary obligation, and as corroborative support for Sanders' story that the trade acceptance was given as security for the loan to Beutke.

[7] The last contention of appellants is that there is a fatal variance between the allegations of the first count and the evidence, in that the complaint alleges a direct loan to appellants while the evidence shows that the money was delivered to Popkin, a third party. This contention misconceives the evidence. The evidence is that the money was loaned to Beutke and the checks were delivered to him, and that Popkin was named payee at the direction of Beutke. As already pointed out, this made the obligation a primary obligation of Beutke's, not a secondary one. Thus, Sanders correctly alleged that the loan was made to Beutke, and the evidence so shows. There is no variance between the pleading and the proof.

[8] It should be noted that Popkin, the recipient of the money, was in court and that appellants did not object to the introduction into evidence of the two checks, nor did they move for a nonsuit on the ground of variance. Under such circumstances, even though there was a variance between the pleading and the proof, appellants must be deemed to have

waived the objection. *Colbert v. Colbert*, 28 Cal.2d 276, 169 P.2d 633.

The judgment is affirmed.

BRAY and FRED B. WOOD, JJ.,
concur.



104 Cal.App.2d 175

**RUBY et al. v. SUPERIOR COURT IN AND
FOR CITY AND COUNTY OF SAN
FRANCISCO et al.**

Civ. 14973.

District Court of Appeal, First District,
Division 1, California.

May 15, 1951.*

Mandamus proceeding by Donovan Ruby and wife, and John P. Andrews, against the Superior Court of the State of California, in and for the City and County of San Francisco, Department Number Ten, Honorable Preston Devine, Judge Presiding therein, to compel the substitution of John P. Andrews as one of parties plaintiff. The District Court of Appeal denied the petition for an alternative writ of mandate, and on petition for rehearing, the District Court of Appeal, Per Curiam, held that the evidence warranted the refusal of the substitution on the ground that the basic purpose of the assignment was to permit a layman to practice law.

Petition for rehearing denied.

1. Mandamus ☞33

Mandate cannot control the refusal of the trial court to substitute an assignee as one of parties plaintiff.

2. Parties ☞59(1)

A substitution of parties intended to permit a layman to practice law should not be permitted.

3. Parties ☞59(1)

Statute authorizing court upon motion to substitute parties to an action, vests discretion of allowing motion in trial court. Code Civ.Proc. § 385.

* Subsequent opinion 231 P.2d 868.

4. Mandamus ☞168(4)

Evidence sustained trial court's finding that assignee, a layman, was brought into the case so that he could, in the guise of appearing in propria persona, in fact represent the plaintiffs, and hence mandamus would not issue to compel substitution of assignee as one of the parties plaintiff. Code Civ.Proc § 385.

Donovan Ruby, Helen Ruby, and John P. Andrews, in pro per.

Herbert Pothier and Marcel E. Cerf, Robinson & Leland, all of San Francisco, for respondents.

PER CURIAM.

[1-4] This Court denied the Petition for an Alternative Writ of Mandate because we were of the opinion that Mandate could not control the refusal of the trial court to substitute John Andrews as one of the parties plaintiff. We are still of that opinion. The trial court interrogated the alleged assignee, a layman, and came to the conclusion that he was merely being brought into the case so that he could, in the guise of appearing in propria persona, in fact represent the petitioners. The record demonstrates that this finding is supported by the evidence and the reasonable inferences therefrom. A substitution intended to permit a layman to practice law should not be permitted. 13 California Law Review 323, 325; 33 California Law Review 622. Whether a motion to substitute shall be granted under Sec. 385 of the Code of Civil Procedure is discretionary with the trial court. *Fay v. Steubenrauch*, 138 Cal. 656, 72 P. 156; *Alameda County Home Investment Co. v. Whitaker*, 217 Cal. 231, 18 P.2d 662. Unlike *Philbrook v. Superior Court*, 111 Cal. 31, 43 P. 402, so heavily relied upon by petitioners, here the trial court was justified in finding that the basic purpose of the assignment was to permit a layman to practice law.

The petition for a rehearing is denied.

104 Cal.App.2d 83

WOODWARD v. BRUNER et al.

Civ. 17885.

District Court of Appeal, Second District,
Division 1, California.

May 8, 1951.

Action by Archie Woodward, judgment creditor, against Edith Bruner and June Bruner, to set aside first named defendant's conveyance of joint tenancy interest to second named defendant as being in fraud of creditors. The second named defendant filed cross-complaint to quiet title alleging demand and refusal by plaintiff to release attachment lien on land, and praying for reasonable attorney's fees incurred in establishing her ownership. The Superior Court of Los Angeles County, J. T. B. Warne, J., entered judgment quieting title in second named defendant and allowed her damages representing attorney's fees, and plaintiff appealed. The District Court of Appeal, Hanson, J., pro tem, held that trial court had no authority to allow counsel fees as damages.

Judgment modified, and as modified, affirmed.

1. Costs ☞172

Damages ☞71

Rule of common law that counsel fees are to be classed as costs and not damages is part and parcel of California law, except to extent that statute or contract between parties provides otherwise.

2. Damages ☞71½

Statutes providing that persons suffering detriment may recover damages and that damages may be recovered for detriment caused by breach of obligation other than contract, were not intended to include attorney fees within their scope. Civ.Code, §§ 3281, 3333.

3. Damages ☞72

In landowner's cross-action to quiet title, trial court had no authority to allow landowner counsel fees as damages, though cross-defendant's refusal to release attachment lien, upon demand, may have necessitated employment of attorney to bring cross-action. Civ.Code, §§ 3281, 3333.

Harry E. Templeton, Los Angeles, for respondent.

HANSON, Justice, pro tem.

The only question brought here by the appeal is whether attorney's fees incurred by the successful respondent in a cross-action, to quiet title to realty against a cloud created by the cross-defendant and for damages, were properly allowed to her *as damages*.

The real estate involved in this action was acquired by the respondents June Bruner and her mother Edith Bruner in June, 1946, by a deed of joint tenancy. In July, 1947, the mother executed a promissory note to the plaintiff herein. In June, 1948, the mother conveyed her joint tenancy interest in the property mentioned to her daughter. Thereafter in December, 1948, the plaintiff instituted in the Municipal Court an action against the mother to recover judgment on the note and, on the theory the conveyance by the mother to the daughter was fraudulent as to him, the plaintiff caused an attachment to be issued and levied against the property. After the plaintiff obtained judgment in the prior action against the mother, he instituted the present action against the mother and her daughter, the respondent herein, to set aside the conveyance as being in fraud of creditors. The mother and daughter answered the complaint averring that the property had been purchased by the daughter out of her own funds and that title had been taken in the name of the mother and daughter as joint tenants merely for the convenience of the daughter. Additionally, the daughter filed a cross-complaint to quiet the title to the property alleging therein a demand upon and a refusal by appellant to release the attachment lien and that by reason thereof she had been compelled to employ an attorney to institute an action (evidently the cross-complaint) to establish her ownership of the property free of any cloud or lien claimed by appellant. The prayer was for judgment establishing and quieting her title and that she have and recover reasonable attorney's fees incurred by her in vindication of her title.

John W. Swink, and Warner & Jackson,
all of Los Angeles, for appellant.

The trial court found for and entered a judgment quieting title in respondent and allowing her damages representing the attorney's fees she had incurred in the sum of \$250. In support of the judgment for attorney's fees respondent contends the attorney's fees were damages she suffered as "the direct and proximate result" of a wrongful act, i. e., "the levy of the attachment upon her real property and the refusal of the appellant to release and discharge the same." In an endeavor to support her contention respondent quotes the provisions of two damage sections in the Civil Code, secs. 3281 and 3333. We do not view the sections as being applicable for reasons presently to be stated.

In the early days of the common law the term "damages" embraced merely the compensation due for the particular injury upon which the writ issued without any allowance for expenses or losses sustained in vindication of the right, such as fees of counsel, court costs or other expenses. In fact costs, as we know them today, were at that time wholly unknown by that name. See *Bac.Abr.tit. Costs*; *Day v. Woodworth*, 13 How. 363, 14 L.Ed. 181. In a very few instances and for a very short period in the very early common law days certain expenses of litigation, other than counsel fees, apparently were allowed as a quantum of the damages. See *Pilford's Case*, 77 Eng. Reprint 1102. However, the early common law did impose upon a plaintiff who failed to sustain his claim a pecuniary penalty assessed by the courts which was akin to costs. If the plaintiff sustained his claim the defendant was subject in the discretion of the court to having a moderate penalty imposed upon him, not measured by the expenses of the litigation. See *Day v. Woodworth*, 13 How. 363, 14 L.Ed. 181; 2 *Cooley's Blackstone*, 4th Ed., p. 1153; *Bac.Abr.tit. Costs*.

[1] As the penalty assessed in favor of the successful plaintiff was generally not comparable to his costs, Parliament in the reign of Edward VI (1547-1553) passed what is known as the Statute of Gloucester, 6 Edw. I, c. 1. That statute expressly provided that a plaintiff who recovered dam-

ages should in addition recover his costs. This statute was interpreted by the common law judges as requiring them to allow, as a part of the statutory costs, moderate counsel fees in favor of the successful plaintiff as costs. After reaching this conclusion the common law judges thereafter consistently held that expenses of litigation could not be recovered as damages, and no costs were recoverable beyond those taxable under the statute. (1 *Sedgwick on Damages*, 9th Ed., secs. 229-230.) This rule of the common law that counsel fees were to be classed as costs and not damages is a part and parcel of our law, except to the extent that a statute or a contract between the parties provides otherwise.

[2] As has been stated respondent bases her right to recover as damages the counsel fees payable by her upon the language found in Civil Code, secs. 3281 and 3333. These sections of the code in part codify and in part expand the common law definition of damages. We read the language of these sections, as of the day they were enacted, and in the light of the then long-established rule of the common law, universally adopted by the American courts, and conclude the legislature did not intend to expand our law of damages so as to include within its scope attorney fees. Our position is buttressed by *Hays v. Windsor*, 130 Cal. 230, 62 P. 395, and *W. & P. Nicholls v. Mapes*, 1 Cal.App. 349, 82 P. 265. In the *Hays* case the court held that counsel fees were not allowable as damages under the provisions of Civil Code, sec. 3336. If, as was there held, the language of that section, did not warrant an allowance of attorney's fees, it is clear that the language of sections 3281 and 3333 is not strong enough.

[3] Because the action of the trial court in allowing as damages the counsel fees incurred by respondent went beyond the power of the court, that portion of the judgment cannot be sustained.

For the foregoing reasons, the judgment is modified by striking therefrom the portion thereof reading: "That the cross-complainant June Bruner have and recover

from cross-defendant Archie Woodward the sum of two hundred and fifty dollars (\$250.00)." As so modified, the judgment is affirmed.

DORAN, Acting P. J., and DRAPEAU, J., concur.



104 Cal.App.2d 162

In re RIDDEL'S ESTATE.

D'OYLEY v. RIDDEL.

Civ. 18317.

District Court of Appeal, Second District,
Division 2, California.

May 14, 1951.

Proceeding in the matter of the estate of Birdella May Hudson Riddel, also known as Birdella May Hudson, deceased, wherein Verona May d'Oyley filed her petition for ratable distribution and for allowance on account of statutory commissions and fees, and Walter Riddel, contestant, filed objections thereto. The Superior Court of Los Angeles County, John F. Moroney, J., rendered an order sustaining the demurrer of the petitioner to the objections of the contestant and also an order for distribution, and the contestant appealed from such orders. The District Court of Appeal, Moore, P. J., held that execution by deceased of a codicil to antenuptial will after marriage to contestant had effect of republishing will, so that marriage of deceased and contestant did not revoke the will.

Judgment and order for distribution affirmed, and appeal from order sustaining demurrer dismissed.

1. Wills ⚡199

Where a will or a codicil is republished after marriage of testator, and it refers to the first will, effect of such subsequent

will or codicil is a republishing of will as modified by codicil, and the two instruments constitute one will and speak from date of codicil. Probate Code, § 25.

2. Wills ⚡439

The defeat of a testator's purpose as disclosed by will of testator should be avoided if it can be done by reasonable construction of codicil.

3. Wills ⚡191, 199

Where testatrix prior to her marriage executed a will without mentioning her prospective husband, and after marriage she executed a codicil which made no reference to husband, execution of codicil had effect of republishing will as modified by codicil, and there was no revocation of the will under statute by the marriage, and husband took nothing thereunder. Probate Code, §§ 25, 70.

Hahn, Ross, Goldstone & Saunders, Los Angeles, for appellant.

Sherman, Thompson & McCarthy, Los Angeles, for respondent.

MOORE, Presiding Justice.

The executrix of the estate having filed her petition for ratable distribution and for allowance on account of statutory commissions and fees the surviving husband filed his objections thereto, pursuant to section 70 of the Probate Code.¹ The demurrer to the husband's objections having been sustained without leave to amend and the court having made its order for ratable distribution and for allowance on account of commissions and fees the husband appealed from the order for distribution and purportedly appealed from the order sustaining the demurrer to his objections.

Decedent made a will prior to her marriage but did not mention her prospective husband. She was thereafter wedded to

1. Section 70: "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the

will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received."

appellant. In a codicil later signed by her no provision for either including or excluding a bequest in appellant's favor was to be found. In such situation appellant asserts the will was revoked, citing *Estate of Piatt*, 57 Cal.App.2d 211, 134 P.2d 321; *Estate of Rozen-Goldenberg*, 1 Cal.App.2d 631, 37 P.2d 132; Calif. Probate Code, sec. 70. Appellant admits the *Estate of Seiler*, 176 Cal. 771, 170 P. 1138, 179 P. 389, and *Estate of Cutting*, 172 Cal. 191, 155 P. 1002, held that a codicil executed after marriage republishes a will made prior to the marriage, but contends that such holding is purely dictum.

[1] To uphold such contention would be error. Where a will or a codicil is republished after the marriage of a testator and it refers to the first will, then by section 25² of the Probate Code the effect of such subsequent will or codicil is a republishing of the will as modified by the codicil and the two instruments constitute one will and they speak from the date of the codicil. *Estate of Seiler*, supra, 176 Cal. 772, 170 P. 1138, 179 P. 389; *Estate of Cutting*, 172 Cal. 191, 197, 155 P. 1002.

[2, 3] The analogy of the charitable bequest to the decedent's codicil does not support the argument of appellant, nor does the decision of *Estate of McCauley*, 138 Cal. 432, 71 P. 512. There the court held that to apply section 25 of the Probate Code to effect a revocation of a charitable bequest in a will by a republication of the latter as of the date of the codicil would leave a large part of the estate undisposed of and defeat the object of the testatrix. To effect the defeat of a testator's purpose as disclosed by his will should be avoided if it can be done by a reasonable construction of the codicil. Section 25, supra, supplies authority for upholding the antenuptial will which was referred to in the codicil, as the latter provides that *all other things*, besides the gift to Miss Towers, will be left to the daughter "as is written in my will." By such language of the codicil, which is still the last will of de-

cedent, appellant is wholly barred from sharing in his decedent's estate.

Both the judgment and order are affirmed. The appeal from the order sustaining the demurrer is dismissed.

McCOMB and WILSON, JJ., concur.



104 Cal.App.2d 61

KELLY et al. v. HILL et al.

Civ. 4311.

District Court of Appeal,
Fourth District, California.

May 4, 1951.

Hearing Denied June 28, 1951.

Mary H. Kelly, doing business under the firm name and style of Shafter Concrete Pipe Company, sued Thomas L. Hill and others to foreclose a lien for work and material furnished by plaintiff under a contract for the construction of a pipe line upon agricultural lands owned by defendants. The Superior Court, Kern County, R. B. Lambert, J., denied recovery on the ground that plaintiff did not possess a license as a contractor as required by the Business and Professions Code, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that, in constructing the pipe line, plaintiff had been engaged in construction "incidental" to farming within the purview of the business and professions code section exempting such construction from contractor's licensing requirement.

Reversed with directions.

1. Licenses ⇨19(3)

A grammatical construction of business and professions code section granting exemption from contractor's licensing requirements indicates legislative intent to exempt from statutory license requirement any construction incidental to construction and repair of irrigation and drainage ditches of irrigation districts, and also any

2. Section 25: "The execution of a codicil referring to a previous will has the ef-

fect to republish the will as modified by the codicil."

such construction incidental to reclamation districts or incidental to farming, dairying, and certain other related pursuits, and therefore section must be construed as exempting any construction or operation incidental to farming, dairying, and the related pursuits. Business and Professions Code, § 7049.

2. Statutes ⇨219, 220

When language of statute is open to any doubt as to its proper interpretation, legislative and administrative construction is to be given great weight by courts in arriving at its proper meaning.

3. Licenses ⇨19(3)

In business and professions code section exempting from contractor's licensing requirements any construction or operation "incidental" to farming, dairying, and certain other pursuits, quoted word means depending upon or appertaining to something else as primary, something necessary, appertaining to, or depending upon another which is termed the principal, something incidental to main purpose. Business and Professions Code, § 7049; Civ. Code, § 662.

See publication Words and Phrases, for other judicial constructions and definitions of "Incidental".

4. Licenses ⇨19(3)

Construction of irrigation pipe line solely for agricultural purposes was construction "incidental" to farming, and therefore contractor who had constructed such pipe line would be entitled to foreclose lien for work and materials furnished in constructing pipe line, even though contractor did not possess license. Business and Professions Code, §§ 7000 et seq., 7026, 7040-7049; Code Civ.Proc. § 1187; Civ. Code, § 662.

Deadrich, Gill & Bates, Bakersfield, for appellant.

Frederick W. Welsh, Roland S. Woodruff, Bakersfield, for respondents.

MUSSELL, Justice.

Action on contract for construction of irrigation line.

Plaintiff, who was conducting a concrete pipe irrigation business in Kern County, entered into a contract with defendants for the trenching, laying and backfilling of a cement pipe line upon agricultural lands owned by the defendants. The pipe line was constructed to irrigate crops to be grown on the land and the work was to be done for a fixed contract price. The reasonable value of the materials furnished and the labor and services performed was \$3,899.45. Upon the failure of the defendants to pay for the work and materials, plaintiff commenced the instant action to foreclose a lien filed under the provisions of section 1187 of the Code of Civil Procedure.

The trial court found that the sum of \$3,899.45, less an offset of \$916.96, was due, owing and unpaid from defendants to plaintiff. The court also found that plaintiff did not possess a license as a contractor under the provisions of chapter 9 of division 3 of the Business and Professions Code of the State of California, and denied recovery to plaintiff on that ground alone.

According to the settled statement in lieu of a reporter's transcript filed herein, there are two points raised on this appeal: 1. The insufficiency of the evidence to justify the finding of the trial court that plaintiff was acting as a contractor under the provisions of division 3, chapter 9 of the Business and Professions Code; and 2. That the court erred in denying recovery to plaintiff on the ground that she had failed to allege and prove that she was a duly licensed contractor under the provisions of said code. The principal question to be here answered is as stated in plaintiff's opening brief in the following language: "Is the construction of an irrigation pipe line upon agricultural lands, made at the request of the owners of that land, and intended solely for agricultural purposes, exempted from the provisions of the contractor's licensing requirements, by the terms of section 7049 of the Business and Professions Code." It is the contention of the plaintiff that the foregoing question must be answered in the affirmative and that plaintiff is entitled to judgment in accordance

with the prayer of her complaint for the amount found due by the trial court.

After a careful consideration of the record before us and a reconsideration of what was said by this court in *Bowline v. Gries*, 97 Cal.App.2d 741, 745, 218 P.2d 806, relative to the construction to be placed upon section 7049 of the Business and Professions Code, we conclude that plaintiff's point is well taken.

Section 7049 of the Business and Professions Code reads as follows: "Ditch work and agricultural or fire prevention work. This chapter does not apply to any construction or operation *incidental* to the construction and repair of irrigation and drainage ditches of regularly constituted irrigation districts, reclamation districts, or to farming, dairying, agriculture, viticulture, horticulture, or stock or poultry raising, or clearing or other work upon land in rural districts for fire prevention purposes, except when performed by a licensee under this chapter." (Italics ours.)

[1] The grammatical construction of this section indicates a legislative intent to exempt from the statutory license requirements any construction or operation incidental to the construction and repair of irrigation and drainage ditches of irrigation districts, and also any **such construction or operation incidental to reclamation districts or incidental to farming, dairying, etc.** In the same sentence it is provided that this chapter does not apply to any construction or operation "*incidental to*" (certain irrigation and drainage work) *or to farming, etc.* The first punctuation mark is the comma placed after the words "irrigation districts" and to apply the exemption to reclamation districts or to farming, which are next mentioned, it is necessary to refer to the first part of the sentence and determine the scope of the exemption therein. The title of the section indicates that there are three kinds of work to which the statute does not apply, to wit: ditch work, agricultural work and fire prevention work. In the section itself the exemption is made applicable to any construction or operation "*incidental*" to such work, and there is no provision that the word "*inci-*

dental" does not apply to reclamation districts, or to farming, dairying, agriculture, etc., which are all separated only by commas. A legislative intent to limit the application of the word "*incidental*" to the construction and repair of irrigation and drainage ditches of regularly constituted irrigation districts does not appear in the language used. The section therefore must be construed as exempting any construction or operation incidental to farming, dairying, agriculture, etc.

It appears from the record that in the year 1944 or 1945 the manager of plaintiff's business went to the office of the Contractors' License Board in Bakersfield, California, to ascertain whether or not a license was required for the construction and installation of a concrete pipe line for irrigation purposes; that he was then informed by the person in charge of said office that a person engaged in construction and maintenance of a concrete pipe line business for agricultural purposes was not required to have a license under the State Contractors' License Law. It further appears that on September 8, 1949, the attorney general of California ruled on the question involved in an opinion which is in part as follows:

"The District Attorney of Fresno presents the following questions:

"1. Whether under B. & P. Code sec. 7049, a contractor's license is required of one constructing irrigation ditches under contract with farm owners * * *.

"Our conclusions are summarized as follows: Construction of irrigation ditches on farm land, for owners of the land, to be used solely for agricultural purposes, is incidental to farming and hence exempted from contractors' licensing requirements under B. & P. Code sec. 7049." 14 Ops. Cal.Atty.Gen. 85; Opinion No. 49-26, September 8, 1949.

[2] The Contractors' Licensing Law was first enacted in 1929, Stats.1929, Chapter 791, page 1591, and was amended in 1931, 1935 and 1937, and in 1939 was codified in the Business and Professions Code of California. Stats.1939, Chapter 37, page 382. The exemptions now embodied

in sections 7040 to 7049 of the code were all contained in the previous statute, under one section heading. No attempt was made by the legislature to recast section 7049 into two distinct subsections and no amendment has been made to section 7049. Apparently the State Contractors' License Board and the attorney general's office of the state have construed the section involved in accordance with the views expressed herein and as said in *Mantzoros v. State Board of Equalization*, 87 Cal.App. 2d 140, at page 143, 196 P.2d 657, at page 659: "It is a well settled rule of statutory construction that when the language of a statute is open to any doubt as to its proper interpretation legislative and administrative construction is to be given great weight by the courts in arriving at its proper meaning."

The statutory definition of "incidental", as applied to appurtenances is set forth in section 662 of the Civil Code in the following language: "Appurtenances. A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another."

[3] And in 20 Words and Phrases, page 419, the following definition appears: "'Incidental' obviously means depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal, something incidental to the main purpose. *The Robin Goodfellow*, D. C. Wash., 20 F.2d 924, 925."

[4] Under these definitions it must be said that an irrigation pipe line such as that under consideration here, which is intended solely for agricultural purposes, is "incidental" to farming and hence is exempt from the contractors' licensing requirements under the code section in question.

It follows that it is immaterial whether or not the plaintiff is a "contractor" within the meaning of section 7026 of the Business and Professions Code.

Since the settled statement indicates that no question was raised as to the amount found to be due by the trial court, the judgment is reversed with instructions to the trial court to enter judgment for plaintiff in the amount found due.

BARNARD, P. J., and GRIFFIN, J., concur.



104 Cal.App.2d 41

IRA v. IRA.

Civ. 17903.

District Court of Appeal, Second District,
Division 3, California.

May 4, 1951.

An action to obtain partition of real property which comprised the subject matter of a property settlement agreement which was entered into between husband and wife was brought by Fred Ira against Louise Ann Ira, also known as Louise Ann Domecq, who filed a cross-complaint and asked that her title to the real property be quieted. The Superior Court, Los Angeles County, Byron J. Walters, J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the property settlement agreement contemplated a present sale and conveyance of real property, and that husband was entitled to a vendor's lien for the unpaid balance under the property settlement agreement.

Judgment reversed with directions.

I. Husband and wife §31(6)

Where by property settlement agreement husband agreed to sell and convey to wife all of husband's right, title and interest to property at certain location, and further agreed to execute and deliver deed, and wife agreed to pay in consideration of transfer certain sum payable in monthly installments, and that any balance unpaid would become immediately due and payable out of money received for property, settle-

ment agreement contemplated present sale and conveyance of real property.

2. Appeal and error ⇨694(1)

In absence of evidence, finding with respect to property settlement agreement was conclusive.

3. Appeal and error ⇨909(5)

Where no issue was presented as to husband's waiver of rights under property settlement agreement, court would not assume that husband waived any of his rights.

4. Husband and wife ⇨46

Where by property settlement agreement husband agreed to sell and convey to wife all of husband's right, title and interest to property at certain location, and further agreed to execute and deliver deed, and wife agreed to pay in consideration of transfer \$4,000 payable in monthly installments, and that any balance unpaid would become immediately due and payable out of money received for property, and wife had paid \$2,100 of purchase price, husband was entitled to vendor's lien for unpaid balance. Civ.Code, § 3046.

Sylvan Y. Allen, Los Angeles, for appellant.

Howard D. McClain, Huntington Park,
Donald A. Rosen, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff and cross-defendant, Fred Ira, appeals from a judgment quieting title in defendant and cross-complainant, Louise Ann Ira, also known as Louise Ann Domecq. The appeal is on the judgment roll.

[1] The pleadings establish the following facts: In August, 1947, defendant obtained an interlocutory decree of divorce from the present plaintiff. The final decree was duly entered. At the time of the interlocutory decree, the parties entered into a property settlement agreement which provided that the "Husband does hereby sell, assign, transfer and convey to wife as her separate property all of his right, title

and interest in and to the property located at Huntington Park, California, and commonly known as 7105 and 7105-1/2 Rugby Street, and legally described as follows [description]. Husband further agrees to execute and deliver to wife concurrently herewith his deed.

"II.

"Wife agrees to pay to husband in consideration of the transfer of said property, the sum of Four-thousand dollars (\$4000.00) payable Thirty-five dollars (\$35.00) per month commencing on June 1, 1947, and further agrees that in the event said property is sold, any balance of the \$4000.00 then unpaid shall become immediately due and payable out of the money received for said property and will be paid out of escrow at that time."

In December, 1948, plaintiff husband brought this action to obtain partition of the real property which comprised the subject matter of the property settlement agreement, alleging ownership by the parties as joint tenants. Defendant answered and cross complained, setting forth a copy of the settlement agreement and asked that her title to the real property be quieted. The trial court concluded that the cross-complainant was the owner in fee of the real property involved and entered judgment quieting her title thereto.

Plaintiff contends that the property settlement agreement was not a conveyance because it was contemplated therein that he would, in the future, execute a deed; that the judgment should have set forth all the terms of the agreement alleged by him to exist against said property, and protected his right to occupy a portion of the premises; and should have provided that either party could bring an action in the future to determine the extent of his or her right.

We find no merit in plaintiff's first contention. The property settlement agreement clearly contemplated a present sale and conveyance of the real property. *Carman v. Athearn*, 77 Cal.App.2d 585, 596, 175 P.2d 926; *Olson v. Cornwell*, 134 Cal. App. 419, 427, 25 P.2d 879. The agreement contained all the elements necessary to effect a conveyance of the real property and

also provided (paragraph V) that " * * * It is further here asserted that the property conveyed to wife as her separate property has been so conveyed to her with the understanding that she will provide for and maintain said daughter."

[2] In appellant's brief it is asserted that the following is a verbatim copy of a provision of the agreement: "D. Wife agrees that in consideration of the husband transferring to her the above described property as her sole and separate property, that husband may reside in and have possession of the rear house located on said property and known as 7105-1/2 Rugby Street, until such time as the property be sold. (Contained in paragraph II of the Property Settlement Agreement.)" There is no such provision, nor any which remotely resembles it, in the agreement attached to defendant's answer, which the court found to be the agreement of the parties. Although respondent pointed out in her brief that appellant's assertion is a clear misstatement of the record, appellant did not file a reply brief, nor has he offered any justification for his statement as to the contents of the agreement. In the absence of the evidence the finding with respect to the agreement is conclusive. Plaintiff did not establish a right to occupy any portion of the premises.

[3,4] In the answer of defendant it was alleged that she had paid plaintiff \$2,100, which was more than had fallen due under the agreement as installments of the purchase price of plaintiff's interest, and that she had fully complied with the agreement upon her part. We cannot assume that plaintiff waived any of his rights under the agreement; there was no such issue. Upon the record which is before us plaintiff is entitled to a vendor's lien for the unpaid balance. Civ.Code, § 3046; 25 Cal.Jur., p. 739, sec. 208, et seq.

The judgment is reversed and the trial court is directed to take evidence, if necessary, and to render judgment quieting cross-complainant's title, subject to a lien in plaintiff's favor for the balance which is found to be unpaid under the agreement set out in the present record, and in ac-

cordance with its terms; no costs on appeal. The attempted appeal from the order denying motion for new trial is dismissed.

PARKER, WOOD and VALLÉE, JJ., concur.



104 Cal.App.2d 199

BLANKINSHIP v. BLANKINSHIP et al.

Civ. 17814.

District Court of Appeal, Second District,
Division 3, California.

May 15, 1951.

Action by Clara E. Blankinship against H. E. Blankinship and others for a declaration of rights to fifty shares of corporate stock. The Superior Court, Los Angeles County, J. F. Moroney, J., rendered judgment for plaintiff and defendants appealed. The District Court of Appeals, Wood, J., held that evidence sustained finding that stock was issued in names of plaintiff and defendants as joint tenants for convenience only and that plaintiff was owner of stock.

Judgment affirmed.

Joint tenancy ☞3

In action for declaration of rights to fifty shares of corporate stock, evidence sustained trial court's finding that plaintiff and her children, the defendants, agreed that stock would be issued in names of parties as joint tenants for convenience only and that plaintiff was owner of stock.

Bailey & Poe, Los Angeles, for appellants.

Gilligan & Pratt, Los Angeles, for respondent.

WOOD, Justice.

Action for a declaration of rights to 50 shares of stock in the American Saw & Knife Works, Ltd., a corporation. The plaintiff is the mother of defendants. The

stock was issued as follows: 10 shares in the names of plaintiff and defendant H. E. Blankinship as joint tenants; 30 shares in the names of plaintiff and defendant William E. Blankinship as joint tenants; and 10 shares in the names of plaintiff and defendant Louise B. West as joint tenants.

The court found that the plaintiff and defendants agreed that the stock would be issued in the names of plaintiff and defendants as joint tenants for convenience only, that plaintiff was not parting with title to said stock, and that the only purpose for holding title to said stock as joint tenants was for convenience. The judgment was that plaintiff is the owner of said stock, and that defendants hold whatever right they have in said stock as trustee(s) for plaintiff. It was ordered in said judgment that defendants assigned and deliver said certificates of stock to plaintiff.

Defendants appeal from the judgment. They contend that said findings were contrary to the evidence; and that the judgment is not supported by the evidence and is contrary to law.

Prior to 1927 plaintiff and her husband owned, as community property, all the 250 shares of stock of said corporation. About 1927 said stock was transferred, in equal shares, to their four children and to plaintiff—each receiving 50 shares. (The four children are the three defendants herein, and James who is not a party to this action.) Plaintiff's husband continued to conduct the business of the corporation with the assistance of James, who is the eldest son. In 1928 the husband died, and James became president of the corporation, and conducted the business. Other members of the family rendered services in behalf of the corporation, and in 1933 the books of the corporation showed that unpaid salaries, which were payable to plaintiff and all of the children except William, had accumulated. A meeting was held for the purpose of discussing the unpaid salaries. The meeting was attended by plaintiff, her sons, her son-in-law D. E. West (the husband of Louise), and an attorney who was "handling the corporation affairs." The attorney suggested that the

corporation "issue new stock to take care of those back salaries," and that the shares of stock be issued in joint tenancy. Pursuant thereto, the corporation issued 114 additional shares of stock on December 8, 1933, and it was determined that those shares should be distributed as follows: 58 to plaintiff, 32 to James, 14 to Louise, and 10 to Herman (defendant H. E. Blankinship). As a result of the issuance of said additional shares, the total stock of the corporation was increased to 364 shares, which shares were owned as follows: 108 by plaintiff, 82 by James, 64 by Louise, 60 by Herman, and 50 by William.

At the time of issuing the new shares of stock, the old certificates were cancelled and new certificates were issued for all the 364 shares. The 108 shares to which plaintiff was entitled were issued in her name and in the names of her children, in joint tenancy, as follows: 58 shares in the names of plaintiff and James; 30 shares in the names of plaintiff and William; 10 shares in the names of plaintiff and Herman; and 10 shares in the names of plaintiff and Louise. The 50 shares last above mentioned are the shares involved herein. The shares to which each son was entitled were issued in his name and the name of plaintiff as joint tenants. It does not appear how the shares to which Louise was entitled were issued. James continued to serve as president of the corporation. D. E. West, who had been secretary and treasurer of the corporation, continued to serve in those capacities, and Herman continued as an employee of the corporation. About 1943, dissension arose as between James on the one side and his brothers and sister on the other side. About that time Louise had a discussion with plaintiff regarding a proposed redistribution of the 58 shares of stock, among all the children, which shares had been issued in the names of plaintiff and James as joint tenants. Pursuant to that discussion, certificates representing various numbers of said 58 shares were issued in the names of plaintiff and the children as joint tenants. The certificate so issued in the names of James and his mother represented 27 shares.

Thereafter, said 58 shares were reissued in the names of James and his mother as joint tenants. Also, about 1943, each son caused his stock, which had been issued in joint tenancy in the names of himself and his mother, to be reissued in the names of himself and his wife in joint tenancy. About 1945 James ceased to be an officer or employee of the corporation. Herman became president of the corporation and he, together with William and Mr. West (who continued to serve as secretary and treasurer), conducted the business of the corporation thereafter. On March 2, 1949, plaintiff attended a stockholders' meeting where, for the first time, she was refused voting privileges by Herman, William and Louise on the 50 shares of stock which plaintiff had caused to be issued in her name and their names as joint tenants. Plaintiff at that time "demanded the stock back from all three" of them, and they did not comply with the demand. Thereafter, she served upon them a written demand for a reconveyance of the stock, and they did not comply with the demand.

Plaintiff testified that she never gave or sold her rights in the 50 shares of stock and she never intended to make a gift of the stock to her children; that she put the stock in joint tenancy with the children for convenience, in place of making a will, but she did not want them to have it as long as she lived, so she put it in joint tenancy.

Herman testified that in 1933 he put his 60 shares of stock in the names of himself and his mother as joint tenants and left those shares in such joint tenancy until 1943 when he caused the stock to be reissued in the names of himself and his wife; that in putting his stock in joint tenancy with his mother he did not intend to give up any interest therein; that he put the stock in her name for convenience; that, in causing the stock to be reissued in the names of himself and his wife, he felt that he had a right to put the stock in the name of anyone he saw fit, and his mother's joint-tenancy stock was not different from his own stock which was in joint tenancy.

Defendant Louise B. West, the daughter, testified that in 1943, when she and her

mother were discussing the redistribution of her mother's stock, she (the daughter) considered that said stock, which was in joint tenancy and included the 50 shares involved herein, was her mother's stock. She also testified that the only reason she did not give the stock to her mother was that her mother might give it to someone else; that she did not think they could trust plaintiff with the stock even though the stock belonged to plaintiff.

James Blankinship testified that in 1933, when they had the meeting regarding the issuance of additional stock, the attorney for the corporation suggested that the stock be issued in joint tenancy as a matter of convenience and to avoid "probate."

Appellants contend, as above stated, that the findings to the effect that the 50 shares of stock were held in joint tenancy for convenience only were not supported by the evidence. They argued that a transfer of property into joint tenancy "for the purpose of avoiding probate is a gift *inter vivos* and irrevocable." The question as to the intent of the plaintiff in causing the certificates of stock to be issued in the names of herself and defendants was one of fact for the determination of the trial court. It appears that for more than 10 years preceding 1943 all the stock of the corporation was held in joint tenancy. The plaintiff testified to the effect, as above shown, that she put the stock in joint tenancy for convenience. In 1943 the sons, whose stock had theretofore been held in joint tenancy with the mother, caused their stock to be reissued to exclude the name of the mother and to include the names of their wives. It is clear that they considered that their stock was held in joint tenancy with the mother for convenience. It could reasonably be inferred that the stock of the mother was also held in joint tenancy for convenience. It is clear that the daughter considered that the stock involved here was owned by the mother. The evidence amply supports the findings and the judgment.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

104 Cal.App.2d 295

PEOPLE v. BECERRA.

Cr. 4565.

District Court of Appeal, Second District,
Division 3, California.

May 17, 1951.

Francisco Becerra was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., of assault with a deadly weapon and he appealed. The District Court of Appeal, Shinn, P. J., held that there was no occasion for instruction as to whether defendant intended to fire the gun where he admitted the act and made no claim that it was accidental.

Affirmed.

1. Criminal law ⇨824(1)

Contention by defendant that instructions given unduly favored prosecution was without merit since it was the privilege of defendant to request instructions in more impartial form but he failed to do so.

2. Criminal law ⇨815(4)

In prosecution for assault with a deadly weapon there was no occasion for instruction as to whether defendant intended to fire the gun where he admitted the act and made no claim that it was accidental. Pen. Code, § 20.

3. Assault and battery ⇨96(8)

Instruction in prosecution for assault with a deadly weapon in respect of criminal intent as being one of necessary elements of offense was adequate. Pen. Code, § 20.

David C. Marcus, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant, Francisco Guadalupe Becerra, appeals from a judgment convicting him of assault with a deadly weapon and from an order denying his motion for a new trial.

The record shows that defendant and the victim, Joe E. Perez, were brothers-

in-law, that enmity had existed between them for several years, and that the two had engaged in several fights prior to the time in question. At approximately 6 p. m. on April 6, 1950, defendant drove to the home of Perez and parked his car across the entrance to the driveway where the latter's car was parked. He honked the horn and Mrs. Perez came out of the house, with her baby in her arms, and told defendant that her husband was asleep. Perez came out of the house and was offered and declined a drink from a bottle handed him by defendant. The defendant apparently invited Perez to go somewhere and fight it out but Perez refused. Defendant then got out of the car and fired either two or three shots at Perez, one of which hit him in the shoulder, and one apparently went through the material of his left trouser leg at the knee. Perez then ran around to the back of his house and into the house of his next door neighbor who, with another neighbor, drove him to the hospital. The record shows that defendant did not try to run from the scene, but that he offered money to one of the bystanders to telephone the police. He admitted having drunk half a pint of whiskey and the half bottle was found in his car. The defendant claimed that Perez was armed with a gun when he came from the house and that he, himself, shot at the victim's legs only to frighten him.

The defendant was charged with assault with a deadly weapon with intent to commit murder but was found guilty of assault with a deadly weapon. He does not contend here that the evidence was insufficient to sustain the conviction, but does contend that the jury was improperly instructed in several instances; that certain other instructions should have been, but were not, given, and that as a result prejudicial error was committed. There is nothing in the record to show by whom any instruction was offered or that any instruction was proposed and refused.

The defendant contends that his defense was based on two theories, that of self-defense and accidental shooting. He contends that the instructions given on self-

defense were so worded that they favored the prosecution, and that no instructions were given on the theory of accident or on the general proposition that in every crime there must be a unity of act and intent. Pen. Code, § 20.

[1] We have examined the record carefully and find that the jury was fairly, fully and correctly instructed concerning the law of self-defense. We find no merit in defendant's contention that the instructions given unduly favored the prosecution. It was the privilege of defendant to request them in more impartial form but he did not do so.

Defendant's contentions that the court, of its own motion should have instructed the jury on general criminal intent and on the theory that the shooting was accidental are interwoven. They are without merit. The court gave the following instruction: "An assault with a deadly weapon is an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another with a deadly weapon. A deadly weapon is any object, instrument or weapon which, used in the manner in which it appears to have been used, is capable of producing, and is likely to produce, death or great bodily injury. To constitute an assault with a deadly weapon, actual injury need not be caused.

The characteristic and necessary elements of the offense are the unlawful attempt, with criminal intent, to commit a violent injury upon the person of another, the use of a deadly weapon in that attempt, and the then present ability to accomplish the injury. * * * This statement of the law is not criticized.

It is urged that it was not sufficient to instruct as to the specific intent to commit a violent injury but a further instruction was required as to the existence of an intent to commit the act, since a union or joint operation of act and intent are the elements of a public offense.

[2, 3] There was no occasion for an instruction as to whether defendant intended to fire the gun. He admitted the act and made no claim that it was accidental. See *People v. Corlett*, 67 Cal.App.

2d 33, 54, 153 P.2d 595, 964. Under the circumstances the quoted instruction was adequate and as favorable to defendant as he had a right to expect. It informed the jury that one element of the offense was the existence of a criminal intent to commit a violent injury upon the person of another. Intentional shooting having been admitted, and proof of an intent to do violent injury having been specified as an element of the offense, further instructions on intent were not required. *People v. Klor*, 32 Cal.2d 658, 197 P.2d 705.

The judgment and order are affirmed. The attempted appeals from the verdict and the sentence are dismissed.

WOOD and VALLÉE, JJ., concur.



104 Cal.App.2d 165

OPPENHEIMER v. DEUTCHMAN et al.

Civ. 17979.

District Court of Appeal, Second District,
Division 3, California.

May 14, 1951.

Rehearing Denied May 28, 1951.

Hearing Denied July 12, 1951.

Action by John G. Oppenheimer against Julius Deutchman, doing business as Billie-Dee of California, Jack Morgan, and Victor Deutchman for alleged assault and battery. The Superior Court, Los Angeles County, William B. McKesson, J., sustained defendants' demurrer to plaintiff's first amended complaint, as amended, rendered judgment dismissing the complaint, and the plaintiff appealed. The District Court of Appeal, Bartlett, J., Pro Tem, held that no cause of action was stated against the last two named defendants, but that complaint stated a cause of action for assault and battery as against first named defendant.

Affirmed in part and reversed in part.

I. Assault and battery § 24(1)

Amended complaint which alleged that individual assaulted and battered process server, and that agents or employees of

individual had acted in scope of their employment, and aided and abetted actions of individual by concealing his identity although they knew it was plaintiff's duty to serve process on him, did not state a cause of action against such agents or employees.

2. Assault and battery ☞39

Where action against alleged agents or employees, for their acts or failure to act while their alleged employer was allegedly assaulting and battering process server, was solely for exemplary and punitive damages, when no actual or general damages were alleged to have resulted from acts, no award of punitive or exemplary damages could be made.

3. Assault and battery ☞24(1)

Amended complaint which alleged that individual assaulted and battered process server, stated a cause of action for assault and battery and was not subject to a general demurrer.

4. Pleading ☞207

Where uncertainties in complaint either did not exist or criticized allegations in complaint referred to immaterial matter or surplusage which could be omitted without impairing sufficiency of complaint, complaint was not subject to special demurrer.

John G. Oppenheimer, in pro. per.

Edward M. Raskin, Los Angeles, for respondents.

BARTLETT, Justice Pro Tem.

This is an appeal from a judgment of dismissal following the sustaining of defendants' demurrer to appellant's first amended complaint and amendment thereto with leave to amend, but which appellant declined to amend.

The first amended complaint was filed December 28, 1949. On January 12, 1950, respondents' demurrer to this pleading was sustained with leave to amend within ten days. On January 23, 1950, appellant filed an amendment to the first amended complaint which consisted only in the deletion of one word. On February 28, 1950,

a demurrer to the first amended complaint, as amended, was sustained and appellant was again given ten days to amend. He refused to amend and the court made its order dismissing the action on March 28, 1950.

[1,2] No cause of action is stated against the respondents, Victor Deutchman and Jack Morgan. The amended complaint alleges that respondent Julius Deutchman assaulted and battered appellant but all that is alleged as to these two respondents is that they were agents or employees of said defendant and, acting in the scope of their employment, aided and abetted the actions of Julius Deutchman by concealing his identity although they knew it was appellant's duty to serve process on Julius Deutchman. No actual or general damages are alleged to have resulted from their acts or failure to act and the action against them is solely for exemplary and punitive damages. As no actual damage is alleged, no award of punitive or exemplary damages could be made. *Rosenberg v. J. C. Penney Co.*, 30 Cal.App.2d 609, 86 P.2d 696; *Clark v. McClurg*, 215 Cal. 279, 9 P.2d 505, 81 A.L.R. 908.

[3,4] As to the respondent Julius Deutchman, the amended complaint stated a cause of action for assault and battery and a general demurrer did not lie. The special demurrer as to him was not well taken because the uncertainties set forth in the demurrer either did not exist or because the allegations criticized refer to immaterial matter or surplusage which could be omitted without impairing the sufficiency of the complaint. *Aronson v. Bank of America*, 42 Cal.App.2d 710, 720, 721, 109 P.2d 1001.

The judgment of dismissal is affirmed as to respondents Victor Deutchman and Jack Morgan. The judgment of dismissal as to the respondent Julius Deutchman is reversed and the court below directed to overrule the demurrer as to that respondent and permit him to answer the amended complaint.

SHINN, P. J., and VALLÉE, J., concur.

104 Cal.App.2d 177

**VALLEY VIEW MUT. WATER CO. v.
BROWNE et al.
Civ. 17850.**

District Court of Appeal, Second District,
Division 1, California.
May 15, 1951.

Valley View Mutual Water Company, a California corporation, brought action against H. Truman Browne, and others, and Park Water Company, a California corporation, and another, to enjoin second named defendant from trespassing upon land of other defendants or furnishing water thereto, and to restrain first named defendant, and another, from purchasing water from second named defendant. The Superior Court of Los Angeles County, Robert Clifton, Judge assigned, entered judgment dismissing the cause after general demurrers to the amended complaint were sustained without leave to amend further, and plaintiff appealed. The District Court of Appeals, White, P. J., held that plaintiff had no exclusive right to serve its stockholders with water.

Judgment affirmed.

1. Waters and water courses ⇨247(2), 252

Mutual water company did not have exclusive right to serve its stockholders, and could not enjoin stockholders from accepting water from another source, though shares were appurtenant to land, since such burden on land would be contrary to public policy against restraints on alienation.

2. Waters and water courses ⇨252, 254

Where mutual water company amended by-laws so as to render certificates of stockholders contracts to purchase water from company exclusively, but without consent of affected stockholders, amendment did not change the existing contract, and therefore, stockholders' purchase of water from another source was not a breach of contract.

3. Waters and water courses ⇨252

The right evidenced by stock certificates in mutual water company is right to receive water, and is primarily a right in real property.

4. Waters and water courses ⇨252

A stockholder in a mutual water company is not prohibited from acquiring shares in a different water company.

5. Waters and water courses ⇨254

Though landowners were shareholders in mutual water company, furnishing of water to landowners, at landowners' request, by another company, would not constitute a trespass by such other company, since mutual water company had no exclusive right to furnish water to landowners.

Floyd E. Pendell, El Monte, Don R. Lehman, Los Angeles, for appellant.

Overton, Selig & Wilson and Paul Overton, all of Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiff has appealed from a judgment of dismissal entered after general demurrers to its amended complaint were sustained without leave to amend further.

The defendants H. Truman Browne and Bettie Forrest Browne are the owners of land within the area served by plaintiff mutual water company, their right to receive water being evidenced by certificates for shares in such company, which shares are appurtenant to the land. These defendants have refused to accept water from plaintiff and are securing their water from defendant Park Water Company. Defendant H. H. Wheeler is president of defendant Park Water Company. By its amended complaint the plaintiff sought an injunction to restrain Park Water Company from "trespassing" upon the land of defendants Browne, or furnishing water thereto, to restrain defendants Browne from purchasing water from defendant Park Water Company, and to restrain all defendants from destroying or interfering with the water lines owned by plaintiff on the property of defendants Browne.

Plaintiff by its amended complaint alleged:

That defendant Park Water Company is a corporation organized for the purpose of furnishing water to customers at a profit and has constructed a small system on land adjoining the district of the plaintiff; that it is the intention of said defendant to trespass upon the district of plaintiff; that said defendant has trespassed to the extent of furnishing customers in lots 1 to 15 of Tract 13904, within the territory of plaintiff, with water and by constructing pipelines.

That on June 20, 1949, plaintiff adopted and caused to be recorded in Los Angeles County its amended by-laws, a copy thereof being attached to the complaint, which by-laws contained the statement that certificates of stock should contain the following provision: "This certificate is issued to the holder hereof and accepted by him on the condition that the shares of stock represented hereby constitutes a contract to purchase water service from the company exclusively, * * *."

The original complaint filed herein did not contain the foregoing allegation, and the sample stock certificates annexed thereto did not contain any provision with reference to a contract to purchase water service exclusively from the plaintiff. The amended by-laws incorporating such contract were not recorded until June 20, 1949, eight days prior to the filing of the original complaint. By the original complaint it appeared that defendants Browne held certificates numbered 434, 552, 554, and 556, in the form attached to the original complaint, which form contained no provision that acceptance of such certificate constituted a contract to take water exclusively from the plaintiff.

Returning to the amended complaint, it is alleged that the defendants Browne had notice of the provisions of the by-laws recorded June 20, 1949, but that said defendants conspired with defendant Park Water Company to trespass upon the territory belonging to the plaintiff corporation "and did violate the right of the plaintiff to serve water to tract number 13904." It is further alleged that plaintiff has supplied water for domestic and irrigation purposes to its stockholders since

its incorporation; that it serves water to its members only, and that the stock of the company by the terms of its by-laws is appurtenant to the land served and cannot be sold or held separate from the land served; that plaintiff has a sufficient supply of water to serve the lands within its district; that plaintiff owns its water system free of encumbrances and its operation is maintained by assessments and income derived from the sale of water to its stockholders.

It further appears from the amended complaint that in 1948 the defendants Browne acquired the land which they subsequently subdivided as tract 13904, consisting of 15 lots, and in connection with the purchase of the land acquired the certificates of stock in plaintiff mutual water company hereinbefore mentioned. Said defendants have constructed single family residences upon these 15 lots, and in connection therewith all of the defendants have placed water pipes on the land for the purpose of providing water service by Park Water Company to the lots in question. It is further alleged that plaintiff has the "right" to serve water for said lots and the defendants Browne have the "duty" to receive water from plaintiff, and that plaintiff is ready, able and willing to furnish water; and that the refusal of defendants Browne to accept water service is contrary to the contract between plaintiff and defendants Browne as provided by the articles of incorporation, by-laws and certificate of stock "to which instrument the defendants Browne have had notice".

[1,2] It would serve no useful purpose to set forth further the allegations of the amended complaint. Suffice it to say, they consist of conclusions which in the view of this court do not follow from such ultimate facts as are alleged. The proposition of law upon which appellant must rely, and which must be rejected, is that a mutual water company has the exclusive right to serve its stockholders and may enjoin its stockholders from accepting water from another source. The fact that the shares are appurtenant to the land is of no significance. Further,

there is no question here of breach of contract by the stockholder. As heretofore noted, there was no agreement by the stockholders to accept water exclusively from plaintiff. Such purported agreement was incorporated in by-laws and stock certificates adopted and issued subsequent to the filing of this action. It is elementary that a mutual water company may not change or modify an existing contract between itself and its shareholders by merely amending its by-laws without the consent of the shareholders affected.

[3] The right evidenced by the stock certificates is a right to receive water and is primarily a right in real property. 26 Cal.Jur. 449; In re Estate of Thomas, 147 Cal. 236, 81 P. 539; Richey v. East Redlands Water Co., 141 Cal. 221, 74 P. 754; Wheat v. Thomas, 209 Cal. 306, 287 P. 102; Imperial Water Co. No. 4 v. Meserve, 62 Cal.App. 593, 217 P. 548.

[4] If appellant's contentions be correct, it would lead to the anomalous situation that, even in the absence of a contractual prohibition one could not acquire shares in two different water companies. That such is not the case is evidenced by the decision in Consolidated People's Ditch Co. v. Foothill Ditch Co., 205 Cal. 54, 60, 61, 269 P. 915. It would also mean that property to which the shares were appurtenant might forever remain burdened by the duty of the landowner to accept water from one source only, a situation clearly contrary to public policy against restraints on alienation.

None of the authorities relied upon by appellant support its contentions. The situation is simply one in which the owner of land to which water rights evidenced by certificates of stock in appellant mutual water company are appurtenant, has subdivided such land, and appellant claims to have the exclusive right to furnish water to the parties who have purchased residences on such land. And this, not by virtue of any covenant or agreement by the subdivider, but by virtue of by-laws of the mutual company adopted subsequent to the subdividing operations of the defendants Browne and subsequent

to the acquisition by such defendants of their certificates for shares in appellant. The belated attempt of appellant to modify the terms and conditions of the contract between it and respondents Browne, as evidenced by the certificates for shares, by amending the by-laws, was futile. Consequently the contentions of appellant in regard thereto must be rejected.

[5] The charges of trespass by the defendant water company and resulting damages are equally fallacious, in that they are based upon the rejected theory that appellant mutual company has an exclusive right to furnish water to the land in question.

For the reasons stated, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



104 Cal.App.2d 219

PEOPLE v. CURTIS.

Cr. 4596.

District Court of Appeal, Second District,
Division 3, California.

May 15, 1951.

Hearing Denied June 14, 1951.

Ellen Theresa Curtis was convicted in the Superior Court of Los Angeles County, Kenneth C. Newell, J., of forgery and she appealed from an order denying her motion to set aside her plea of guilty made in the action and judgment rendered and entered as result thereof. The District Court of Appeal, Bartlett, J., pro tem, held that the trial court was not required on motion to set aside plea of guilty to accept the defendant's uncorroborated statement as true.

Judgment and order appealed from affirmed and attempted appeals from other orders dismissed.

1. Criminal law ☞ 1023(12)

Motion to set aside plea of guilty and judgment entered as result thereof was in

the nature of proceeding for writ of error *coram nobis* and the order denying it was appealable as an order made after judgment.

2. Criminal law §997

Trial court on motion to set aside plea of guilty and judgment rendered as result thereof was not required to accept defendant's uncorroborated statement as true.

Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

BARTLETT, Justice pro tem.

This is an appeal by the defendant from an order denying her motion to set aside her plea of guilty made in the action and the judgment rendered and entered as a result thereof.

By an information filed by the District Attorney of Los Angeles County on June 7, 1950, the defendant was charged with three counts of forgery and also with a prior conviction of a felony. On July 16, 1950, she appeared in court with her attorney, P. E. Durkee, and entered a plea of not guilty to each of the counts of the information and denied the prior conviction alleged in the information. Three days later she appeared in court with the same counsel, Deputy District Attorney Galliano being present, and by leave of court withdrew her plea of not guilty to count I of the information, entered a plea of guilty thereto and again denied the prior conviction. The defendant then waived time for sentence and her request for leave to file an application for probation was granted. The hearing of this application, the pronouncement of judgment and sentence as to count I and the disposition as to counts II and III were set for August 11, 1950. On that date she appeared with her attorney, Deputy District Attorney Crail being present, and the matters were continued to August 25, 1950. She appeared on that date again with Mr. Durkee representing her and Deputy District Attorney

Crail again represented the People. The court found that the prior conviction, as alleged in the information, was true, denied the application for probation and pronounced judgment and sentence as to count I of the information. Following that the court dismissed counts II and III of the information. Thereafter the defendant appeared without counsel on a motion to modify sentence. The hearing on this motion was continued to September 11, 1950, when she again appeared without counsel, Deputy District Attorney Galliano representing the People. The motion to modify the sentence was denied. Immediately thereafter David Silverton was substituted as her counsel in place of Mr. Durkee. Mr. Silverton then orally made the following motion: "Comes now the defendant, Ellen Curtis, and herewith requests the Court to set aside the sentence heretofore imposed and withdraw her plea of guilty heretofore entered for the purpose of entering a new and different plea, and in support of that motion the defendant asks leave of Court to take the witness stand in order to tell of the proceedings which occurred prior to her pleading guilty for the purpose of enabling the Court to pass upon the motion. The defendant has advised me that she is not in truth and in fact guilty, and that she only pleaded guilty because she was required to do so." The defendant then took the witness stand and testified in her own behalf. No other testimony was taken. At the close of the hearing the motion was denied.

[1] The motion made by the defendant in the trial court was in the nature of a proceeding for a writ of error *coram nobis* and the order denying it is appealable as an order made after judgment. *People v. Kirk*, 98 Cal.App.2d 687, 692, 220 P.2d 976. Defendant bases her contention that the order denying her motion should be reversed on the authority of the decision of the court in *People v. Odum*, 91 Cal.App.2d 761, 205 P.2d 1106. At pages 770 and 771 of 91 Cal.App.2d, at page 1112 of 205 P.2d of that opinion the court set forth a quotation from *People v. Gilbert*, 25 Cal. 2d 422, 154 P.2d 657, a portion of which is set forth in defendant's brief as follows:

"The state will not, through its courts, pronounce judgment on a plea which has been procured by fraud or duress or by any force which operates to preclude the exercise of free will and judgment by the party. * * * If facts existed which would vitiate the pleas, and which, without any fault or negligence of the defendants, were not presented to the court, then the defendants are entitled to have their pleas and the judgments vacated. * * * The record discloses evidence tending to show that the free will and judgment of one or both defendants were overreached by unjustified representations of their counsel seemingly corroborated by acts and statements of the court and deputy district attorney. * * *" Defendant argues that the facts of this case are similar in character to those in *People v. Odlum*, supra, 91 Cal.App.2d 761, 205 P.2d 1106, and bring her within the rule stated in the quoted language.

The only witness who testified at the hearing was the defendant. She testified that, in her opinion, she was innocent of the charge to which she had pleaded guilty. As to any representations made to her which caused her to so plead, her whole testimony on that question was as follows: "Q. Will you please tell the Court why you pleaded guilty to an offense when you were of the opinion that you were not guilty? A. Because I plead not guilty when I came into Court, and my lawyer took me aside and talked to me, and he even come to my home and had me come into his office several times and he said that he had gone to see Galliano, the District Attorney, and I didn't even know who he was by sight, or otherwise, and he says that he said that if I would plead guilty to one count that he would dismiss the other count and that I would get no more than ninety days in the County Jail, if any time at all, even with my past record." The distinctions between the case of *People v. Odlum*, supra, 91 Cal.App.2d 761, 205 P.2d 1106, and this one are many. In that case the motion was not heard or decided on its merits, the trial judge saying he had " * * no jurisdiction whatsoever in the matter." That was the basis for the court's reversal

of the order denying the motion. The court said, 91 Cal.App.2d at page 772, 205 P.2d at page 1113: "It is for the superior court, after a hearing on the merits, to determine whether the judgment and plea of guilty should be vacated." In this case the court accepted jurisdiction, heard the matter on the merits and, after that hearing, decided adversely to the defendant. Also, in *People v. Odlum*, supra, 91 Cal. App.2d 761, 205 P.2d 1106, the defendant was corroborated not only by a lengthy, detailed affidavit of another witness but also as was the case in *People v. Gilbert*, supra, 25 Cal.2d 422, 154 P.2d 657, by acts and statements of the court and the deputy district attorney. In the case before us there was no corroboration of the defendant's testimony or of any purported deal between her attorney and the deputy district attorney from any source. The acts and conduct of the court and district attorney far from indicating that any such agreement as that mentioned in defendant's testimony existed, suggested that there had been no such agreement. In the *Odlum* case the defendant had admitted the prior conviction charged in the information and in spite of this fact the court permitted him to file an application for probation. In the case before us the defendant had at all times throughout the proceedings including the very day on which she was sentenced, denied the prior conviction charged. Counts II and III were not dismissed at the time she changed her plea as to count I, but were continued for disposition at a later time and, in fact, were not dismissed until after the court had found the fact of the prior conviction and judgment and sentence had been pronounced on count I. At the time of the denial of her application for probation and the pronouncing of judgment and sentence, while her attorney Mr. Durkee was present, Deputy District Attorney Galliano, whose name is mentioned in her testimony, was not present. Mr. Crail represented the People on that occasion.

[2] It is true that the only testimony given at the hearing was that of the defendant as set forth herein. The court, however, was not required to accept the

defendant's uncorroborated statement as true. The decision in *People v. Kirk*, supra, 98 Cal.App.2d 687, 692, 220 P.2d 976, was on an appeal from a motion such as we have here. The court said, 98 Cal.App.2d at page 692, 220 P.2d at page 980: "Defendant's first contention on this appeal is that the trial court was required, as a matter of law, to grant the first motion for relief because the affidavits in support thereof were uncontradicted. This contention cannot be sustained. A trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence contradicting it, and this rule applies to an affidavit. Further, the trial court as trier of the fact, is the judge of the credibility of the witness whether he testify in person or by affidavit. *Lohman v. Lohman*, 29 Cal.2d 144, 173 P.2d 657; *Berg v. Journeymen's Plumbers & Gas Fitters Union*, 5 Cal.App.2d 582, 42 P.2d 1091."

The judgment and order appealed from are affirmed; the attempted appeals from other orders are dismissed.

SHINN, P. J., and VALLÉE, J., concur.



104 Cal.App.2d 124

Ex parte MAYNARD.

Cr. 2258.

District Court of Appeal, Third District,
California.

May 10, 1951.

Arthur Wayne Maynard brought habeas corpus proceedings to secure his release from prison. The District Court of Appeal, Peek, J., held that facts and circumstances did not warrant issuance of writ.

Writ denied.

1. Habeas corpus ☞46

Superior court had jurisdiction to entertain petition for a writ of habeas corpus

by one seeking to have judgment finding him guilty of first degree burglary set aside on ground that evidence had been insufficient to establish degree of burglary to be burglary in the first degree.

2. Habeas corpus ☞1

A writ of habeas corpus being in the nature of a collateral attack on a judgment of conviction pursuant to which petitioner is held in custody, remedy extends only so far as is necessary to relieve petitioner from imprisonment if illegally detained.

3. Habeas corpus ☞90

Where petitioner pleaded guilty to charge of burglary, and court determined crime to be first-degree burglary, and thereafter petitioner brought habeas corpus proceedings in superior court, claiming that evidence was insufficient to establish degree of burglary to be that of first-degree burglary, and seeking to have judgment set aside, and superior court determined offense to be second-degree burglary and resentenced petitioner, validity of conviction was not affected, though order of superior court purported to set aside judgment and sentence, and original commitment was required to stand, modified only as to degree of crime charged, and detention of petitioner was not unlawful because he was denied right in habeas corpus proceeding to withdraw his plea of guilty and to enter a plea of not guilty. Pen.Code, § 1018.

Henry Teichert, Sacramento, for petitioner.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

PEEK, Justice.

By a petition for a writ of habeas corpus petitioner seeks his release from the state prison at Folsom alleging that he is unlawfully restrained of his liberty under a judgment of the trial court which he contends is void because of certain procedural steps taken subsequent to his commitment.

The essential facts as disclosed by the record before us are that on September 20, 1948, following his plea of guilty to the crime of burglary as charged in an information filed by the district attorney of Placer county, the court determined the crime to be burglary in the first degree, denied probation and sentenced petitioner for the term prescribed by law. At that hearing petitioner was not represented by counsel and no appeal was taken therefrom. Thereafter on February 7, 1950, a hearing was had in the Superior Court of said county upon petitioner's first petition for a writ of habeas corpus. Following that hearing the court issued its order wherein it was stated that the prior proceedings failed to reflect evidence sufficient to establish the degree of burglary to be that of burglary of the first degree, and ordered that the previous judgment and sentence be set aside and that petitioner be returned for the purpose of establishing by competent evidence the degree of the crime charged. On March 14, 1950, pursuant to said order a hearing was had in said Superior Court at which petitioner was present with counsel and orally moved to withdraw his former plea of guilty to the information and to enter a plea of not guilty thereto. This motion was denied and the court proceeded to take evidence following which the offense was determined to be burglary of the second degree. In denying said motion the court stated that the proceeding was solely for the limited purpose of fixing the degree and declined to re-sentence the petitioner on the ground that the original sentence was still in full force and effect. Subsequently petitioner filed his present petition for a writ of habeas corpus as previously noted.

In support of his main contention that his present detention is unlawful since he was denied the right to withdraw his plea of guilty and to enter a plea of not guilty, petitioner relies upon section 1018 of the Penal Code, which provides: "On application of the defendant at any time before judgment the court may, and in case of a

defendant who appeared without counsel at the time of the plea the court must, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted."

Thus, the first question to be considered is the effect of the order of February 7, 1950 purporting to nullify and set aside the original judgment and sentence.

[1-3] There can be no question but that the Superior Court had jurisdiction to entertain the first petition for a writ of habeas corpus, *In re Hughs*, 159 Cal. 360, 113 P. 684, and to remand the defendant with directions to the trial court to fix and determine the degree of the crime of burglary of which the petitioner was convicted. However, the first order remanding petitioner could not affect the validity of his conviction. *In re Stroff*, 132 Cal.App. 351, 22 P.2d 770. A writ of habeas corpus being in the nature of a collateral attack on the judgment or order pursuant to which the petitioner is held in custody, *In re McVickers*, 29 Cal.2d 264, 274, 176 P.2d 40, the remedy extends only so far as is necessary to relieve the petitioner from imprisonment if he be illegally detained. *In re Corryell*, 22 Cal. 178, 179, 182. Therefore the order of the Superior Court, on the first petition for habeas corpus, although it purported to set aside the judgment and sentence, could, and in fact did, affect the same only to the extent necessary to redetermine the degree of the burglary. This is apparent on the face of the order.

It necessarily follows that petitioner's motion to withdraw his plea of guilty was not, as he contends, made before judgment, and his original commitment must stand modified only as to the degree of the crime charged. Furthermore, petitioner has failed to show any other facts or circumstances that would warrant issuance of the writ.

The writ is denied.

ADAMS, P. J., and DEIRUP, Justice pro tem., concur.

In re LOEWENSTEIN'S ESTATE.**LOWELL v. KUCHEL.**

Civ. 18214.

District Court of Appeal, Second District,
Division 2, California.

May 14, 1951.

Rehearing Denied June 1, 1951.

Hearing Granted July 12, 1951.*

Proceedings in the matter of the estate of Melanie L. Loewenstein, deceased, wherein Herbert D. Lowell, as executor, sued Thomas H. Kuchel, as Controller, to determine the liability of the decedent's estate for inheritance tax. The Superior Court, Los Angeles County, Otto J. Emme, J., entered an order fixing the inheritance tax on decedent's estate, and Herbert D. Lowell appealed. The District Court of Appeal, Moore, P. J., held that there had been no gift, either inter vivos or causa mortis, of the principal of an interest income contract during the life time of the decedent, such as would be subject to taxation.

Reversed with directions.

McComb, J., dissented.

Prior opinion 228 P.2d 49.

1. Insurance ⇨585(1)

Where interest income contract provided for succession to rights as beneficiary thereunder but gave first beneficiary right, with written consent of donor or his legal representative, to require payment to her of "any portion of amount retained, interest payments on amount so paid thereupon to cease", reasonable interpretation of contract gave first beneficiary right to withdraw such portions of principal as she and donor or his legal representative might conclude to be necessary to provide for her well being, but only by actual withdrawal, and only to extent of such withdrawals, would interests of successor beneficiaries thereunder be foreclosed.

2. Taxation ⇨866

Where interest income contract provided for succession to rights as beneficiary thereunder and gave first beneficiary power to anticipate principal upon consent of donor or his legal representative, and first beneficiary procured such written consent but did not withdraw principal during her life time and did not manifest any clear in-

tent to terminate original contract and substitute new agreement whereby she would retain only reserved life interest in proceeds, any proceeds of policy received after death of first beneficiary by successor beneficiaries would flow only from original donor and would not result from any transfer by first beneficiary, even though successor beneficiary were her solē heir, and therefore contract principal would not be part of first beneficiaries estate for inheritance tax purposes. Revenue and Taxation Code, §§ 13641-13648, 13692, 13693; 26 U.S.C.A. § 811(f) (2) (A).

Frank M. Gunter, Beverly Hills, for appellant.

James W. Hickey, Sacramento, Morton L. Barker and Walter H. Miller, Los Angeles, for respondent.

MOORE, Presiding Justice.

From the order fixing the amount of the inheritance tax upon the estate of his mother, Melanie L. Loewenstein, Herbert D. Lowell, her son and sole distributee of her estate, appeals.

In October, 1939, Henry Meis, uncle of decedent, residing in Ohio, purchased from the Connecticut Mutual Life Insurance Company an "interest income contract" on the life of Melanie L. Loewenstein. It provided that the company held and would retain the amount of \$68,828.54 and pay interest thereon monthly at not less than 3 per cent per annum to Melanie during her lifetime and after her death to her husband, Daniel Loewenstein, and after the death of the survivor of such persons to their son, appellant Herbert D. Lowell (formerly named Herbert D. Loewenstein) throughout his lifetime; that upon the death of the last survivor of Melanie, Daniel and Herbert, the company would pay the amount then retained to the surviving widow of Herbert, or if he leave no widow, to his surviving children in equal shares, or if there be no such children then surviving, the remainder of the amount then retained was to be distributed among four designated charities.

* Subsequent opinion 236 P.2d 566.

The contract provided also that prior to November 16, 1939, or after October 14, 1940, Melanie "with the written consent of said Henry Meis, or if he be deceased, with the written consent of the legal representative or representatives of said Henry Meis, may require the company to pay to her order any portion of the amount retained, interest payments on the amount so paid thereupon to cease."

On October 24, 1947, at decedent's request, appellant and the executors of the estate of Henry Meis executed a document signed by decedent as follows: "Whereas said Melanie L. Loewenstein desires to have the right and power to require The Connecticut Mutual Life Insurance Company to pay to her order from time to time such portion or all of the amount retained by said Company pursuant to said agreement; and Whereas Herbert * * * is fully satisfied that his mother Melanie L. Loewenstein shall have such right and privilege and joins in this agreement for the purpose of giving such consent; and Whereas Charles Levy and Sidney J. Eisman as Executors of the Estate of Henry Meis, deceased, are agreeable to such payments to Melanie Loewenstein and join in this agreement for the purpose of giving their written consent to such payments to Melanie L. Loewenstein: Now Therefore, said Melanie * * * with the written consent of * * * Executors of the Estate of Henry Meis * * * does hereby request and require The * * * Company * * * to pay to her all or any portion of the amount retained * * * such withdrawals * * * to be made * * * at any time and from time to time of all or such amounts of principal which said Melanie * * * may desire to withdraw * * *"

During her lifetime decedent did not require the company to make any payments of the principal to her. Consequently, the principal sum of the contract became the property of Herbert, next in line, either by virtue of the terms of the contract or by the laws of succession. The inheritance tax collector levied a tax upon the principal amount of the policy as payable to appellant

because decedent, the Meis executors and appellant had executed the above quoted instrument which was approved by the insurance company.

The question for decision is whether the principal sum of the policy is properly subject to an inheritance tax as an inter vivos transfer without consideration intended to "take effect in possession or enjoyment at or after the death of the transferor", pursuant to Revenue and Taxation Code, secs. 13641-13648.

Respondent urges affirmance of the judgment contending that the execution of the document of October 24, 1947, effected a termination of the interests of all contingent beneficiaries under the policy as created by Henry Meis; that this was an exercise of the option given Melanie in the policy; that she then had complete ownership and control over the principal; that as appellant received the proceeds on Melanie's death the property was subject to the tax.

There are two insurmountable obstacles blocking the path to such a simple and confident solution to the problem. First: The record does not disclose that the proceeds of the policy were or are to be paid to appellant. Indeed, appellant asserts that the insurance company is now paying to him only the interest currently earned by the principal sum and that the insurer recognizes fully the rights of the charities and other contingent beneficiaries under the original policy. Second: Contrary to what was adjudged below, it is not apparent that decedent so exercised the option given her under the contract that all rights of future beneficiaries were terminated.

[1] The only reasonable interpretation of the provision giving Melanie the right to "require the Company to pay to her order, any portion of the amount retained" is that Meis intended thereby to give his niece the authority to withdraw such portions of the principal as she and Meis' legal representatives might conclude to be necessary to provide for her well-being. Only by such *actual withdrawal*, and only to the extent of such withdrawals, would

the interests of appellant and other potential beneficiaries be foreclosed. That appellant's interest in the contract fund was to be defeated only by an actual consumption of the principal is further indicated by the fact that the provisions creating Melanie's authority also added that "interest payments on the amount so paid thereupon cease."

The original agreement between Meis and the company created a relationship between them akin to that of settlor-trustee with Melanie as beneficiary of a life income but giving her as holder of the life interest a power to invade the corpus with the consent of the settlor or his personal representatives. The agreement of October, 1947, did no more than to purport to give Melanie the consent of such representatives. It was merely a "consent in advance" giving her a clear field to consume the principal at her discretion.¹ It did no more than pave the way for any invasion. The result of its execution was the same as if the original contract as purchased by Meis had given Melanie the right to require payments to be made to her without consent of any person.

It is true that decedent's powers after the consent were virtually the equivalent of complete and absolute ownership. But this is the case in any situation where the holder of a life income who benefits under a trust has a power also to invade the corpus or has a general power of appointment. *Fisher v. Ludwig*, 6 Cal.App. 144, 91 P. 658, cited by respondent stands only for a proposition of personal property law that actual possession of property is not always necessary for a gift to be completed. No provision for remainder interests was there involved. The decedent therein intended to make a complete gift of the sums in his bank account by a transfer of the bank book alone. The decision is not applicable here.

[2] It is true also that in the "request" of October, 1947, decedent "does hereby request and require" the insurance company to pay her the amount retained. However,

this language is limited by the further declaration that "such withdrawals" are to be made from time to time as she "may desire." It follows that inasmuch as she left the funds with the insurance company, continued drawing only the interest thereon, and did not manifest any clear intent to terminate the original contract and substitute a new agreement with the company whereby she would retain only a reserved life interest in the proceeds, she has made no transfer to her son, either *inter vivos* or *causa mortis*. On the contrary, she did no more than prepare for a possible future exercise of the powers given to her. The second agreement did not change or terminate the interests of any remainderman and could not reasonably be construed to have been even an attempt to defeat their interests. Any proceeds of the policy, now or hereafter received by appellant or by others, flow only from the original donor, Henry Meis, and do not result from any transfer by decedent.

It should be noted that Melanie's interest, viewed as a power to consume or a power of appointment, might well be taxable as part of her estate under the Federal law. (Internal Revenue Code, sec. 811(f) (2) (A), 26 U.S.C.A. § 811(f) (2) (A).) But in this state such a power is now taxable only to the donor of such power (herein, Mr. Meis) where the donor has died after June 25, 1935. See *In re Estate of Rath*, 10 Cal.2d 399, 407-408, 75 P.2d 509, 115 A.L.R. 836; Rev. & Tax.Code, secs. 13692 and 13693; *In re Estate of Newton*, 35 Cal. 2d 830, 221 P.2d 952. The problem of whether a tax is due by Mr. Meis or one may be levied upon his estate is of no concern here. He deceased in 1943 and at the time was not a domiciliary of this state.

From the foregoing considerations it is ordered that the judgment be and it is hereby reversed with instructions to amend the findings, conclusions and judgment, and adjudge that no tax is due upon the principal sum payable by the Connecticut Mutual Life Insurance Company on its contract.

1. We express no opinion as to the validity of such an "advance consent."

WILSON, J., concurs.

McCOMB, Justice (dissenting).

I dissent. I adhere to the views expressed by this court in *Re Estate of Loewenstein*, Cal.App., 228 P.2d 49.

failed to commence drilling operations within time prescribed.

Walter H. Hewicker, Bakersfield, for appellants.

W. E. James, Bakersfield, for respondent.

MOORE, Presiding Justice.

The judgment herein quieted title in respondent whose interest is a leasehold estate. The court found that the two leases theretofore executed by respondent to appellants had terminated prior to the commencement of this action and the latter now have no interest in the lands described.

Appellants contend here that the default under the lease resulting from their failure to commence drilling operations within a year from the date of the writing and their failure to tender rentals within the year did not *ipso facto* terminate their rights. They claim that the leases could be terminated only upon their failure to cure the default within thirty days after service of notice of default as provided by paragraph 22. On the contrary, respondents contend that the leases involved are of the "unless" type which provide for an *ipso facto* termination of the lessee's rights if drilling be not commenced within the time specified unless the drilling time is extended by the payment of deferment rental. See XIII So. Cal. Law Review, pp. 403-405.

From the language of paragraphs 5, 6, and 22 of the leases it is readily to be seen that appellants are endeavoring to establish that the lease may be terminated by the lessee only¹ and that if the lessee does not



104 Cal.App.2d 159

NORRIS OIL CO. v. VON GLAHN et al.

Civ. 17970.

District Court of Appeal, Second District,
Division 2, California.

May 14, 1951.

Rehearing Denied June 1, 1951.

Hearing Denied July 12, 1951.

Action by the Norris Oil Company against Elmer C. von Glahn and others to quiet title in an interest in a leasehold estate. The Superior Court, San Luis Obispo County, Ray B. Lyon, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Moore, P. J., held that the oil and gas lease had terminated prior to the commencement of the action.

Affirmed.

Mines and minerals Ⓒ78(2)

Under oil and gas lease giving lessee right to elect not to commence or prosecute drilling and thereupon lease should terminate, the lease was terminated where lessee

1. "5. The Lessee agrees to commence drilling operations on said land within one year from the date hereof (unless the Lessee has sooner commenced the drilling of an offset well on said land as herein provided) and to prosecute the same with reasonable diligence until oil or gas is found in paying quantities, or to a depth at which further drilling would, in the judgment of the Lessee, be unprofitable; or it may at any time within said period terminate this lease and surrender said land as hereinafter provided. No implied covenant shall be read into this lease requiring the Lessee to drill or to continue drilling on said land,

or fixing the measure of diligence therefor. The Lessee may elect not to commence or prosecute the drilling of a well on said land as above provided, and thereupon this lease shall terminate."

"6. Commencing one year from date if Lessee has not theretofore commenced drilling operations on said leased land or terminated this lease, the Lessee shall pay to Lessor yearly in advance, as rental, the sum of one dollar per acre for so much of said land as may be held under this lease at the time of such payment, until drilling operations are commenced or this lease terminated."

"22. Upon the violation of any of the

elect to terminate the lease, he shall pay yearly in advance a rental of \$1.00 per acre until drilling commences. Paragraphs 6 and 22 are not controlling. Paragraph 6 permits the lessee to pay a yearly, advance rental of one dollar per acre until operations are commenced, if the lessee has not begun drilling within one year from date of the lease. Paragraph 22 makes provision for a procedure and penalty in event the lessee violates a term or condition of the lease and fails to commence to remedy such violation within 30 days after notice to do so. That paragraph applies to lessee's failure to perform other conditions as required by the lease, *Alexander v. Oates*, 100 Cal.App. 2d 266, 223 P.2d 264; *Carlisle v. Lady*, 109 Cal.App. 567, 573, 293 P. 686 and is not inconsistent with the provision contained in paragraph 5 which distinctly provides that "the lessee may elect not to commence or prosecute the drilling of a well on said land as above provided, and thereupon the lease shall terminate." In *Alexander v. Oates*, supra, because the lessee was obligated to commence drilling on the land within three years he forfeited his lease for failure to commence within that period. In *Carlisle v. Lady*, supra, because the lessee did not "commence the drilling of said test well within said additional 3 months," the lease *ipso facto* terminated, and the notice declaring a forfeiture "relates to the covenants of the lease and not to the condition" which required the lessee to commence drilling a test well within six months; or within the additional three months gained by paying the lessor fifty cents an acre per month.

terms or conditions of this lease by the Lessee and the failure to begin to remedy the same within thirty days after written notice from Lessor so to do, then, at the

So, in the leases at bar, the provisions of paragraph six and 22 relate to the commencement of drilling after the lapse of the first year of the lease term. *Wilcox v. West*, 45 Cal.App.2d 267, 114 P.2d 39, 41, involved a similar lease. While the appellants there acknowledged their cause would have been hopeless if they had not commenced drilling operations, still they prevailed because they performed as provided. But the opinion observed: "The lease here involved is what is generally known as the 'unless' lease, and results in an automatic termination of the lease if the lessee fails to commence operations within the time limited, and fails to pay delay rentals in advance."

Only recently this court decided *Richfield Oil Corporation v. Bloomfield*, 103 Cal. App.2d 589, 229 P.2d 838, wherein a lease containing similar provisions was held to have been properly forfeited by reason of the lessee's failure to commence drilling operations. A discussion of the "unless" variety of oil lease will be found there.

The authorities cited by appellant, *Title Insurance & Trust Company v. Amalgamated Oil Company*, 63 Cal.App. 29, 218 P. 71; *Griffin v. Kent*, 111 Cal.App. 569, 295 P. 854, are not pertinent. Neither contained a provision for an *ipso facto* termination in the event of lessee's failure to commence drilling within a specified time.

Affirmed.

McCOMB and WILSON, JJ., concur.

option of the Lessor, this lease shall forthwith cease and terminate, and all rights of the Lessee in and to said land be at an end. * * *



